FEDERAL REGULATION OF R.S. 2477 RIGHTS-OF-WAY

*MATTHEW L. SQUIRES**

Introduction ..... 548 R
I. The R.S. 2477 Controversy ..... 556 R
A. R.S. 2477 Origins and Legal History ..... 556 R
B. Right-of-Way Scope and Perfection under State Law ..... 561 R
II. Two Circuits' Conflicting Approaches to R.S. 2477 Regulation ..... 567 R
A. The Property Clause Power ..... 569 R
B. The Tenth Circuit's Proprietary Approach under the Common Law of Servitudes ..... 571 R
i. The Proprietary Approach ..... 571 R
ii. Evidence of the Proprietary Approach in Tenth Circuit Decisions ..... 574 R
C. The Ninth Circuit's Legislative Approach and Its Extraterritorial Extension ..... 581 R
i. The Legislative Approach ..... 581 R
ii. Evidence of the Legislative Approach in Ninth Circuit Decisions ..... 585 R
III. For the Legislative Approach ..... 590 R
A. Concerns with the Legislative Approach ..... 591 R
B. Doctrinal Arguments for the Legislative Approach ..... 593 R
C. Policy Argument Against Subverting Federal Legislation with State Law ..... 597 R
D. Policy Argument against Variation among States Undermining Uniform Federal Land Management ..... 601 R
E. Allowing Proper State Influence Through Savings Clauses and Takings Law ..... 606 R
Conclusion ..... 611 R

* Managing Editor—Development, *New York University Annual Survey of American Law*, 2007–08; J.D. candidate, New York University School of Law, 2008. Thanks to Kevin Jones and Professor Katrina Wyman for mentoring and guidance throughout the writing process and to Professor James Rasband for his insights. My appreciation also to the editors of the *New York University Annual Survey of American Law* for their assistance, particularly Megan Bradley, Ben Geffen, and Dave Edwards. Special thanks to Addy and my family for their constant support.

INTRODUCTION

In August of 2005 Kane County, in southern Utah, passed an ordinance opening all Class D roads in the county to Off-Highway Vehicle ("OHV") use.[1] Many of the roads Kane County opened include trails previously closed to OHVs by the National Park Service ("NPS") or the Bureau of Land Management ("BLM") in pristine areas in Bryce Canyon and Zion National Parks, Grand Staircase Escalante National Monument, Glen Canyon National Recreation Area, and several wilderness study areas.[2] Because Class D roads in Utah include "any road, way, or other land surface route" created by the passage of vehicles over a continuous ten-year period, the trails claimed by Kane County in many cases have never been maintained, have not been used by motorized vehicles for decades, and have returned to a natural state.[3] Kane County not only opened the "roads" over the objections of federal land-management agencies by publishing its ordinance, but also removed federal trail-head signs prohibiting OHV access and replaced them with county markers opening the routes.[4] Garfield and San Juan Counties in Utah have passed similar ordinances opening routes on federal lands to OHV use, and Moffat County in Colorado has passed an ordinance claiming ownership of all routes crossing federal lands, openly defy-

1. Kane, Utah, Ordinance 2005-3 (Aug. 8, 2005), http://www.wilderness.org/Library/Documents/upload/KaneCounty-OHVordinance-August2005-signed.pdf. The definition of OHV in the ordinance includes "all motorcycles, snowmobiles, and all type I vehicles [three- and four-wheelers], and all terrain type II vehicles [all other types of recreational off-road vehicles]." *Id.*

2. Joe Baird, Mark Havnes & Robert Gehrke, *Rebellion in Kane County*, SALT LAKE TRIB., Nov. 21, 2005, at A1; Joe Bauman, *Activists Ratchet Up Fight over Kane Roads*, DESERET NEWS, Oct. 14, 2005, at B10; *see also* Press Release, The Wilderness Soc'y, Lawsuit Brought to Protect Grand Staircase-Escalante National Monument and Zion and Bryce National Parks from Utah's Kane County (Oct. 13, 2005), http://www.wilderness.org/NewsRoom/Release/20051013.cfm. Kane County rescinded the controversial ordinance in December 2006 as a result of legal pressure, but County Commissioner Mark Habbeshaw claimed the retreat was only temporary. Joe Baird, *Kane Backs off OHV Stand*, SALT LAKE TRIB., Dec. 13, 2006.

3. UTAH CODE ANN. § 72-3-105 (2000); S. Utah Wilderness Alliance v. Bureau of Land Mgmt. (*SUWA II*), 425 F.3d 735, 771, 781 (10th Cir. 2005) (explaining that an acceptance of an R.S. 2477 right-of-way in Utah requires continuous public use for a period of ten years, even without mechanical construction); *see also* The Wilderness Society, Photos of "Roads" Claimed by Kane County, http://www.wilderness.org/WhereWeWork/Utah/KaneCountySigns-photos.cfm (last visited Jan. 9, 2008).

4. *See* Wilderness Soc'y v. Kane County, 470 F. Supp. 2d 1300, 1302–03 (D. Utah 2006).

ing federal land-management agencies' authority to regulate the routes.[5]

The opening of trails in a few counties to OHV use might seem like only a small victory for OHV groups. In reality, it is a key tactic in the endemic battle over federal land management in the West because it sets a legal precedent for state and county control of rights-of-way crossing federal lands everywhere.[6] The counties' claims highlight one of the federal government's most serious vulnerabilities in its current land-management system. In opening the routes, the counties rely on a Civil War-era law commonly referred to as R.S. 2477, which was designed to promote expansion into the West by freely granting public easements, or rights-of-way, across federal lands.[7] From its enactment in 1866 to its repeal in 1976, R.S. 2477 vested tens of thousands of rights-of-way across federal lands in the states and counties, arguably more than five thousand in Utah alone.[8] Before the early 1980s, states and counties seldom

5. Garfield, Utah, Ordinance 2007-2 (Apr. 9, 2007), http://www.utah-trails.com/utah-ordinance-2007.shtml; San Juan, Utah, Amended Ordinance 1999-1 (Sept. 12, 2005), http://www.sanjuancounty.org/archives/Minutes/20050912.TXT; Moffat, Colo., Resolution 2003-5 (Jan. 10, 2003), http://www.co.moffat.co.us/NaturalResources/2003_RS2477_RESOLUTION_2.pdf; *see also* Mike Soraghan, *BLM Backing for Roads Asked*, DENVER POST, Oct. 31, 2006, at B5; Moffat County Rights-of-Way, http://www.co.moffat.co.us/NaturalResources/rightofwaymap_lg.htm (last visited Jan. 9, 2008) (map of claimed rights-of-way).

6. *See* Bret C. Birdsong, *Road Rage and R.S. 2477: Judicial and Administrative Responsibility for Resolving Road Claims on Public Lands*, 56 HASTINGS L.J. 523, 523–24, 533–36 (2005); Stephen H.M. Bloch & Heidi J. McIntosh, *A View From the Front Lines: The Fate of Utah's Redrock Wilderness Under the George W. Bush Administration*, 33 GOLDEN GATE U. L. REV. 473, 488, 491–92 (2003).

7. Mining Act of 1866, ch. 262, 14 Stat. 251, *repealed by* Federal Lands Policy and Management Act of 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2744, 2793 (codified at 43 U.S.C. §§ 1701–82 (2000)). R.S. 2477, originally section 8 of the Mining Act of 1866, was codified in 1873 as section 2477 of the Revised Statutes and later re-codified in 1938. 43 U.S.C. § 932 (1938).

8. U.S. DEP'T OF THE INTERIOR, REPORT TO CONGRESS ON R.S. 2477: THE HISTORY AND MANAGEMENT OF R.S. 2477 RIGHT-OF-WAY CLAIMS ON FEDERAL AND OTHER LANDS 29 (1993) [hereinafter DOI REPORT] (noting that as of 1993 the DOI and courts together had recognized 1,453 R.S. 2477 rights-of-way across BLM lands, with about 5,600 claims remaining, primarily in Utah, and an unknown number of unasserted potential claims); *see also* Bloch & McIntosh, *supra* note 6, at 489 ("[T]he State of Utah and a number of rural counties have asserted at least 10,000 and as many as 20,000 R.S. 2477 claims throughout national parks, wilderness areas, proposed wilderness areas, and critical wildlife habitat."); Letter from Stephen G. Boyden, Assistant Attorney Gen., State of Utah, to Bruce Babbitt, U.S. Sec'y of the Interior (June 14, 2000) (on file with author) (including twenty-nine county maps of R.S. 2477 claims, available at http://www.highway-robbery.org/lands/utah.htm).

sought judicial enforcement of R.S. 2477 rights-of-way because the federal government's land-use policy was development-oriented and, therefore, seldom constrained the prerogative of the states regarding federal lands.[9] The federal government's shift to a more conservation-oriented land-use policy in the last thirty years, however, has reined in state discretion over federal land use.[10] As a result, many states and counties have become increasingly antagonistic to federal land-management mandates and have turned to R.S. 2477 to preserve local access to federal lands, not only to benefit recreation, but also to maintain extractive industries that rely on the routes for access to resources on federal land.[11]

Under the traditional common law of servitudes, R.S. 2477 offers states and counties a powerful tool to limit federal control over local lands because it subordinates the purposes of the land to the purposes of the route. Right-of-way easements, often called servitudes, do not grant title to the road or fee simple to the easement-holder, but rather grant specific use rights to accomplish the purpose of the easement that dominate any uses the underlying fee owner may make of the land.[12] Therefore, the easement owner is referred to as the "dominant estate owner" and the fee owner as the

9. Michael S. Freeman & Lusanna J. Ro, *RS 2477: The Battle over Rights-of-Way on Federal Land*, 32 COLO. LAW. 105, 106 (2003) ("For most of the statute's existence, the absence of formal RS 2477 records presented relatively few problems for federal land management, because in general the . . . existence [of RS 2477 roads was] obvious and unquestioned.") (quotation omitted); James R. Rasband, *Questioning the Rule of Capture Metaphor for Nineteenth Century Public Land Law: A Look at R.S. 2477*, 35 ENVTL. L. 1005, 1016–19, 1028 (2005) ("[F]or much of its history the interpretation of R.S. 2477 was not a particularly pressing issue for public land management. . . . Moreover, because no application needed to be filed or recorded to effectuate a grant, and because the federal government did little to hinder state, county, and private access across the public domain, there was little occasion to fight about whether an R.S. 2477 right-of-way had been established as against the United States.").

10. *See* Scott W. Hardt, *Federal Land Management in the Twenty-First Century: From Wise Use to Wise Sterwardship*, 18 HARV. ENVTL. L. REV. 345, 350–62 (1994) (examining the historical development of the multiple use concept).

11. *See id.*; Rasband, *supra* note 9, at 1028–41 (discussing the history of federal control over R.S. 2477 rights-of-way). *See generally* WILLIAM L. GRAF, WILDERNESS PRESERVATION AND THE SAGEBRUSH REBELLIONS (1990) (surveying the conflicts over the preservation and management of wilderness areas). R

12. S. Utah Wilderness Alliance v. Bureau of Land Mgmt. (*SUWA II*), 425 F.3d 735, 747 (10th Cir. 2005) ("A right of way is not tantamount to fee simple ownership of a defined parcel of territory. Rather, it is an entitlement to use certain land in a particular way."); Utah v. Andrus, 486 F. Supp. 995, 1002, 1010 (D. Utah 1979) (stating that regulation of an easement may not prevent access or be so prohibitive as to render land incapable of full economic development); RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 1.1, 4.10 (2000).

"servient estate owner."[13] Under the common law of servitudes, neither estate owner may unreasonably interfere with the other's use and enjoyment of the underlying land or the easement.[14] However, when the dominant owner's use of the easement, pursuant to its terms, conflicts with the servient owner's use of the underlying land, the dominant owner prevails.[15] Depending on the applicable state common law, dominant estate owners may even improve and develop an easement right-of-way to better accomplish the purpose for which it was granted, making closure by the servient estate owner out of the question.[16] Closing roads or restricting motorized access to them, however, is perhaps the most effective and certainly a common means for federal agencies to ensure conservation of federal lands.[17] Limiting the federal government's ability to regulate thousands of routes crossing federal lands, therefore, is a serious threat to federally mandated conservation efforts.[18]

Legal battles over R.S. 2477 rights-of-way in the past two decades have made this threat more and more likely to materialize. Until now, R.S. 2477 litigation has focused on the proper determination of how an R.S. 2477 right-of-way is perfected, or acquired, and its scope, or characteristics and potential uses.[19] Since R.S. 2477 itself provides no indication of how a state or county might perfect an R.S. 2477 easement grant or what the scope of the grant is, courts and commentators have divided over whether they should look to state law for standards or fashion a universal rule based on federal law.[20] Additionally, since federal land-management agen-

13. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.1.

14. *Id.* § 4.10.

15. *Id.*

16. *See, e.g.*, Sierra Club v. Hodel (*Hodel II*), 848 F.2d 1068 (10th Cir. 1988), *overruled on other grounds by* Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992).

17. *See* Birdsong, *supra* note 6, at 532.

18. *See* DOI REPORT, *supra* note 8, at 33–37 (discussing potential impacts of R.S. 2477 claims on federal land management). R

19. *See, e.g.*, 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, 113, 143 (2005) (suggesting that "ultimately only the articulation of specific legal standards for the meaning of R.S. 2477's terms can completely resolve the R.S. 2477 controversy on public lands").

20. *Compare* Kevin Hayes, *History and Future of the Conflict over Wilderness Designations of BLM Land in Utah*, 16 J. ENVTL. L. & LITIG. 203, 224–30 (2001) (arguing that both perfection and scope should be determined by a federal standard), *and* William J. Lockhart, *Federal Statutory Grants Are Not Placeholders for Manipulated State Law: A Response to Ms. Hjelle*, 14 J. ENERGY NAT. RESOURCES & ENVTL. L. 323, 334–44 (1994) (same), *with* Barbara G. Hjelle, *Ten Essential Points Concerning R.S. 2477 Rights-of-Way*, 14 J. ENERGY NAT. RESOURCES & ENVTL. L. 301, 312–17 (1994) (argu-

cies in the past have not asserted any rights to determine R.S. 2477 claims, courts and commentators have divided over what type of deference to give federal agencies now claiming a prerogative to pass binding judgment on R.S. 2477 claims.[21]

The two circuits that contain the most federal lands within their jurisdictions, the Ninth and Tenth Circuits,[22] have taken markedly different approaches in dealing with the applicability of state law to R.S. 2477 claims, though the Tenth Circuit has most clearly, and recently, spoken in favor of state law. The Tenth Circuit in *Southern Utah Wilderness Alliance v. Bureau of Land Management* (*SUWA II*), decided in 2005, held that state law governs both the perfection and scope of an R.S. 2477 right-of-way, and that the BLM does not have primary jurisdiction to determine the validity of R.S. 2477 claims.[23] On the other hand, the Ninth Circuit, while not holding outright that a federal standard applies, has repeatedly disregarded state law in determining the validity of federal agency action vis-à-vis potential R.S. 2477 rights-of-way. Focusing on the federal agency's authority to regulate pursuant to its mandate, the Ninth Circuit in *Vogler v. United States* and its progeny has consistently avoided deciding whether state or federal law provides the appropriate standard to decide R.S. 2477 perfection and scope.[24] Based on current case law, therefore, federal land managers in the Tenth Circuit can expect courts to apply state common law in determining whether counties and states own R.S. 2477 rights-of-way and what they may do on them. Land managers in the Ninth Circuit

ing perfection and scope of an R.S. 2477 right-of-way must depend on state law standards), *and* Mitchell R. Olson, Note, *The R.S. 2477 Right of Way Dispute: Constructing a Solution*, 27 ENVTL. L. 289, 289–92 (1997) (same).

21. *See, e.g.*, S. Utah Wilderness Alliance v. Bureau of Land Mgmt. (*SUWA II*), 425 F.3d 735, 749–57 (10th Cir. 2005) (noting that circuits are split on the standard of review of decisions whether to recognize the primary jurisdiction of an administrative agency, but holding that BLM lacks primary jurisdiction to make binding determinations concerning R.S. 2477 claims).

22. *See* JAMES R. RASBAND, JAMES SALZMAN & MARK SQUILLACE, NATURAL RESOURCES LAW AND POLICY 140–41 (2004).

23. 425 F.3d at 745 (applying a state law definition of the scope); *id.* at 757 (BLM lacks primary jurisdiction to make binding determinations concerning R.S. 2477 claims); *id.* at 770–71 (federal law "borrowed" from common law and state law to determine requirements for perfection of right-of-way).

24. 859 F.2d 638 (9th Cir. 1988); *see also* Shultz v. Dep't of Army (*Shultz I*), 10 F.3d 649, 655 (9th Cir. 1993) (holding that Alaska state law governed perfection and scope of R.S. 2477 rights-of-way), *withdrawn and superseded by* (*Shultz II*), 96 F.3d 1222 (9th Cir. 1996) (holding that Shultz had not shown existence of an easement under either state or federal standards but not mentioning whether state or federal law provided the correct standard).

still cannot be sure whether courts will follow the Tenth Circuit's approach.

In this situation, where it appears that courts will find large numbers of R.S. 2477 rights-of-way to be validly owned by the states and under the control of the counties, federal land managers must wonder whether they have any remaining means of regulating use of the rights-of-way to protect sensitive federal lands. As mentioned, the balance of commentary and court opinion has focused thus far on perfection and scope of R.S. 2477 rights-of-way and agency jurisdiction over claims. Those questions are germane, however, in only a gate-keeping sort of way if federal agencies can restrict uses of even valid R.S. 2477 rights-of-way. How and to what extent federal agencies can regulate use of valid R.S. 2477 rights-of-way, therefore, is the subject of this Note. In particular, this Note considers two divergent approaches to regulation of R.S. 2477 rights-of-way evident in Ninth and Tenth Circuit decisions.

While their incorporation of state law and deference to federal agencies differ,[25] the Ninth and Tenth Circuits have thus far reached similar outcomes when it comes to regulation of R.S. 2477 rights-of-way, both ruling that the federal agency regulations of the R.S. 2477 rights-of-way at issue were appropriate. The Tenth Circuit in *SUWA II* went on to hold that regardless of the validity of the R.S. 2477 right-of-way, the federal government could still require the county to apply for a BLM permit before making any changes to the route other than routine maintenance.[26] The Ninth Circuit in *Vogler* held that whether or not a valid R.S. 2477 right-of-way existed, the NPS had a right to regulate use of the road through a permit process.[27] Both circuits have held that the federal government can implement reasonable regulations on the use of R.S. 2477 rights-of-way including some kind of permit application.[28] However, I believe these similar outcomes belie fundamentally different legal rationales the Ninth and Tenth Circuits have used to decide that federal agencies may regulate uses of R.S. 2477 rights-of-way. The

25. *See supra* notes 22–23 and accompanying text; *see also Current Circuit Splits*, 2 SETON HALL CIR. REV. 509 (2006) (discussing the circuits' different standards of review for lower courts' decisions regarding agency jurisdiction).

26. 425 F.3d at 748; *see also* United States v. Jenks (*Jenks II*), 22 F.3d 1513, 1518 (10th Cir. 1994), *aff'd*, (*Jenks III*), 129 F.3d 1348 (10th Cir. 1997).

27. 859 F.2d at 642; *see also* Clouser v. Espy, 42 F.3d 1522, 1538 (9th Cir. 1994).

28. *SUWA II*, 425 F.3d at 747–48; *Clouser*, 42 F.3d at 1538–39; *Vogler*, 859 F.2d at 642; Sierra Club v. Hodel (*Hodel II*), 848 F.2d 1068, 1083, 1086–87 (10th Cir. 1988), *overruled on other grounds by* Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992); *see also* discussion *infra* Part III.A.1–2.

two approaches I will present not only would result in different outcomes in future cases but also have constitutional portent because they reflect diametrically opposed interpretations of the Property Clause and tap into the deeply seated federalist furor pervasive in federal land-use debate in the West.[29]

The difference between the Ninth and Tenth Circuits' approaches is in how they determine the scope of federal agencies' power to regulate the rights-of-way. The Tenth Circuit cabins the federal government's authority to reasonably regulate use of an R.S. 2477 right-of-way in the state common law of servitudes.[30] Locating the federal government's power to regulate within the state common law of servitudes reflects what I call the "proprietary" interpretation of the Property Clause because, if limited to this approach alone, it accords the federal government no more power to regulate than any similarly situated private proprietor of land would have in the state.[31] The Ninth Circuit, on the other hand, derives federal agencies' authority to regulate R.S. 2477 rights-of-way directly from the Property Clause power, as delegated by Congress through federal agency statutory mandates.[32] I call this the "legislative" interpretation because the only limits it admits on agency regulatory power are those legislatively imposed on the agencies by Congress or required by the Constitution itself.

In this Note, I argue that federal authority to regulate R.S. 2477 claims should be determined according to the legislative approach. The legislative approach is more consistent doctrinally with Supreme Court precedent than the proprietary approach. It eliminates the unnecessary and inefficient regulatory variability inherent in an approach based on differing state laws. Furthermore, the legislative approach allows for significant preservation of local interests in federal lands through R.S. 2477 rights-of-way while ensuring that federal conservation mandates are not held hostage to adverse local interests.

At their core, the legislative and proprietary interpretations of federal agency power to regulate R.S. 2477 claims under the Prop-

29. U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."); *see also* Hardt, *supra* note 10, at 350–62; Rasband, *supra* note 9, at 1028–41. **R**
See generally GRAF, *supra* note 11 (surveying the conflicts over the preservation and management of wilderness areas).

30. *See* discussion *infra* Part II.B.

31. *See* discussion *infra* Part II.B.

32. *See* discussion *infra* Part II.C.

erty Clause reflect fundamentally different approaches to the management of federal public lands. The proprietary approach reflects the longstanding antipathy in the West to the federal role in land management in the West. In effect, this approach attempts to minimize the federal role in the management of federal lands by defining the federal power to regulate R.S. 2477 claims in terms of state property law, not federal law. The proprietary approach makes the federal lands under and around a state's 2477 rights-of-way subservient to the state's interests in the rights-of-way.[33] Conversely, the legislative approach embodies a much greater openness to a federal presence in land management in the West. Under the legislative approach, the federal authority to regulate state R.S. 2477 rights-of-way is defined by federal, not state property, law. So, while the R.S. 2477 debate has profound practical consequences for land use, it also taps into deeply entrenched attitudes about federal involvement in local affairs.[34] As Jacob C. Schipaanboord points out, the debate over R.S. 2477 claims is ultimately a "[d]ebate over the role of the federal government in local public lands" because the outcome directly affects the "interplay between local governance of the land and federal governance of the land."[35]

As a symbol of a political schism, therefore, R.S. 2477 arguments lend themselves to easy extrapolation into larger arguments about federalism. The scope of this Note, however, does not allow a substantive discussion of the implications a federalist constitutional perspective may or should have on the future development of Property Clause doctrine or related implications on the scope of

33. *See* discussion *infra* Part II.B.

34. *See* Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39216, 39217–18 (proposed Aug. 1, 1994) (noting that competing interpretations of R.S. 2477 mirror "competing ideas about the purposes for which Federal lands should be managed").

35. Jacob C. Schipaanboord, Note, *America's Troubled Roads*, 26 J. LAND RESOURCES & ENVTL. L. 153, 160 (2005); *see* Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. at 39217–18. *See generally* Peter A. Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 117–25 (2001) (discussing implications on federalism of interpreting the Property Clause broadly); Bruce Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 ENVTL. L. 847 (1982) (discussing the conflict over public land management between the states and the federal government); David E. Engdahl, *State and Federal Power over Federal Property*, 18 ARIZ. L. REV. 283, 361–62 (1976) (discussing the evolving concept of federalism and its effect on public property); 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) (discussing the federalism-infused debate in the West over control over public lands and the implications of the equal footing doctrine).

agency regulatory authority over federal lands. Rather, my argument is more procedural than substantive: when courts consider the scope of federal agency authority over R.S. 2477 rights-of-way, they should start at the top, with the Property Clause, and then consider what statutory limitations, if any, Congress placed on the agency through enabling and organic acts. For practical purposes, my starting point reflects an assumption that the Supreme Court's past construction of the Property Clause is stable—though states and counties are welcome to challenge the statutes delegating regulatory authority to the agencies based on a more limiting reading of the Property Clause.

In Part I, I discuss R.S. 2477's origins, repeal, and legal history. Part II discusses the two conceptions of the federal Property Clause power—legislative and proprietary—found in the caselaw. I argue that court opinions in the Ninth and Tenth Circuits upholding federal regulation of R.S. 2477 rights-of-way embody these fundamentally different approaches to the Property Clause power. In Part III, I argue that federal authority to regulate valid R.S. 2477 rights-of-way should be determined using the legislative approach for both doctrinal and policy reasons. The legislative approach is supported by Supreme Court precedent, and, as a matter of policy, it is preferable because it prevents individual states from subverting federal legislation through a back-door approach like R.S. 2477; it allows federal lands to be managed uniformly from state to state; and it allows federal land managers to accomplish their conservation mandates while still allowing states' and counties' R.S. 2477 claims a role in defining the mandates' reach.

I.
THE R.S. 2477 CONTROVERSY

A. R.S. 2477 Origins and Legal History

Some background on the original context of R.S. 2477, its function and administration while active, and the context of its repeal informs the debate over its terms and illustrates its significance to counties and states struggling to protect their interests in federal lands. Part of the Mining Act of 1866, R.S. 2477 reads simply, "the right-of-way for the construction of highways across public lands, not reserved for public uses, is hereby granted."[36] Good law for 110 years, R.S. 2477 was repealed on October 21, 1976, with the enact-

36. *See* Mining Act of 1866, ch. 262, § 8, 14 Stat. 251, *repealed by* Federal Lands Policy and Management Act of 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2744, 2793 (codified at 43 U.S.C. §§ 1701–82 (2000)).

ment of the Federal Land Policy and Management Act of 1976 ("FLPMA").[37] However, FLPMA did not terminate valid rights-of-way existing on the date of its approval.[38] Therefore R.S. 2477 rights-of-way that perfected prior to FLPMA's enactment are "grandfathered in" and continue to be valid public easements, and the countless roads and trails crossing federal land that existed prior to 1976 are fair game to be claimed by states and counties as R.S. 2477 rights-of-way.[39]

Though there is no legislative history for the Mining Act of 1866, it was passed in response to the western migration to promote development and settlement of the West—part of the federal government's general policy of development.[40] Before its enactment, an unavoidable consequence of the western migration had been large-scale trespass on federal lands.[41] Congress intended to open up federal lands by promoting road-building in order to stimulate development of the West to support the growing nation and increase the value of federal lands.[42] Hence, during the same period, Congress regularly granted other types of rights-of-way across federal lands. For instance, the larger Mining Act declared the mineral lands of the public domain "free and open to exploration and

37. *See* 43 U.S.C. §§ 1701–82.

38. Pub. L. No. 94-579, § 701(a), 90 Stat. 2744, 2786 (codified at 43 U.S.C. § 1701 note (a)).

39. *See, e.g.*, Sierra Club v. Hodel (*Hodel II*), 848 F.2d 1068, 1083–84, 1086–87 (10th Cir. 1988) (noting that no action on the part of the federal government was required to perfect an R.S. 2477 right-of-way; each new use of a road automatically vested as incident of the right-of-way; and all uses before repeal of the statute, not terminated or surrendered, remain part of an R.S. 2477 right-of-way), *overruled on other grounds by* Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992); *see also* DOI REPORT, *supra* note 8, at 29 (noting the scope of potential R.S. 2477 claims). R

40. Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. at 39217; *see also* Nicolas v. Grassle, 267 P. 196, 197 (Colo. 1928) (historical discussion of the congressional intent and purpose of R.S. 2477); Flint & Pere Marquette Ry. Co. v. Gordon, 2 N.W. 648, 653–55 (Mich. 1879) (same); City of Butte v. Mikosowitz, 102 P. 593, 595 (Mont. 1909) (same); Wallowa County v. Wade, 72 P. 793, 794–95 (Or. 1903) (same); Smith v. Mitchell, 58 P. 667, 668 (Wash. 1899) (same); Yeager v. Forbes, 78 P.3d 241, 247 (Wyo. 2003) (statement on the purpose of R.S. 2477 and frontier road system); Harry R. Bader, *Potential Legal Standards for Resolving the R.S. 2477 Right of Way Crisis*, 11 PACE ENVTL. L. REV. 485, 485–502 (1994) (providing a comprehensive discussion of the historical context giving rise to the R.S. 2477 grant).

41. *See* Cent. Pac. Ry. v. Alameda County, 284 U.S. 463, 472–73 (1931) (stating that R.S. 2477 was enacted to encourage roads as "necessary aids to the development and disposition of the public lands" and recognizing that their maintenance was "clearly in furtherance of the general policies of the United States").

42. *See* Hayes, *supra* note 20, at 225. R

occupation," allowed issuance of patents for discoveries of quartz, and granted rights-of-way for construction of canals and ditches.[43]

Congress's goal—to grant free and easy access to and across federal lands—is exemplified in the self-executing way R.S. 2477 was implemented by federal land-management agencies. Early federal regulations addressing R.S. 2477 stated: "This grant becomes effective upon the construction or establishing of highways, in accordance with the State laws, over public lands not reserved for public uses. No application should be filed under this act, as no action on the part of the Federal Government is necessary."[44] This language, requiring no action on the part of the federal government to perfect an R.S. 2477 right-of-way, did not change in any material way until after the enactment of FLPMA in 1976.[45] Therefore, state and local governments could acquire R.S. 2477 rights-of-way without any regulatory action or approval by the federal government, and new uses or improvements of an R.S. 2477 right-of-way could cumulate additional rights to the state or local government up to the enactment of FLPMA.[46] Furthermore, even though no R.S. 2477 rights-of-way could be perfected on lands that the federal government had reserved for public uses, "such as in national parks, monuments, wildlife refuges or forests[,]. . . . a state's interest in the right of way, after acceptance, [could not] be extinguished simply because the public lands through which it passes [had] been subsequently reserved."[47]

43. Mining Act of 1866, ch. 262, §§ 1, 3, 9, 14 Stat. 251, *repealed by* Federal Lands Policy and Management Act of 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2744, 2793 (codified at 43 U.S.C. §§ 1701–82).

44. Regulations Governing Rights-of-Way for Canals, Ditches, Reservoirs, Water Pipe Lines, Telephone and Telegraph Lines, Tramroads, Roads and Highways, Oil and Gas Pipe Lines, Etc. 56 Interior Dec. 533, 551 (1938).

45. *See* 43 C.F.R. §§ 2822.1-1, 2822.2-1 (1972).

46. Sierra Club v. Hodel (*Hodel II*), 848 F.2d 1068, 1083–84 (10th Cir. 1988) ("R.S. 2477 was an open-ended and self-executing grant. . . . Because the grantor, the federal government, was never required to ratify a use on an R.S. 2477 right-of-way, each new use of the [right-of-way] automatically vested as an incident of the easement."), *overruled on other grounds by* Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992); *see also* Shultz v. Dep't. of Army (*Shultz I*), 10 F.3d 649, 655 (9th Cir. 1993) ("The grant is self-executing.") (internal quotation marks omitted), *withdrawn and superseded by* (*Shultz II*), 96 F.3d 1222 (9th Cir. 1996); Hjelle, *supra* note 20, at 303–04. R

47. Bader, *supra* note 40, at 490–91; *see also* United States v. Balliet, 133 F. Supp. 2d 1120, 1129 (W.D. Ark. 2001) (stating that for the establishment of an R.S. 2477 right-of-way plaintiff must show that the road in question was built when the land was public land and before it was reserved for a national park).

With the enactment of FLPMA in 1976, Congress implemented a new multiple-use-based approach to management of federal lands that focused on sustainability and federal oversight.[48] Congress determined that lands managed by the Secretary of Interior "should be retained in public ownership and managed according to the principles of multiple use and sustained yield, while preventing unnecessary or undue degradation of the lands."[49] The process under FLPMA for acquiring rights-of-way for roads across federal lands, though consolidated, is infinitely more onerous than the self-executing R.S. 2477.[50] For example, permits issued under FLPMA do not vest as perpetual property rights.[51] They must be granted through an affirmative decision by the federal government "made according to a process that takes into account a variety of considerations, including environmental quality, national land use policies, economic efficiency, and fair market value."[52] Additionally, "[t]he limitations on the rights of the federal government to 'eviscerate' the property right granted under R.S. 2477 do not apply to [FLPMA] rights-of-way."[53] Besides the new limitations on rights-of-way, many other provisions of FLPMA demonstrated Congress's intention to draw in the reins on federal lands. For example, FLPMA provides for the review and designation of Wilderness Study Areas ("WSAs") and requires that WSAs be managed to preserve their suitability for designation as wilderness and to prevent their unnecessary or undue degradation.[54]

The federal government's new approach to federal land management elicited a strong backlash from western states and counties.[55] Many counties, afraid of losing significant income from extractive industries on federal lands, took action to subvert the nascent federal programs, including bulldozing roads into pristine federal lands to prevent them from being classified as "roadless"

48. *See supra* note 10 and accompanying text. R

49. Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39216, 39217 (proposed Aug. 1, 1994).

50. *See* 43 U.S.C. §§ 1761–71 (2000); *see also Hodel II*, 848 F.2d at 1078.

51. 43 U.S.C. § 1764(b) (2000) ("Each right-of-way or permit granted, issued, or renewed pursuant to this section shall be limited to a reasonable term in light of all circumstances concerning the project.").

52. Freeman & Ro, *supra* note 9, at 106 n.19 (citing 43 U.S.C. §§ 1761–71).

53. Hjelle, *supra* note 20, at 308 (citing *Hodel II*, 848 F.2d at 1087–88). R

54. 43 U.S.C. § 1732(c) (2000).

55. *See supra* note 11 and accompanying text; *see also* Governor's Executive Order Directing the Attorney General to File Notice of Intent to Quiet Title to R.S. 2477 Rights-of-Way Throughout the State (May 5, 2000), http://www.rules.utah.gov/execdocs/2000/e2000-05-05.htm (declaring that Utah state and county governments share the desire to defend R.S. 2477 claims). R

wilderness areas under the Wilderness Act.[56] Even before the enactment of FLPMA, many interest groups levied their political weight to secure concessions in federal land-management legislation to protect state and county property interests in federal lands.[57]

Responding to pressure from states, counties, and the extractive industry, Congress, though it changed the granting of future easements in FLPMA, did not terminate existing R.S. 2477 rights-of-way. FLPMA expressly protected rights-of-way "existing on the date of approval of this Act," noting that "[n]othing in this title shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted."[58] Therefore, while no more R.S. 2477 rights-of-way would be granted after FLPMA, the rights-of-way that predate FLPMA were exempted from any of FLPMA's management provisions that would effect their termination.[59] With over a hundred years' worth of potential rights-of-way crisscrossing federal lands, the correct legal standards for acquiring, or "perfecting," an R.S. 2477 right-of-way and the appropriate uses and improvements it allows, or its "scope," have became hotly contested subjects.

56. *See, e.g.*, United States v. Nye County, 920 F. Supp. 1108, 1109–10, 1111 (D. Nev. 1996) (regarding Nye County Commissioner's bulldozing a road into Toiyabe National Forest); Mike Gorrell, *Feds Sue to Halt Road Work in Wild Utah Areas Feds Sue to Halt County Road Graders*, SALT LAKE TRIB., Oct. 19, 1996, at A1; Vincent J. Schodolski, *Range Wars: Nevada Struggle Emblematic of Battle to Put Public Land Strictly in Counties' Hands*, S.F. EXAM'R, May 21, 1995, at A6; Ed Vogel, *Nye's Carver Leads Fight for Land Use*, LAS VEGAS REV.-J., May 7, 1995, at 1.A; Jim Woolf, *Road-Grading Dispute Reaches Uintah County*, SALT LAKE TRIB., June 2, 1999, at C3.

57. H.R. REP. NO. 94-1163, at 19 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6175, 6193 ("In considering this Title, the Committee took notice of the longtime policies of the Department of the Interior favoring State and local governments and non-profit organizations by special price and liability considerations under appropriate circumstances.").

58. Federal Lands Policy and Management Act of 1976, Pub. L. No. 94-579, §§ 509(a), 701(a), 90 Stat. 2744, 2781, 2786 (codified at 43 U.S.C. §§ 1701 note (a)–(h), 1769 (2000)) ("Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this act. . . . All actions by the Secretary concerned under this Act shall be subject to valid existing rights.").

59. *See* Sierra Club v. Hodel (*Hodel II*), 848 F.2d 1068, 1086–88 (10th Cir. 1988) (holding that the non-impairment standard affecting BLM management of WSAs did not apply to valid R.S. 2477 rights-of-way), *overruled on other grounds by* Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992).

B. Right-of-Way Scope and Perfection under State Law

Though FLPMA grandfathered in existing R.S. 2477 rights-of-way, it provided no additional standards regarding perfection or scope of R.S. 2477 rights-of-way. As a result, the question of whether state or federal law should provide the standards for perfection and scope of R.S. 2477 rights-of-way has been the focal point in the fight over R.S. 2477 and, by extension, a key nexus in the larger federal land-use debate. The Ninth and Tenth Circuits have adopted different approaches for resolving this issue. Considering their approaches to scope and perfection of R.S. 2477 rights-of-way helps establish the context in which federal land managers are now looking to define their regulatory power over valid rights-of-way. Furthermore, the circuits' approaches to scope and perfection also reflect their differing approaches to the necessarily subsequent question of regulation.

According to its sparse text, R.S. 2477 granted rights-of-way for "the construction of highways across public lands, not reserved for public uses."[60] One of the key issues in deciding whether a valid R.S. 2477 claim has been perfected, or acquired, is determining whether the "construction" of a "highway" occurred before R.S. 2477's repeal.[61] Courts and commentators have divided over whether these key definitions should be based on state or federal law,[62] with the Tenth Circuit applying state law and the Ninth Circuit deciding not to decide.

60. Mining Act of 1866, ch. 262, § 8, 14 Stat. 251, *repealed by* Federal Lands Policy and Management Act of 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2744, 2793 (codified at 43 U.S.C. §§ 1701–82 (2000)); *see also* Regulations Governing Rights-of-Way for Canals, Ditches, Reservoirs, Water Pipe Lines, Telephone and Telegraph Lines, Tramroads, Roads and Highways, Oil and Gas Pipe Lines, Etc. 56 Interior Dec. 533, 551 (1938) (stating, in an early regulation, that a valid R.S. 2477 claim existed "upon the construction or establishing of highways, in accordance with the State laws, over public lands not reserved for public uses").

61. *See* Suthers, *supra* note 19, at 114–15. **R**

62. *Compare* S. Utah Wilderness Alliance v. Bureau of Land Mgmt. (*SUWA II*), 425 F.3d 735, 771 (10th Cir. 2005) (holding that an R.S. 2477 right-of-way may be accepted by mere use, as defined under state law), *Hodel II*, 848 F.2d 1086–88, Barker v. Bd. of County Comm'rs, 49 F. Supp. 2d 1203, 1214 (D. Colo. 1999) (creation of R.S. 2477 right-of-way determined by state law), United States v. 9,947.71 Acres of Land, 220 F. Supp. 328, 335 (D. Nev. 1963) (stating that an R.S. 2477 "highway may be established across or upon such public lands in any of the ways recognized by the law of the state in which such lands are located" (quoting Smith v. Mitchell, 58 P. 667, 668 (Wash. 1899))), Heath v. Parker, 30 P.3d 746, 750 (Colo. Ct. App. 2000) (discussing a broad definition of road/highway in Colorado under which a footpath may qualify), Moffat, Colo., Maintenance Protocol for R.S. 2477 Rights-of-Way (Jan. 10, 2003), http://www.co.moffat.co.us/NaturalResources/

The Tenth Circuit has held that state law determines whether a valid R.S. 2477 claim has been perfected.[63] In particular, the Tenth Circuit held in *SUWA II* that though federal law governed the interpretation of federal statutes creating rights-of-way, federal law "borrowed" from long-established principles of common law and state law to the extent those principles provided convenient and appropriate tools for effectuating congressional intent.[64] This holding has had a number of consequences. Since state conceptions of what constitutes "the construction or establishing of" a "highway" vary, there are variations in the standards governing the recognition of rights-of-way across states.[65] In addition, lax state-law definitions of "construction" and "highway" have primed states for thousands of potential R.S. 2477 claims. For instance, in Colorado and Utah "highways" can be "formed by the passage of wagons, etc.,

MAINTENANCE_PROTOCOL_2477s.pdf, Hjelle, *supra* note 20, at 305–08 (arguing in favor of state law controlling), *and* Olson, *supra* note 20, at 297–98 (validating an R.S. 2477 right-of-way must depend on state law standards), *with* United States v. Gates of the Mountains Lakeshore Homes, Inc., 732 F.2d 1411, 1413–14 (9th Cir. 1984) ("The scope of a grant of federal land is, of course, a question of federal law." (citing United States v. Oregon, 295 U.S. 1, 28 (1935))), S. Utah Wilderness Alliance v. Bureau of Land Mgmt. (*SUWA I*), 147 F. Supp. 2d 1130 (D. Utah 2001) (supporting a federal standard and holding that "more than mere use" is required to perfect an R.S. 2477 right-of-way, and that the BLM's decision that a claimed R.S. 2477 right-of-way was invalid withstood the court's APA scrutiny), *aff'd in part and rev'd in part by SUWA II*, 425 F.3d at 771, Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39216, 39217 (proposed Aug. 1, 1994) (proposing DOI regulations providing federal standards for determining perfection of R.S. 2477 rights-of-way), Hayes, *supra* note 20, at 239–40 (arguing in favor of federal law controlling), *and* Lockhart, *supra* note 20, at 334–44 (same). R R R

63. *SUWA II*, 425 F.3d at 770–71.

64. *Id.* at 762 (citation omitted).

65. States where public use has constituted acceptance of a R.S. 2477 right-of-way under state law include Alaska, Colorado, Idaho, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. *See, e.g.*, *SUWA II*, 425 F.3d at 770–71; Wilkenson v. Dep't of Interior, 634 F. Supp. 1265, 1272 (D. Colo. 1986); Dillingham Commercial Co. v. City of Dillingham, 705 P.2d 410, 413–41 (Alaska 1985); Brown v. Jolley, 387 P.2d 278, 281–82 (Colo. 1963); Leach v. Manhart, 77 P.2d 652, 653 (Colo. 1938); Nicolas v. Grassle, 267 P. 196, 197 (Colo. 1928); Kirk v. Schultz, 119 P.2d 266, 268 (Idaho 1941); Anderson v. Richards, 608 P.2d 1096, 1098 (Nev. 1980); Wilson v. Williams, 87 P.2d 683, 685 (N.M. 1939); Montgomery v. Somers, 90 P. 674, 677 (Or. 1907); Boyer v. Clark, 326 P.2d 107, 109 (Utah 1958); Lindsay Land & Live Stock Co. v. Churnos, 285 P. 646, 648–49 (Utah 1929); Okanogan County v. Cheetham, 80 P. 262, 263 (Wash. 1905), *overruled on other grounds by* McAllister v. Okanogan County, 100 P. 146, 148 (Wash. 1909); Bishop v. Hawley, 238 P. 284, 285 (Wyo. 1925); *see also* Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39216, 39217–18 (proposed Aug. 1, 1994).

over the natural soil."[66] Colorado, in fact, has adopted such a broad definition of what constitutes a "highway" that even a footpath can be considered a highway.[67] As mentioned earlier, the state of Utah has already claimed that more than five thousand R.S. 2477 rights-of-way exist in the state.[68]

The debate over the scope of an R.S. 2477 right-of-way revolves around the question of what uses and improvements states and local governments can make to the road in question relying on a valid easement. Specifically, are states and local governments entitled to restore and extend routes and open routes to new uses despite incidental detrimental effects on the federal lands?[69] Should state or federal law answer this question?[70] With reasoning similar to that it applied in *SUWA II*, the Tenth Circuit held in *Sierra Club v. Hodel* (*Hodel II*) that state law governs the scope of an R.S. 2477 right-of-way.[71] Applying Utah state law, the court held that the width of an R.S. 2477 right-of-way is defined in the state as "that which is reasonable and necessary for the type of use to which the road has been put."[72] In determining what is "reasonable and necessary," the court stated that the rights-of-way are subject to the Utah state law and common law principles that govern the scope of easements.[73] Under Utah state law, improvements to a right-of-way to ensure safe travel for increased traffic fall within the scope of the grant as long as the general type of use at issue vested prior to R.S. 2477's repeal.[74] In the case of *Hodel II*, the result of being able to make

66. *Wilkenson*, 634 F. Supp. at 1272 (citing Cent. Pac. Ry. Co. v. Alameda County, 284 U.S. 463, 467 (1932)); *see Boyer*, 326 P.2d at 109. One provision in Utah law allowing public use to perfect public rights-of-way goes back to the nineteenth century. *See* UTAH CODE ANN. § 72-5-104 (2000); Compiled Laws of Utah § 2066, sec. 2 (1888); Blonquist v. Blonquist, 516 P.2d 343, 344 (Utah 1973).

67. Heath v. Parker, 30 P.3d 746, 750 (Colo. Ct. App. 2000) (citing COLO. REV. STAT. § 43-2-201 (2000); Simon v. Pettit, 687 P.2d 1299, 1305 (Colo. 1984) (Lohr, J., dissenting)).

68. *See supra* note 8 and accompanying text. **R**

69. *See* Sierra Club v. Hodel (*Hodel II*), 848 F.2d 1068 (10th Cir. 1988) (discussing the question and holding that states do hold this power), *overruled on other grounds by* Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992).

70. *Compare* Hayes, *supra* note 20, at 243–45, *with* Hjelle, *supra* note 20. **R**

71. *Hodel II*, 848 F.2d at 1083–84.

72. *Id.* at 1083 (quoting Sierra Club v. Hodel (*Hodel I*), 675 F. Supp. 595, 607 (D. Utah 1987)).

73. *Id.*

74. *Id.* at 1083–84; *see also* S. Utah Wilderness Alliance v. Bureau of Land Mgmt. (*SUWA II*), 425 F.3d 735, 749 (10th Cir. 2005) (holding that performing maintenance and repair on a road falls within the scope of an R.S. 2477 right-of-way).

"reasonable and necessary" improvements to the Burr Trail to answer the exigencies of increased use included expanding a one-lane dirt road into a two-lane gravel road and re-routing the road in various locations onto previously undisturbed federal lands.[75]

The effect of *Hodel II* becomes even more potentially burdensome on federal land management when combined with the liberal perfection of R.S. 2477 rights-of-way under Utah law in *SUWA II*. Pursuant to the combined holdings of *Hodel II* and *SUWA II*, Utah counties can claim any number of long-abandoned routes crossing federal lands and restore and improve them to accommodate increased traffic or achieve safety requirements. Therefore, barring any supervening regulation of their R.S. 2477 rights-of-way, states and counties in the Tenth Circuit have control over the federal lands underlying R.S. 2477 rights-of-way and the federal lands surrounding the rights-of-way inasmuch as those rights-of-way may be modified or enlarged under state law.

Since the Ninth Circuit has not been forced to directly confront the issues of scope and perfection, it is difficult to predict whether it would reject the Tenth Circuit's approach outright. However, the Ninth Circuit's caselaw basing scope on federal standards and the circuit's otherwise careful avoidance of the issue suggests that it is not comfortable basing R.S. 2477 perfection and scope purely on state law. In *United States v. Gates of the Mountains Lakeshore Homes, Inc.*, the Ninth Circuit recognized the superiority of federally-based standards for scope, holding: "The scope of a grant of federal land is, of course, a question of federal law,"[76] though in some instances where Congress is silent, it may have intended to incorporate by implication a state-law standard.[77] The Forest Service had claimed that the right to install electric lines under an R.S. 2477 right-of-way was beyond the easement's scope.[78] In considering how to determine the scope of the right-of-way, the

75. According to Kevin Hayes, *Hodel II* seriously amplified the scope of the R.S. 2477 right-of-way:

> Essentially, the court found that FLPMA saved not only the existing use of the right-of-way at the time FLPMA repealed R.S. 2477, but also whatever enlargements of the right-of-way would have been permitted by state law at the time of R.S. 2477's repeal. Under this theory, the BLM cannot prevent any enlargements of R.S. 2477 right-of-ways because the enlargements are already grandfathered in as vested rights.

Hayes, *supra* note 20, at 230. For additional conservation-oriented commentary on *Hodel II*, see Schipaanboord, *supra* note 35, at 160. R

76. 732 F.2d 1411, 1413 (9th Cir. 1984).

77. *Id.* at 1413.

78. *Id.* at 1412.

court determined that Montana state law, which would have allowed the lines, should *not* govern because the federal government had enacted legislation governing the grant of power line rights-of-way, thereby removing them from the scope of subsequently granted R.S. 2477 rights-of-way.[79] This decision imposes a significant restriction on the potential applicability of state law to the scope of R.S. 2477 rights-of-way because it essentially holds that whenever a federal statute provides a mechanism for granting or regulating a use right, that use right is no longer within the scope of subsequently granted R.S. 2477 rights-of-way.[80]

In situations where there may be no federal statute on which to rely, the Ninth Circuit has still avoided construing R.S. 2477 rights-of-way based on state law. In *United States v. Vogler*, for example, the Ninth Circuit declined to rule on an R.S. 2477 right-of-way's perfection or scope because it found the NPS could regulate the route with a permit requirement whether the R.S. 2477 right-of-way existed or not.[81] The reasoning in *Vogler* and subsequent cases that avoids determining the appropriate standards for scope and perfection relies on the ability of federal agencies to regulate even valid rights-of-way.[82] The Ninth Circuit's reasoning will be more thoroughly discussed in the next Parts, but choosing to avoid deciding outright whether state law governs scope and perfection is a significant departure from the Tenth Circuit's approach.

The Ninth Circuit's decision in *Shultz v. Department of Army (Shultz I)*, demonstrates even more clearly its reticence to construe R.S. 2477's terms based on state law.[83] Evaluating a claimed easement across Fort Wainright in Alaska based on either R.S. 2477 or common law easement theories, a three-judge panel held that Alaska state law governed perfection and scope of R.S. 2477 rights-of-way and that a valid right-of-way existed based on either R.S. 2477

79. *Id.* at 1413.

80. *See id.*

81. 859 F.2d 638 (9th Cir. 1988).

82. *See* Clouser v. Espy, 42 F.3d 1522, 1538 (9th Cir. 1994) (choosing to avoid deciding whether a valid R.S. 2477 right-of-way exists because "regardless whether the trails in question are public highways under R.S. § 2477, they are nonetheless subject to the Forest Service regulation"); United States v. Hicks, 1994 U.S. App. LEXIS 26372, at *3 (9th Cir. May 19, 1994) (noting that the validity of the R.S. 2477 claim had not been raised in the district court, but stating that "[e]ven if title to the road were with the State of Alaska, an issue we do not reach, the NPS could still impose reasonable regulations on the use of the road").

83. 10 F.3d 649, 655 (9th Cir. 1993), *withdrawn and superseded by* (*Shultz II*), 96 F.3d 1222 (9th Cir. 1996).

or common law prescriptive easement theories.[84] However, three years later, the same three Ninth Circuit judges reheard the *Shultz* arguments, withdrew their ten-page opinion, and superseded it with a one-paragraph opinion, holding that Shultz had not shown existence of an easement under either state or federal standards and not mentioning whether state or federal law provided the correct standard.[85] The *Shultz II* opinion provides no reasoning for the shift, but in contrast to the *Shultz I* proceeding, the Department of Army was joined as amici in its petition for rehearing by the Sierra Club and other conservation-oriented organizations.[86] *Shultz I* had construed Alaska state law to provide lax standards similar to those in Utah and Colorado, allowing a footpath to count as a "highway" and improvements over time to turn the footpath into a paved road.[87] This seems to have alerted various amici to the portent of the case. Commenting on the *Shultz II* opinion as amicus for Shultz on his petition for certiorari, the Utah Association of Counties claimed that the *Shultz II* opinion "eviscerates Alaska state law as applied to rights-of-way perfected under [R.S. 2477]" and that "the Ninth Circuit Court's action is part of a trend towards a substitution of arbitrary federal power for the rule of law when dealing with these vested property rights."[88]

The Ninth Circuit, therefore, has not yet applied state law to determine the scope or perfection of an R.S. 2477 right-of-way in any regard, and its past decisions suggest it will continue to avoid finally deciding the issue. The Tenth Circuit, however, has clearly decided that state law applies to both the perfection and scope of R.S. 2477 rights-of-way. In either case, federal land managers are left wondering to what extent they may regulate a valid R.S. 2477 right-of-way. In the Ninth Circuit, the rationale for choosing to avoid deciding whether the right-of-way exists, thereby avoiding the question of whether state law applies, depends on the federal regulation being appropriate over even valid rights-of-way.[89] In the Tenth Circuit, the lax requirements for perfection and liberal scope

84. *Id.* at 655, 662.

85. *Shultz II*, 96 F.3d at 1223. Judge Alarcon dissented, noting that he would have denied rehearing based on Judge Fletcher's original opinion in *Shultz I*. *Id.* (Alarcon, J., dissenting).

86. *See id.* at 1222–23. Shultz was also joined by several amici at the rehearing stage. No amici participated in the original appeal. *See Shultz I*, 10 F.3d at 652.

87. *Shultz I*, 10 F.3d at 657–58.

88. Brief for Utah Association of Counties as Amicus Curiae Supporting Writ of Certiorari at 1, Shultz v. Department of Army, 523 U.S. 1072 (1998) (No. 97-1117).

89. *See supra* notes 81–82 and accompanying text.

provided by state law also lead to the question of the extent to which valid rights-of-way can be regulated, even perhaps beyond their traditional scope.

II.
TWO CIRCUITS' CONFLICTING APPROACHES TO R.S. 2477 REGULATION

This Note is concerned with the federal government's authority to regulate valid R.S. 2477 claims. To a large extent, R.S. 2477 claims are a tool used by states and local governments intent on fighting federal land-management policy to preserve and increase extractive and recreational uses of federal lands. As the Department of the Interior's ("DOI") 1994 proposed rules explained:

> Some State and county governments, intent on maintaining a road infrastructure for their citizens and providing for economic development, have turned to R.S. 2477 as a guarantee of access across and to Federal lands, believing it to provide simpler and less restrictive access than other Federal laws. There are some proponents of unlimited and unregulated access to Federal lands who view R.S. 2477 as a mechanism on which they believe they can rely to circumvent the protective requirements of current environmental and land use law and to authorize the present expansion of footpaths and animal trails into highways. Some environmental groups view R.S. 2477 with alarm, believing it to have been resurrected so long after its repeal as a weapon to defeat the designation of existing and potential wilderness areas (which are roadless by definition).[90]

Many federal lands are vulnerable to R.S. 2477 claims. As of 1993, the DOI and the courts had recognized about 1,453 R.S. 2477

90. Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39216, 39216–17 (Aug. 1, 1994). R.S. 2477 claims are particularly relevant to the designation of Wilderness Areas and Wilderness Study Areas because of the statutory requirement that they be "roadless." *See* 16 U.S.C. §§ 1131(c), 1132(c) (2000) (defining "wilderness" as a roadless area of 5,000 acres or more). Wilderness designation significantly affects the management of federal lands because new mining and logging operations, roads, motorized vehicles, and mechanized activity are largely prohibited in wilderness areas. 16 U.S.C. §§ 1131(c), 1133(c)–(d). Furthermore, under FLPMA the DOI must prevent any new surface impairments in WSAs that would affect wilderness area suitability and manage current uses to avoid "unnecessary or undue degradation" of the wilderness characteristics of the area. 43 U.S.C. § 1782(c) (2000). Parties that rely on federal lands for extractive industry have a strong incentive, therefore, to use R.S. 2477 to make sure that the areas are not "roadless."

rights-of-way across BLM lands.[91] About 5,600 claims were outstanding at that time, but the DOI recognized that it was impossible to calculate all potential, unasserted claims.[92] According to a January 14, 1993 NPS memorandum, about 17 million acres in 68 parks could be impacted by right-of-way claims, which the agency said "could be devastating" for the parks' fish and wildlife habitat, historical and archaeological sites, and wilderness.[93] As mentioned above, several counties have passed ordinances opening routes across national park lands.[94] The state of Utah has been particularly aggressive in facilitating these claims.[95] As this Note goes to press, a key case is pending in Utah District Court concerning San Juan County's claimed right-of-way across the Salt Creek in Canyonlands National Park in defiance of park management restrictions.[96] If the court finds that "San Juan County has an R.S. 2477 right in the road using the Tenth Circuit's interpretation of R.S. 2477 in [*SUWA II*], it is unclear to what extent the NPS may continue to regulate use of the road."[97] As this potential outcome suggests, the Tenth Circuit's decision in *SUWA II* leads to the question whether federal land-management agencies retain any regulatory power over the routes at all, and if they do, how much?

There is little doubt that federal land managers do retain regulatory power over valid R.S. 2477 rights-of-way.[98] The scope of that power is uncertain, however, and depends on how courts construe the federal Property Clause power and interpret the manager's statutory mandate. In this Part, I argue that the Ninth and Tenth Cir-

91. DOI REPORT, *supra* note 8, at 34–35. R

92. *Id.*

93. Memorandum from Martin C. Ott, Utah State Coordinator, Nat'l Park Serv., to R.S. 2477 Task Force Leader, at 2 (Jan. 14, 1993), http://www.suwa.org/site/DocServer/NPS_Memo_1_.pdf?docID=181; *see also* Heidi McIntosh, *New Highways under an Old Law? R.S. 2477 and its Implications for the Future of Utah's Federal Public Lands*, 18 UTAH BAR J. 16, 17 (2005).

94. *See supra* notes 1–5 and accompanying text. OHV groups have also asserted R.S. 2477 claims. *See* Julie Cart, *Bush Opens Way for Counties and States to Claim Wilderness Roads*, L.A. TIMES, Jan. 21, 2003, at A1. R

95. *See, e.g.*, Stan Johnson, Recent Development, *Roads on Public Lands*, 2000 UTAH L. REV. 961 (2000) (discussion of Utah Amendment claiming interest in all county roads that cross federal land); Press Release, John Huntsman, Jr., Governor of Utah, A New Plan for Identifying Public Roads in Utah (Sept. 21, 2005), *available at* http://www.utah.gov/governor/news/2005/news_09_21_05.html.

96. San Juan County v. United States, No. 2:04-CV-552-BSJ (D. Utah); *see also* San Juan County v. United States, 503 F.3d 1163 (10th Cir. 2007) (allowing three conservation groups to intervene in the government's behalf).

97. Suthers, *supra* note 19, at 140 n.149. R

98. *See infra* Parts II.B–C.

cuits have thus far upheld regulation of valid R.S. 2447 rights-of-way based on two distinct rationales that reflect two different conceptions of the federal Property Clause power—the legislative and proprietary approaches. A nuanced discussion of the key Ninth and Tenth Circuit cases will help tease out that distinction.

A. The Property Clause Power

Article IV, Section 3, Clause 2, of the Constitution reads simply: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ."[99] The words "needful" and "respecting" have proven to allow a liberal construction of the clause that has not yet been definitively limited by the Supreme Court.[100] The Supreme Court in *Kleppe v. New Mexico*, for instance, noted that "while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that '[t]he power over the public land thus entrusted to Congress is without limitations.'"[101] Additionally, in a more nuanced recognition of Congress's extensive Property Clause power, the Supreme Court has noted that the Property Clause gives Congress the power over public lands "to control their occupancy and use, to protect them from trespass and injury, and to prescribe the conditions upon which others may obtain rights in them."[102] Given this only vaguely limited Congressional power over federal property, the derived authority of federal land-management agencies to regulate federal lands to protect against interference with their intended uses is also not clearly limited.[103] Several scholars have argued, therefore, that as a means of regulating and protecting federal lands, management agencies should rely on the Property Clause directly as a broad-based source of authority to accomplish their mandates as opposed to seeking particularized approval for regulatory action from Congress.[104]

99. U.S. CONST. art. IV, § 3, cl. 2.

100. *See, e.g.*, Kleppe v. New Mexico, 426 U.S. 529, 539 (1976) (upholding Congress's power to regulate wild horses and burros on federal lands under the Property Clause); Camfield v. United States, 167 U.S. 518, 524 (1897) (upholding government's power to regulate fence building around federal properties though on state lands).

101. *Kleppe*, 426 U.S. at 539 (quoting United States v. San Francisco, 310 U.S. 16, 29 (1940)).

102. Utah Power & Light Co. v. United States, 243 U.S. 389, 405 (1917).

103. Minnesota v. Block, 660 F.2d 1240, 1249 (8th Cir. 1981).

104. *See, e.g.*, Harry R. Bader, *Not So Helpless: Application of the U.S. Constitution Property Clause to Protect Federal Parklands From External Threats*, 39 NAT. RESOURCES J.

The applicability of the Property Clause power to the R.S. 2477 context, however, depends on one's conceptual interpretation of that vague power. A narrow conceptual approach to the Property Clause that limits the scope of federal agency power to that granted a normal proprietor under state law would offer the same regulatory control any servient estate owner has but would not overcome any state laws affecting scope and perfection of the rights-of-way. I call this the proprietary approach. On the other hand, an expansive conceptual approach that limits a federal agency's power according only to limitations expressly written into its enabling statute offers powerful regulatory control and would overcome state laws affecting perfection and scope of the right-of-way. I call this the legislative approach.

In *Kleppe v. New Mexico*, the Supreme Court recognized both approaches: "Congress exercises the powers both of a proprietor and of a legislature over the public domain."[105] Despite the Supreme Court's holding recognizing both a proprietary and legislative aspect to the Property Clause power, scholars disagree over the traditional interpretation of the Property Clause, and case law has borne out both approaches separately.[106] The proprietary and legislative approaches to the Property Clause power, conceived of sepa-

193, 193–201 (1999) (tracing application of Property Clause power beyond federally owned land and arguing that instead of federal legislation creating buffer zones around national parks, park managers should take advantage of the extraterritorial reach of the Property Clause: "The Property Clause is available, and has been successfully relied upon, to control activities adjacent to, or within the perimeter area of, a federal conservation unit which significantly interferes with the primary purposes for which the federal land is designated."). *See generally* George C. Coggins, *Protecting the Wildlife Resources of National Parks from External Threats*, 22 LAND & WATER L. REV. 1, 25–26 (1987); Ronald F. Frank & John H. Eckhard, *Power of Congress Under the Property Clause to Give Extraterritorial Effect to Federal Lands Law: Will "Respecting Property" Go The Way Of "Affecting Commerce"?*, 15 NAT. RESOURCES LAW. 663 (1983); Joseph L. Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239, 250–58 (1976); Louis Touton, Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817 (1980).

105. 426 U.S. at 540 (citation omitted).

106. *See* Eugene R. Gaetke, *Refuting the "Classic" Property Clause Theory*, 63 N.C. L. REV. 617, 620 (1985) ("[T]he Court's current, expansive view of the property clause power is consistent with and supported by the documented intentions of the Framers and the early Supreme Court decisions interpreting that power. Indeed, the broad view of that power has been the true 'classic' property clause theory all along."); Dale D. Goble, *The Myth of the Classic Property Clause Doctrine*, 63 DENV. U. L. REV. 495, 495–97 (1986) ("The proponents of the [classic Property Clause] doctrine unfortunately fail to carry their burden of persuasion. Although attractive, the doctrine is fundamentally misconceived.").

rately, offer two alternatives modes of regulating R.S. 2477 rights-of-way that in many situations may have the same effect but ultimately support polar opposite views on the role of the federal government in land-management.

B. The Tenth Circuit's Proprietary Approach under the Common Law of Servitudes

i. The Proprietary Approach

According to the proprietary Property Clause approach, often called the "classic" theory in scholarship,[107] the federal government has the rights of a proprietor over federal lands. In other words, the government may prosecute its property rights the same as any other owner of land in a state.[108] The Tenth Circuit cases that have recognized land-management agencies' regulatory interests in R.S. 2477 rights-of-way have done so from a primarily proprietary approach—focusing on federal agencies' interests in federal land according to state law.

As the Supreme Court noted in *Camfield v. United States*: "[T]he government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property."[109] In *Camfield*, the Court specifically noted that protection of federal lands from traditional trespass would require no federal legislation:

> It needs no argument to show that the building of fences upon public lands with intent to inclose them for private use would be a mere trespass, and that such fences might be abated by the officers of the government, or by the ordinary processes of courts of justice. To this extent, no legislation was necessary to vindicate the rights of the government as a landed proprietor.[110]

Not only does Congress have the power to prosecute traditional state-law-based property rights, this proprietary power can be wielded by the executive branch and land-management agencies under its supervision either by explicit grant or through long-stand-

107. *See supra* note 106.

108. *See Kleppe*, 426 U.S. at 540–41; Gaetke, *supra* note 106, at 620.

109. 167 U.S. 518, 524 (1897).

110. *Id.*; *see also* United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915) ("Congress not only has a legislative power over the public domain, but it also exercises the powers of the proprietor therein. . . . Like any other owner it may provide when, how and to whom its land can be sold. It can permit it to be withdrawn from sale.").

ing acquiescence by Congress.[111] Under the proprietary approach, then, whatever state-law remedies are available to the owner of land surrounding and underlying an easement (the servient estate owner) against the owner of the easement (the dominant estate owner) are also available to Congress and land-management agencies.

Traditional state principles of property law provide some regulatory power to a servient estate owner over a dominant estate owner's use of an easement.[112] Both the dominant and servient owners are limited in their use of the easement by a reasonableness standard subject to the terms of the easement:

> Except as limited by the terms of the servitude . . . , the holder of an easement . . . is entitled to use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of the servitude. . . . Unless authorized by the terms of the servitude, the holder is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment.[113]

> Except as limited by the terms of the servitude . . . , the holder of the servient estate is entitled to make any use of the servient estate that does not unreasonably interfere with enjoyment of the servitude.[114]

The servient owner, therefore, is not bound to suffer unreasonable burdens to the servient estate and may use the servient estate to whatever extent does not unreasonably interfere with the purpose of the easement.[115]

Determining what constitutes unreasonable damage to the servient estate requires careful analysis under state law that takes into

111. *See Midwest Oil Co.*, 236 U.S. at 483 (holding that the President has power as a proprietor to withdraw federal lands from sale as a result of a long-continued practice acquiesced to by Congress and upheld by the courts). It may seem odd to divide Congress's Property Clause power into proprietary and legislative distinctions, since whenever Congress acts it is necessarily by legislation. However, the distinction is more appropriately understood as categorizing two types of actions Congress may take through legislation in respect to federal lands: one that controls the land only as a proprietor might and one that controls the land as a state might through its police powers.

112. *See* Utah v. Andrus, 486 F. Supp. 995, 1002, 1010 (D. Utah 1979) (stating regulation of easement may not prevent access or be so prohibitive as to render land incapable of full economic development).

113. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.10 (2000).

114. *Id.* § 4.9.

115. *Id.* § 4.10 cmt. c; *see also* United States v. Jenks (*Jenks II*), 22 F.3d 1513, 1518 (10th Cir. 1994), *aff'd*, (*Jenks III*), 129 F.3d 1348 (10th Cir. 1997).

account the purpose and terms of the easement, its history of use, and context.[116] A certain amount of inconvenience to the servient owner and damage to the property is usually contemplated within the terms of the easement, especially in the face of foreseeable developments in the dominant estate and advances in technology that allow for more convenient use of the easement.[117] However, the dominant owner is not entitled to cause damage to the servient estate beyond that contemplated by the parties in the grant or reasonably necessary to accomplish the purpose of the servitude.[118] The purpose and scope of the easement as extrapolated from the intent of the parties, therefore, play the key role in determining what future uses of the easement by the dominant owner are unreasonable and what regulation on use the servient owner may employ.[119]

In some cases, contextual circumstances may affect whether the damage on the servient estate is reasonable, as the Restatement notes:

> In determining whether a particular improvement will cause unreasonable damage to the servient estate, aesthetics and the character of the property are important concerns. Straightening and paving roads in urban environments, for example, may enhance the value and enjoyment of both dominant and servient estates, while the same actions in a rural area may significantly damage the servient estate.[120]

Since what constitutes unreasonable damage to the servient estate will vary based on aesthetic concerns and the character of the property, a fact-based, case-by-case determination is required when conflicts arise.[121]

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116. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.10 cmts. g, h.

117. *Id.* § 4.10 cmts. d, g.

118. *Id.* § 4.10; *see, e.g.*, Brock v. B & M Moster Farms, Inc., 481 N.E.2d 1106, 1109 (Ind. Ct. App. 1985) (easement holder not entitled to pave right-of-way granted in 1911 for wagons, horses, and foot-passers unless necessary to make it passable), *superseded on other grounds by statute*, IND. CODE § 8-4-35-4 (repealed 1995) (current version at IND. CODE § 32-5-12-6(a)(2) (2000)), *as recognized in* Consol. Rail Corp. v. Lewellen, 682 N.E.2d 779, 783 (Ind. 1997).

119. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.10 cmts. d, h ("The first step in determining whether the holder of an easement is entitled to make a particular use challenged by the owner of the servient estate is to determine whether the use falls within the purposes for which the servitude was created.").

120. *Id.* § 4.10 cmt. d.

121. United States v. Garfield County, 122 F. Supp. 2d 1201, 1258 (D. Utah 2000) (holding that Garfield County trespassed by exceeding the bounds of its R.S. 2477 right-of-way, noting that "[t]he entire debate concerning impact on Park lands, resources and values, including the 'visitor experience,' is inescapably context-driven, perception-driven, and deeply subjective").

The servient estate owner has a right to reasonably regulate uses of the easement by the dominant estate owner that are unreasonably burdensome, because such uses are not use-rights granted to the dominant owner by the easement in the first place.[122] An easement grants a dominant owner only non-possessory rights to enter and use land based on the purpose and scope of the easement according to its terms.[123] The rights to enter and use the land are, therefore, limited, and the servient owner retains residual possessory rights to protect the remainder of the land and even the land crossed by the easement itself.[124] Hence, the servient estate owner is obligated only "not to interfere with the uses authorized by the easement."[125] Other uses, in fact, constitute a trespass, which the servient owner may prevent.[126]

ii. Evidence of the Proprietary Approach in Tenth Circuit Decisions

The Tenth Circuit cases that have recognized land-management agencies' regulatory interests in R.S. 2477 rights-of-way have done so primarily by focusing on the federal agencies as servient estate owners. Though the Tenth Circuit does not say that state law should determine the scope of the Property Clause power or that state law always determines the regulatory authority of agencies, all of the cases in the Tenth Circuit in which courts have held that land-management agencies may regulate uses of R.S. 2477 rights-of-way fall within the scope of the traditional principles of the common law of servitudes just discussed.[127] Since the Tenth Circuit's opinions do not look to federal statutes or regulations to rationalize limiting the agencies' regulatory authority under state law, the court can be considered to have procedurally adopted the proprietary approach.

As discussed above, the Tenth Circuit looks to the property law of the state in which R.S. 2477 rights-of-way are found to establish whether they are perfected, their purpose, and the permissible scope of future improvements.[128] Regarding routes in southern Utah, the Tenth Circuit has held that the appropriate standard for determining what maintenance and improvements an R.S. 2477

122. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.10 cmts. d, g, h.

123. *Id.* § 1.2.

124. *See Garfield County*, 122 F. Supp. 2d at 1257.

125. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2 (emphasis added).

126. *See Garfield County*, 122 F. Supp. 2d at 1257.

127. *See, e.g.*, S. Utah Wilderness Alliance v. Bureau of Land Mgmt. (*SUWA II*), 425 F.3d 735, 748 (10th Cir. 2005).

128. *See supra* Part I.B.

holder may perform on the easement is the "reasonable and necessary" standard as applied under Utah state law.[129] Additionally, remedies for unreasonably burdensome modifications of the R.S. 2477 rights-of-way are governed under traditional state property law principles.[130] The District Court of Utah, for example, held that a county's widening and realigning of a roadway, making a cut into a hillside, on its R.S. 2477 right-of-way in a national park constituted an unreasonable burden on the servient estate and therefore a trespass for which they were liable according to state law.[131]

Given this focus on state law to determine perfection, scope, and liability relating to R.S. 2477 rights-of-way, it is an easy inference for the Tenth Circuit to characterize the federal government's regulatory power over the routes in the same state-law framework.[132] Thus far the Tenth Circuit has analyzed in state-law terms all challenges to federal regulations of R.S. 2477 rights-of-way. The only proposed federal regulation of R.S. 2477 rights-of-way the Tenth Circuit has ruled on are regulations requiring states and counties to apply for a permit before making uses of an R.S. 2477 right-of-way that involve surface disturbance or novel uses, or modi-

129. *See SUWA II*, 425 F.3d at 748; Sierra Club v. Lujan, 949 F.2d 362, 364–65 (10th Cir. 1991); *Garfield County*, 122 F. Supp. 2d at 1242; *see also* U.S. GEN. ACCOUNTING OFFICE, NO. B-300912, RECOGNITION OF R.S. 2477 RIGHTS-OF-WAY UNDER THE DEPARTMENT OF THE INTERIOR'S FLPMA DISCLAIMER RULES AND ITS MEMORANDUM OF UNDERSTANDING WITH THE STATE OF UTAH 15, 18–21 (2004) (providing a discussion of the federal government's position as a servient estate owner in relation to R.S. 2477 rights-of-way), *available at* http://www.gao.gov/decisions/other/300912.pdf.

130. *See Garfield County*, 122 F. Supp. 2d at 1242–43.

131. *See id.* ("R.S. § 2477 grants a *right-of-way*, a species of easement across the public lands of the United States. . . . Rights-of-way are a species of easements and are subject to the principles that govern the scope of easements. . . . The Utah Legislature recognized these principles [traditional principles of the common law of servitudes] when in 1993 it enacted the Rights-of-Way Across Federal Lands Act, which mandates that [t]he holder of an R.S. 2477 right-of-way and the owner of the servient estate *shall exercise their rights without unreasonably interfering with one another*. . . . Utah law thus does not depart from traditional principles governing easements in dealing with R.S. § 2477 rights-of-way; to the contrary, Utah law expressly reaffirms them.") (internal citations and quotation marks omitted).

132. *See, e.g.*, United States v. Jenks (*Jenks I*), 804 F. Supp. 232, 235 (D.N.M. 1992), *aff'd in part as modified, rev'd in part*, (*Jenks II*), 22 F.3d 1513 (10th Cir. 1994), *aff'd*, (*Jenks III*), 129 F.3d 1348 (10th Cir. 1997) (holding that whether an R.S. 2477 right-of-way has been established is a question of state law, and that easement rights are subject to regulation by the Forest Service as the owner of the servient estate); *Garfield County*, 122 F. Supp. 2d at 1240 (stating that an R.S. 2477 right-of-way is subject to reasonable federal regulations and discussing the United States's interest as a servient estate owner).

fications to the easement beyond mere maintenance.[133] Since similar regulations have been upheld in the Ninth Circuit under the broader legislative approach to the federal Property Clause power,[134] the Tenth Circuit's persistent reliance on the proprietary approach to uphold these regulations reveals its careful avoidance of invoking broader legislative Property Clause powers. Examination of the Tenth Circuit R.S. 2477 cases demonstrates this careful avoidance.

In *United States v. Jenks*, the Forest Service brought an action to compel a landowner to apply for a permit for an easement he claimed across Forest Service lands.[135] The Forest Service asserted that, pursuant to regulations issued by the Secretary of Agriculture under the Alaska National Interest Lands Conservation Act ("ANILCA"), it could require Jenks to apply for a permit that was designed to document "the occupancy and use authorized on National Forest System lands or facilities and identify[ ] the landowner's rights, privileges, responsibilities, and obligations."[136] Under the permitting process, landowners seeking access to inholdings were required to apply for a special-use permit and the Forest Service was obliged to "secure to the landowner the reasonable use and enjoyment of his property."[137] Jenks claimed, however, that the routes were R.S. 2477 rights-of-way and that he had patent or common law easement rights to them under the doctrines of grant by necessity or by implication.[138] Jenks claimed in addition that as a result of his R.S. 2477 and common law based right of access, he was not subject to the Secretary's ANILCA permitting process.[139]

Both the District Court of New Mexico and the Tenth Circuit Court of Appeals disagreed with Jenks and held that he was subject to the permit process, but the court of appeals reversed the district court's decision in part, revealing a significant nuance.[140] The district court had issued an injunction prohibiting Jenks from using the rights-of-way until his permit had been approved.[141] The dis-

133. *See SUWA II*, 425 F.3d at 746–47; *Jenks II*, 22 F.3d at 1519; Sierra Club v. Hodel (*Hodel II*), 848 F.2d 1068, 1088 (10th Cir. 1988), *overruled on other grounds by* Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992).

134. *See* Clouser v. Espy, 42 F.3d 1522, 1526, 1529–30 (9th Cir. 1994); United States v. Vogler, 859 F.2d 638, 642 (9th Cir. 1988).

135. *Jenks I*, 804 F. Supp. at 233.

136. *Jenks II*, 22 F.3d at 1517–18 (citing 36 C.F.R. § 251.110(d) (1992)).

137. *Id.* at 1518 (citing §§ 251.112(a), 251.110(c)).

138. *Id.* at 1517.

139. *Id.*

140. *Id.* at 1519; *Jenks I*, 804 F. Supp. at 235.

141. *Jenks I*, 804 F. Supp. at 236.

trict judge emphasized that the Forest Service had legislative authority above and beyond Jenks's common law easement rights, holding, "even if I am to agree with defendant that there are preexisting easements for each of the roads . . . plaintiff can still regulate these access rights pursuant to ANILCA and FLPMA."[142] The court of appeals, however, ignored the Forest Service's legislative authority and focused on its proprietary authority, holding, "these permit procedures are not inconsistent with Defendant's asserted patent or common law rights. . . . Under basic principles of property law, these rights would still be subject to regulation by the Forest Service as the owner of the servient estate."[143] The shift in reasoning between the district court and the court of appeals, both of which upheld the regulation, demonstrates the Tenth Circuit's careful avoidance of the legislative approach to the Property Clause power.

Further illustrating its proprietary focus, the Tenth Circuit in Jenks held that the district court's injunction was overbroad because it exceeded a servient owner's right to regulate. The court held that the district court should not have prohibited Jenks from using the access routes until his permit was approved because as a servient owner the Forest Service could require only that easement owners apply for a permit, not actually wait to receive one.[144] Rely-

142. *Id.*

143. *Jenks II*, 22 F.3d at 1518 (citing RESTATEMENT OF PROP. § 484 (1944) (servient owner may prevent uses of easement which are not reasonably required by normal development of dominant tenement owner)); *see also* Columbia Gas Transmission, Corp. v. Ltd. Corp., 951 F.2d 110, 113 (6th Cir. 1991) (dominant estate holds rights correlative to rights of servient owner); Brooks v. Tanner, 680 P.2d 343, 347 (N.M. 1984) (citing Posey v. Dove, 257 P.2d 541, 549 (N.M. 1953)) (burden on servient estate cannot be increased without consent of servient owner).

144. *Jenks II*, 22 F.3d at 1519; *see also* Sierra Club v. Hodel (*Hodel II*), 848 F.2d 1068, 1088 (10th Cir. 1988) ("Although the district court ordered the County to apply to BLM for a permit to move the road, we do not construe that order to mean that BLM may deny the permit, or impose conditions it might on ordinary right-of-way requests under FLPMA which would keep the County from improving the road."), *overruled on other grounds by* Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992). Following *Jenks II* and *Hodel II*, some commentators have espoused the theory that the federal government may not regulate rights vested through a direct grant of Congress. *See, e.g.*, Hjelle, *supra* note 20, at 305–08, 317–18. The court in *Jenks I* also approved the regulations in the permit itself under a similar legislative rationale, noting that the contested regulations "(1) impose a fee; (2) make use of the easements conditional; (3) allow the Forest service to terminate the easements; and (4) make the transfer of the easements discretionary . . . . [and] do not unlawfully infringe on defendant's property rights" because 43 U.S.C. § 1765(b) (FLPMA) grants "the Forest Service broad regulatory powers over rights-of-way through federal land" and such regulations are not limited in the Organic Act, FLPMA, or ANILCA. 804 F. Supp. at 237. The Court of

ing on the common law of servitudes, the court of appeals determined that giving a servient estate owner power to condition use of the easement on his discretionary approval of a permit would be unreasonably burdensome on the dominant estate owner's use and enjoyment.[145] However, requiring that a permit be filed to catalog uses being made of the easement would not be too onerous.[146] Allowing the Forest Service to regulate R.S. 2477 right-of-way users only by requiring that they apply for special use permits might seem to leave the Forest Service with little, if any, real regulatory power over easement holders. It actually leaves them in the same subservient position as any other servient owner in the state: they can enforce their rights in court.[147]

In *SUWA II*, the Tenth Circuit relied on the common law of servitudes to justify the BLM's regulatory control over all improvements to R.S. 2477 rights-of-way in the state of Utah.[148] The court in *SUWA II* upheld the requirement that counties must provide advance notice to the BLM of any improvements they plan to make to R.S. 2477 rights-of-way so that the BLM can make an "'initial determination' regarding the reasonableness and necessity of any proposed improvements beyond mere maintenance of the previous condition of the road."[149] The court justified this rule by drawing on the common law of servitudes: "Utah adheres to the general rule that the owners of the dominant and servient estates 'must exercise [their] rights so as not unreasonably to interfere with the other.'"[150] It referred to the purpose of the notice requirement being "so that both the County and the BLM may be satisfied that

Appeals, in a subsequent decision, rendered this determination moot. United States v. Jenks (*Jenks III*), 129 F.3d 1348, 1352 (10th Cir. 1997). It ruled that because the Forest Service had granted a thirty-year easement to the county, the permit process was no longer applicable. *Id.*

145. *Jenks II*, 22 F.3d at 1519.

146. *Id.*

147. The requirement construed in *Jenks II* that common law easement-owners apply for special-use permits really gives the Forest Service no regulatory authority in the permit process itself—so it is hard to argue that the permit process itself unreasonably burdens the dominant estate owner's use and enjoyment of the easement. It does, however, arguably put the Forest Service in a more analagous position to traditional servient estate owners because it helps them stay apprised of potentially burdensome activity on their lands.

148. S. Utah Wilderness Alliance v. Bureau of Land Mgmt. (*SUWA II*), 425 F.3d 735, 746–47 (10th Cir. 2005).

149. *Id.* at 746 (citing *Hodel II*, 848 F.2d at 1084–85).

150. *Id.* (citing *Hodel II*, 848 F.2d at 1083); United States v. Emery County, No. 92-C-1069S, ¶ 6 (D. Utah, consent decree entered Dec. 15, 1992)); *see also* United States v. Garfield County, 122 F. Supp. 2d 1201, 1246 (D. Utah 2000).

the proposed work on the R.S. 2477 highway is reasonable and necessary and that no unnecessary or undue degradation to the public lands would occur thereby."[151] Furthermore, the court explained that,

> The principle that the easement holder must exercise its rights so as not to interfere unreasonably with the rights of the owner of the servient estate, derives from general principles of the common law of easements rather than the peculiar status of National Parks.[152]

In its discussion of the BLM's authority to review counties' proposed plans of improvement to R.S. 2477 rights-of-way, the *SUWA II* court did not cite the Property Clause or any statute under which the BLM has such authority. It is clear that the court was relying entirely on the common law of servitudes for the source of the BLM's review authority.[153]

Surprisingly, the Tenth Circuit decision in *SUWA II* cited the Ninth Circuit's decision in *Vogler*, notwithstanding the crucial differences between the two courts' approaches.[154] The citation, however, is carefully postured to emphasize the Ninth Circuit holding rather than its rationale, exaggerating the precedential support for the decision. The *SUWA II* court picks its words with precision, saying it is "consistent with holdings of circuit courts that changes in roads on R.S. 2477 rights of way across federal lands are subject to regulation by the relevant federal land management agencies."[155] The Tenth Circuit's holding in *SUWA II* may uphold permitting processes and review requirements, but the proprietary rationale it used is fundamentally different from the Ninth Circuit's legislative rationale. Ultimately, the Tenth Circuit conflates two very different legal rationales by co-opting the Ninth Circuit's holding in a case with similar facts, thereby masking its own unconventional approach.

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151. 425 F.3d at 746.

152. *Id.* at 747 (citing United States v. Jenks (*Jenks II*), 22 F.3d 1513, 1518 (10th Cir. 1994) (holding that, under "basic principles of property law," easement rights are subject to regulation by the Forest Service as the owner of the servient estate)).

153. *Id.*

154. *See id.* at 746.

155. *Id.* at 746 (emphasis added) (citing Clouser v. Espy, 42 F.3d 1522, 1538 (9th Cir. 1994) (holding that "regardless whether the trails in question are public highways under R.S. § 2477, they are nonetheless subject to the Forest Service regulations"); United States v. Vogler, 859 F.2d 638, 642 (9th Cir. 1988) (holding that proposed improvements to an R.S. 2477 route in a National Preserve are subject to regulation by the National Park Service)).

The Tenth Circuit's affinity for the proprietary approach is also evident in its reasoning in *Hodel II* in support of the "unnecessary and undue degradation" standard by which the BLM regulates WSAs under FLPMA. In FLPMA, Congress required that WSAs be regulated according to a quite onerous non-impairment standard.[156] However, Congress carved out an exception to the non-impairment standard for some uses of WSA land that existed prior to its designation as a WSA—called "grandfathered uses"—which were instead to be regulated according to a less severe "unnecessary and undue degradation" standard.[157] In *Hodel II*, the Tenth Circuit read Congress's exemption of "grandfathered uses" as a reflection of "the common law of easements" in that Congress did not want to "eviscerate the County's dominant estate," as in the case of R.S. 2477 rights-of-way.[158] The Tenth Circuit read the "unnecessary and undue degradation" standard to fit into the proprietary approach as well, determining that it "proscribes [only those] uses of the dominant estate that unreasonably interfere with (*i.e.*, unnecessarily or unduly degrade) the servient estate."[159]

As demonstrated in these cases, therefore, the Tenth Circuit focuses on the state common law of servitudes as a source of author-

156. 43 U.S.C. § 1782(c) (2000) ("During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as *not to impair the suitability of such areas for preservation as wilderness*, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on [the date of approval of this Act] Oct. 21, 1976: *Provided*, That, in managing the public lands the Secretary shall by regulation or otherwise take any action required to *prevent unnecessary or undue degradation of the lands* and their resources or to afford environmental protection.") (first and third emphases added); *see also* Bureau of Land Management, No. H-8550-1, Interim Management Policy and Guidelines for Land under Wilderness Review 5 (1995) (examining Congressional intent of "nonimpairment").

157. The non-impairment standard applies to all uses of WSA lands except those subject to pre-FLPMA valid existing rights and pre-FLPMA mining or grazing operations, which are subject to the "unnecessary or undue degradation" standard. 43 U.S.C. § 1782(c); *see* Sierra Club v. Hodel (*Hodel II*), 848 F.2d 1068, 1085–96 (10th Cir. 1988); Utah v. Andrus, 486 F. Supp. 995, 1003–05 (D. Utah 1979); Reeves v. United States, 54 Fed. Cl. 652, 659, 665 (2002); *see also* 43 U.S.C. § 1701 (providing that "all actions by the Secretary concerned under this Act [FLPMA] shall be subject to valid existing rights"); Hayes, *supra* note 20, at 213–17, 235–39 (discussing BLM's management responsibilities during the interim period between identification of a WSA and Congressional designation and related legal controversies).

158. *Hodel II*, 848 F.2d at 1086–87.

159. *Id.*

ity under the Property Clause to determine the scope of federal land-management agencies' regulatory power over rights-of-way crossing federal lands. Though the Tenth Circuit has often upheld federal agencies' attempts to police R.S. 2477 rights-of-way by requiring counties to apply for permits for certain uses, the Tenth Circuit's proprietary approach conforms to the desire of many western state governments and local governments to rein in the federal government's control over both federal and non-federal land management. The Ninth Circuit's top-down focus on the Property Clause and federal land-management enabling acts, on the other hand, illustrates a fundamentally different approach to federal regulatory power over federal lands.

C. The Ninth Circuit's Legislative Approach and Its Extraterritorial Extension

i. The Legislative Approach

The Ninth Circuit has approached the question of federal authority to regulate R.S. 2477 claims from what I label a legislative perspective. Rather than using state law to determine the scope of federal regulatory authority, the Ninth Circuit has used federal law—focusing on enabling statutes by which Congress delegates its broad property power.

Pursuant to the Property Clause, Congress has legislative authority over federal lands that allows it to preempt the application of state law on federal lands.[160] The scope, therefore, of the Property Clause power, under the legislative approach, is in no way constrained by state law. In *Kleppe v. New Mexico*, for instance, the Supreme Court recognized,

> [T]he "complete power" that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there. . . . Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause. . . . "A different rule would place the public domain of

160. Kleppe v. New Mexico, 426 U.S. 529, 540 (1976); United States v. City and County of San Francisco, 310 U.S. 16, 29–30 (1940) (holding that despite state power-distribution policies, the federal government could require that its own policies be adhered to since the land on which the power was generated originated in a federal land-grant conditioned on the federal distribution policy).

> the United States completely at the mercy of state legislation". . . . The Federal Government does not assert exclusive jurisdiction over the public lands in New Mexico . . . . But where . . . state laws conflict with . . . legislation passed pursuant to the Property Clause, the law is clear: The state laws must recede.[161]

The Supreme Court has also held that the Property Clause authorizes Congress to legislate extraterritorially in relation to state- and privately-owned lands surrounding federal lands, at least in some circumstances.[162] The Court has suggested that in legislating extraterritorially, Congress exercises a power similar to the police power of the states, limited only by the "exigencies of the particular case."[163] A further discussion of the extraterritorial reach of the Property Clause power helps explain how R.S. 2477 rights-of-way might be regulated under the legislative approach. The cases also illustrate what the legislative approach looks like procedurally.

Camfield set the stage for extraterritorial application of the Property Clause power by upholding a federal prohibition on fences enclosing federal property even though the fences at issue were located just off federal property.[164] Justifying the fact that enforcement of the federal law "may involve an entry upon the lands of a private individual," the Court characterized the fencing scheme as "clearly a nuisance."[165] The Court did not, however, look to state nuisance law to determine that the fencing scheme burdened the federal government's rights of use and enjoyment. Instead it recognized that the federal government had authority under the Property Clause to establish for itself what types of activity impinging on federal lands constituted a nuisance by stating that "[t]he general government doubtless has a power over its own property analogous to the police power of the several states, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case."[166]

By referring to a federal statute to justify extraterritorial regulation in *Camfield*, the Court opened the way for broader federal con-

161. *Kleppe*, 426 U.S. at 540–41, 543; *see also* Hunt v. United States, 278 U.S. 96, 100 (1928) (holding that the Secretary of Agriculture's authority to order killing of deer on federal property superseded Arizona game law under the Property Clause).

162. *See* Camfield v. United States, 167 U.S. 518, 525–26 (1897).

163. *See id.*

164. *Id.*

165. *Id.* at 525.

166. *Id.*

trol over state and private property near federal lands and public activity off federal lands that impacts federal lands. Several cases following *Camfield* demonstrate the extraterritorial expansion of the Property Clause power.[167]

However, after *Camfield*, it remains unclear to what extent the "exigencies of the particular case" may extend in extraterritorial application of the Property Clause.[168] Current circuit-court precedent supports only a rational-basis or nexus-type test (similar to substantive due process), though there is a hint in the Eighth Circuit that a "substantial impact" test may develop,[169] and some scholars have called for other limitations.[170] In *United States v. Alford*, the Supreme Court upheld a federal prohibition on building fires "near" any national forest under the Property Clause.[171] In *Kleppe*, the Court specifically affirmed the extraterritorial reach of the Property Clause in *Camfield*, though the issue in *Kleppe* was not extraterritorial.[172] However, neither case provided an indication of the extent to which the Property Clause might be applied extraterritorially.

Two Eighth Circuit cases involved extraterritorial application of the Property Clause power when the regulated activity "signifi-

167. *See, e.g.*, Minnesota v. Block, 660 F.2d 1240 (8th Cir. 1981) (upholding a ban on motorized vehicle use that applied to 120,000 acres outside the Boundary Waters Wilderness Canoe area); United States v. Lindsey, 595 F.2d 5, 6 (9th Cir. 1979) (noting that state title to land did not deprive United States of regulatory control over defendants who violated federal law requiring permits for fires); United States v. Brown, 552 F.2d 817, 821, 823 (8th Cir. 1977) (upholding NPS regulations prohibiting hunting on a state lake entirely surrounded by the Voyageurs National Park); United States v. Moore, 640 F. Supp. 164, 166 (S.D. W. Va. 1986) (stating that the Secretary of Interior had authority pursuant to the Property Clause to regulate the state's spraying of pesticide in the New River Gorge National River despite the fact that only 6,000 acres of the 63,000-acre area were federally owned.).

168. *Camfield*, 167 U.S. at 525–26.

169. *See infra* notes 176–77. R

170. *See* Bader, *supra* note 104, at 203–05 (arguing for application of a significant interference test as well as a federal purpose test); Bader, *supra* note 40, at 508 ("Cases involving exercises of federal regulatory power over conduct on state and private lands should be upheld only when the conduct sought to be restricted would significantly frustrate federal purposes on federal lands."); Frank & Eckhard, *supra* note 104, at 665, 677–78 (arguing that the "significantly interfere" language from *Brown* should "be adopted in delineating the proper extent of the extraterritorial effect of the property power: Congress may only regulate those activities on nonfederal lands that significantly interfere with the purposes for which the adjacent federal land is managed").

171. 274 U.S. 264, 266–67 (1927).

172. Kleppe v. New Mexico, 426 U.S. 529, 546 (1976) (recognizing that "it is clear the regulations under the Property Clause may have some effect on private lands not otherwise under federal control").

cantly" affected the purpose for which the federal land was reserved.[173] In *United States v. Brown*, the court upheld NPS regulations prohibiting hunting on a state lake entirely surrounded by the Voyageurs National Park because hunting would significantly interfere with the purposes for which the park was established.[174] In *Minnesota v. Block*, the court upheld a ban on motorized vehicle use that applied to 120,000 acres outside the Boundary Waters Wilderness Canoe Area because motorized vehicle use could significantly interfere with the wilderness values of the area.[175] It is important to note that neither case expressly held that the purpose for which federal land is reserved must be "significantly" impaired to justify extraterritorial reach of the Property Clause power, but in both cases the court noted that the regulation in question did, in fact, avoid a "significant" interference.[176] The actual holding in each case was vaguely grounded on a rational-basis-type test that considered whether the regulation was designed to protect the federal land or the purposes and uses for which the land was reserved.[177]

173. Minnesota v. Block, 660 F.2d 1240, 1249 (8th Cir. 1981); United States v. Brown, 552 F.2d 817, 822 (8th Cir. 1977).

174. 552 F.2d at 822–23.

175. 660 F.2d at 1249.

176. In *Brown*, the court specifically noted that the case provided an opportunity to answer the question left open in *Kleppe* of "whether the Property Clause empowers the United States to enact regulatory legislation protecting federal lands from interference occurring on non-federal public lands." 522 F.2d at 822. The court in *Brown* held that "when regulation is for the protection of federal property, 'the Property Clause is broad enough to reach beyond territorial limits.'" *Id.* (quoting *Kleppe*, 426 U.S. at 538). Likewise, in *Block*, the court recognized that *Kleppe* left open the question of the extent of Congress's Property Clause power "as applied to activity occurring off federal land," but the court in *Block* held that "[u]nder this authority to protect public land, Congress' power must extend to regulation of conduct on or off the public land that would threaten the designated purpose of federal lands." 660 F.2d at 1249.

177. *Block*, 660 F.2d at 1249–50 ("Under [the Property Clause] authority to protect public land, Congress' power must extend to regulation of conduct on or off the public land that would threaten the designated purpose of federal lands. Congress clearly has the power to dedicate federal land for particular purposes. As a necessary incident of that power, Congress must have the ability to insure that these lands be protected against interference with their intended purposes. . . . [I]f Congress enacted the motorized use restrictions to protect the fundamental purpose for which the BWCAW had been reserved, and if the restrictions in section 4 reasonably relate to that end, we must conclude that Congress acted within its constitutional prerogative."); *Brown*, 552 F.2d at 822–23 ("[T]he district court determined that hunting on the waters in the park could significantly interfere with the use of the park and the purpose for which it was established. . . . The regulations prohibiting hunting and possession of a loaded firearm were promulgated

These cases signify a broadening of the extraterritorial-reach rationale from *Camfield* and *Alford*, which focused on protecting the land itself, to one more focused on preserving the uses and purpose of the federal lands as reflected in acts and mandates to land-management agencies.[178] The legislative approach, therefore, to determining a land-management agency's power to regulate R.S. 2477 rights-of-way is not constrained by the common law of servitudes or state law.[179] It offers land managers power to protect federal land and preserve its purposes and uses that is limited only by federal legislation respecting the land or the agency. State law may still be relevant, but only if state law is incorporated through federal law should it have any bearing on agency authority. Therefore, procedurally, courts applying the legislative approach should consider the broad Property Clause power, examine its delegation to federal agencies through federal statute, consider whether federal legislation in any way limits the regulatory power of the agencies, and defer to state-law standards only when they find such deference consistent with Congress's intent.

ii. Evidence of the Legislative Approach in Ninth Circuit Decisions

All of the Ninth Circuit's decisions concerning R.S. 2477 rights-of-way have used the legislative approach.[180] The progenitor of the

pursuant to [the Property Clause power] and are valid prescriptions designed to promote the purposes of the federal lands within the national park.") (internal quotation marks and citations omitted).

178. *See Block*, 660 F.2d at 1251 (noting that "motorized vehicles significantly interfere with the use of the wilderness by canoeists, hikers, and skiers and that restricted motorized use would enhance and preserve the wilderness values of the area" and, therefore, protect the purposes for which it was reserved); *Brown*, 522 F.2d at 822 (noting the necessity of the regulations because "hunting on the waters in the park could significantly interfere with the use of the park and the purposes for which it was established") (internal quotation marks omitted); *see also* Frank & Eckhard, *supra* note 104, at 675–76 ("The rationale of *Camfield* and *Alford* referred to the protection of the lands themselves; the later cases articulated a more meaningful and broader justification—protection of the uses or purposes for which the federal property adjacent to the lands in issue was reserved or established. . . . Congress and its subsidiary administrative agencies could regulate in order to protect federal property and to preserve the uses and purposes of the federal land adjacent to the private lands in issue.").

179. *See supra* Part II.A.

180. *See, e.g.*, Clouser v. Espy, 42 F.3d 1522, 1526, 1529–30 (9th Cir. 1994) (upholding Forest Service decision restricting plaintiffs to "using pack animals or other non-motorized means" to access private mining claims in National Forests and Wilderness Areas despite the adverse impact on the commercial viability of those claims); United States v. Vogler, 859 F.2d 638, 642 (9th Cir. 1988) (holding that whether the state of Alaska had a valid R.S. 2477 right-of-way or not, the NPS

Ninth Circuit R.S. 2477 cases is a 1986 District of Colorado case, *Wilkenson v. DOI*, in which the court examined a restriction on commercial vehicles and imposition of a vehicle fee on an R.S. 2477 right-of-way through the Colorado National Monument.[181] Tracing the pedigree of the restrictions on the R.S. 2477 right-of-way through regulations, enabling statutes, and the Property Clause, the court held that the NPS can regulate an R.S. 2477 right-of-way within a national park according to its statutory mandate to protect the park, but that the NPS lacked authority *under its own rules* to ban commercial access outright or to charge a fee to the general public for access along an established R.S. 2477 right-of-way.[182]

Even though the *Wilkenson* court struck down the regulation,[183] *Wilkenson* marked the beginning of the legislative approach in the R.S. 2477 context. The court did not consider the regulation's relationship to the public's state-law-based rights to use the route, as the Tenth Circuit would under its proprietary approach.[184] Instead, it considered only the scope of the NPS's regulatory power under its own regulations and the relationship of those regulations to the NPS mandate in the National Park Organic Act.[185] This is the pattern subsequent cases in the Ninth Circuit have followed.

In *United States v. Vogler*, the Ninth Circuit held that whether the state of Alaska had a valid R.S. 2477 or not, the NPS had authority to restrict use of a right-of-way into the Yukon-Charley Rivers National Preserve under the Property Clause because under ANILCA the regulation was "necessary to conserve the natural beauty of the Preserve."[186] Vogler had appealed after a district judge permanently enjoined him from driving off-road vehicles to his mining claims within the Preserve.[187] He claimed the government had no power to regulate his use of the Bielenberg park trail because it was an established right-of-way under R.S. 2477.[188] However, in upholding the regulation requiring Vogler to acquire a permit, the court

had authority to restrict use of a right-of-way into the Yukon-Charley Rivers National Preserve under the Property Clause because the regulation was "necessary to conserve the natural beauty of the Preserve").

181. Wilkenson v. Dep't of Interior, 634 F. Supp. 1265, 1272, 1279 (D. Colo. 1986).

182. *Id.*

183. *Id.* at 1280.

184. *Id.*

185. *See id.* at 1278–80.

186. 859 F.2d 638, 642 (9th Cir. 1988).

187. *Id.* at 639–40.

188. *Id.*

traced the NPS's regulatory authority back to the Property Clause.[189] Pursuant to the Property Clause, the Preserve was made part of the National Park System by act of Congress.[190] ANILCA gave the Secretary of Interior regulatory authority over the National Park System to uphold its mandate.[191] The Secretary's regulations were reasonable under ANILCA's mandate since they were designed to "conserve the scenery and the natural and historic objects and the wildlife therein and to . . . leave them unimpaired for the enjoyment of future generations."[192] Therefore, the NPS has authority to reasonably regulate use of rights-of-way crossing the Preserve.[193]

Though the court determined that ANILCA allows regulation of the right-of-way, it did not determine "what precise use, if any, Vogler might properly make of the Bielenberg trail" nor to what extent the Secretary might regulate his use.[194] It held simply that the requirement that Vogler get a permit for his use of his off-road vehicles on the trail was within the Park Service's authority based on ANILCA.[195] Insofar as *Vogler* involves a requirement that Vogler get a permit to make use of the R.S. 2477 right-of-way, the decision bears a resemblance to Tenth Circuit cases decided under the proprietary approach.[196] However, the approach to finding the permit requirement valid is fundamentally different because it traces the NPS's authority through federal legislation back to the Property Clause's broad grant and does not rely on any reference to state common law.[197]

189. *Id.* at 641.

190. *Id.*

191. *Id.*

192. *Id.* (quoting 16 U.S.C. § 1 (2000)).

193. *Id.* at 642; *see also* United States v. Hicks, 1994 U.S. App. LEXIS 26372, at *3 (9th Cir. May 19, 1994) (holding that the NPS can impose reasonable regulations on the use of an R.S. 2477 road). Hicks was fined for not having a permit to drive on the road to access mining claims. *Id.* The court did not reach the R.S. 2477 claim, because it was not raised in the district court, but provided the following discussion in a note: "Even if title to the road were with the State of Alaska, an issue we do not reach, the NPS could still impose reasonable regulations on the use of the road." *Id.* at *3 n.2.

194. *Vogler*, 859 F.2d at 642 n.5.

195. *Id.* at 642.

196. *Compare id.*, *with* S. Utah Wilderness Alliance v. Bureau of Land Mgmt. (*SUWA II*), 425 F.3d 735, 746–47 (10th Cir. 2005), United States v. Jenks (*Jenks II*), 22 F.3d 1513, 1519 (10th Cir. 1994), *aff'd*, (*Jenks III*), 129 F.3d 1348 (10th Cir. 1997), *and* Sierra Club v. Hodel (*Hodel II*), 848 F.2d 1068, 1088 (10th Cir. 1988), *overruled on other grounds by* Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992).

197. *See Vogler*, 859 F.2d at 642.

Still, one could argue that since all the *Vogler* court upheld was a regulation creating a permitting process—which Tenth Circuit decisions have upheld under the common law of servitudes—it did not allow an unreasonable burden to the dominant owner's use and enjoyment of the easement and did not, therefore, necessarily rely on any authority beyond that of a traditional proprietor. *Vogler* even specified that the Forest Service's regulations "do not deprive Vogler of 'adequate and feasible' access to his claims," which could be construed as simply incorporating the common law of servitudes.[198] This argument, however, is weakened by comparing *Vogler* with the Tenth Circuit's decision in *Jenks II*. In *Vogler*, the court upheld an injunction barring Vogler from any use of the right-of-way until his permit were approved.[199] In *Jenks II*, the court partially reversed and remanded a district court's similar injunction because it determined that the Forest Service's regulatory authority extended only to making users *apply* for a permit, not to making them receive approval.[200] Therefore, the regulation upheld in *Vogler* was more burdensome than any upheld in the Tenth Circuit because it actually stopped use until a permit were approved.

Other Ninth Circuit cases following *Vogler*'s legislative approach make it even clearer that the limits of state common law do not constrain the scope of federal regulation of R.S. 2477 rights-of-way. In *Clouser v. Espy*, for example, the court held that the Forest Service has the authority to regulate the use of R.S. 2477 roads where regulation is necessary to carry out the Department of Agriculture's statutory duty to protect National Forests against environmental depredations.[201] Under that statutory mandate, the Forest Service could properly prohibit motorized access to a mining claim and limit such access to non-motorized means such as pack animals.[202] Plaintiffs argued that the court should consider their R.S. 2477 right-of-way claim because it "might otherwise afford them a legal basis for circumventing the Service's ban on motorized access."[203] But the court held:

> We reject this claim [that they could escape the ban if there were a valid R.S. 2477 right-of-way] on the ground . . . that

198. *Id.* at 641 (quoting 16 U.S.C. § 3170(b) (2000)).

199. *Id.* at 641 n.2.

200. *Jenks II*, 22 F.3d at 1519. The authority of federal land management agencies to require R.S. 2477 right-of-way owners to *apply* for a permit has also been upheld by the Tenth Circuit. *See SUWA II*, 425 F.3d at 746–47; *Hodel II*, 848 F.2d at 1088.

201. 42 F.3d 1522, 1538 (9th Cir. 1994).

202. *Id.*

203. *Id.* at 1538.

> regardless whether the trails in question are public highways under R.S. § 2477, they are nonetheless subject to the Forest Service regulation. . . . As 16 U.S.C. § 551 confers on the Department of Agriculture similar authority to regulate national forest areas, Vogler indicates that encompassed within that grant is the authority to regulate use of R.S. § 2477 roads where such is necessary to carry out Agriculture's statutory duty to protect national forests against "depredations."[204]

In its discussion of the Forest Service's ability to regulate an R.S. 2477 right-of-way, the court made no mention of the common law of servitudes or even the "reasonable regulation" requirement derived from *Vogler*, demonstrating that it is not a requirement based on the Property Clause but a standard under ANILCA involving regulation of access to an inholding.[205] The only standard articulated in *Clouser* is that the regulation be "necessary to carry out Agriculture's statutory duty."[206] Furthermore, a prohibition on motorized means of access across an R.S. 2477 right-of-way is clearly more burdensome than the requirements to apply for a permit upheld in *Jenks II* and *SUWA II* in the Tenth Circuit. Lack of any reference to the common law of servitudes accompanied by a regulation that severely limits traditional use and enjoyment of the easement suggest that the *Clouser* court paid no attention to the dictates of state law in determining the Forest Service's regulatory authority over the state's right-of-way.

In *Hale v. Norton*, the Ninth Circuit upheld a regulation even though the R.S. 2477 claim had not been decided.[207] The Hales owned land entirely encircled by the Wrangell-St. Elias National Park and Preserve in Alaska.[208] Historically a thirteen-mile road allowed access to the property, but it had been declared abandoned in 1938 as all the road's bridges had washed away and erosion and vegetation had reduced it to a trail.[209] In 2003, after the Hales used a bulldozer to bring supplies to the home on the property, the NPS posted notice that no motorized vehicles were allowed on the road with exception of snow machines.[210] After the park superintendent informed the Hales that they needed a right-of-way permit and they

204. *Id.*

205. *Id.*; *see also* Adams v. United States (*Adams I*), 3 F.3d 1254, 1259 (9th Cir. 1993) *aff'd*, (*Adams II*), 255 F.3d. 787, 794 (9th Cir. 2001).

206. *Clouser*, 42 F.3d at 1538.

207. 476 F.3d 694, 699 (9th Cir. 2007).

208. *Id.* at 696.

209. *Id.*

210. *Id.*

discovered their application for an "emergency" temporary permit would be subject to an Environmental Assessment, they filed suit claiming the NPS was violating their R.S. 2477 right-of-way by requiring they get a permit.[211] Following *Vogler*, the Ninth Circuit held that even if the Hales had a valid right-of-way over the MGB road, which they did not decide, "The Hales' ability to use the MGB road within the Park is subject to reasonable regulation."[212] The "regulation" being upheld as "reasonable" was the requirement that the Hales get a right-of-way permit in order to use the road with any vehicles other than a snow machine.[213] *Hale* is significant, not only as a recent example of the legislative approach from *Vogler* but also because it upheld a severe regulation on an R.S. 2477 right-of-way that could not be justified under the common law of servitudes.[214]

As demonstrated in these cases, the Ninth Circuit uses a legislative approach to analyze the regulatory authority of federal land-management agencies by focusing on federal statutes as the sole check of federal land-management agencies' regulatory power over rights-of-way crossing federal lands. Though the permit-requiring regulations the Ninth Circuit has upheld seem to differ sometimes only in degree from the Tenth Circuit's holdings, the two circuits' underlying rationales for allowing reasonable regulation of valid R.S. 2477 rights-of-way are fundamentally different.

III.
FOR THE LEGISLATIVE APPROACH

Having now juxtaposed the proprietary and legislative approaches to the Property Clause and considered their incarnations in the Ninth and Tenth Circuits' R.S. 2477 cases, I will argue in this Part that future courts should adopt the legislative approach. Each approach is controversial not only because of its ramifications on the debate over federal land management but also because of its implications in the larger battle over federalism.

211. *Id.* at 696–97.

212. *Id.* at 699.

213. *See id.* at 700.

214. *See, e.g.*, United States v. Jenks (*Jenks II*), 22 F.3d 1513, 1519 (10th Cir. 1994) (holding that under the common law of servitudes, a regulator lacks discretion to deny a permit application), *aff'd*, (*Jenks III*), 129 F.3d 1348 (10th Cir. 1997); Sierra Club v. Hodel (*Hodel II*), 848 F.2d 1068, 1088 (10th Cir. 1988) (same), *overruled on other grounds by* Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992).

Doctrinally, the legislative approach is supported by a long history of Supreme Court precedent.[215] On policy grounds, even though it threatens extension of theoretically limitless power over state lands, it is preferable for several reasons. The legislative approach prevents states from using subversive tactics, including altering state law affecting federal lands to undercut federal land management. It also allows federal agencies to develop a uniform regulatory approach to R.S. 2477 rights-of-way despite significant differences among the laws of the states. Under the proprietary approach, the federal authority would vary depending on the state, and strategic modification of state law could radically affect federally mandated conservation initiatives. At the end of the day, the legislative approach still affords states and counties means to enforce the boundaries on agency power that Congress intended. This Part treats first some of the concerns the legislative approach raises. Then it discusses the doctrinal arguments in favor of the legislative approach, applying them particularly to the R.S. 2477 context. Finally, it presents the two policy arguments that favor the legislative approach and deals with a potential counterargument based on savings clauses in FLPMA and other statutes.

A. Concerns with the Legislative Approach

The chief concern the legislative approach raises is that it apparently lacks inherent limits—especially considering the extraterritorial reach of the Property Clause demonstrated in *Brown* and *Block*.[216] Several cases use the terms "reasonable government regulation" when referring to agency authority to regulate rights-of-way, but that language is derived from specific statutes, not from the Property Clause itself.[217] In cases not governed by a specific statu-

215. *See infra* Part III.B.

216. *See supra* Part II.A.

217. *Vogler* limited regulation of the right-of-way to allow "adequate and feasible access"—which subsequent cases have called "reasonable government regulation." *See Hale*, 476 F.3d at 699. Some might argue based on this language that there is a reasonableness or even a balancing-of-interests requirement applicable to all regulation of R.S. 2477 rights-of-way under the Property Clause. However, the Property Clause itself includes no requirement that regulations be "reasonable." *See* U.S. CONST. art. IV, § 3, cl. 2. In *Vogler* the notion that regulations of R.S. 2477 rights-of-way may not deprive users of "adequate and feasible" access comes directly from ANILCA. 16 U.S.C. § 3170(b) (2000) ("Notwithstanding any other provisions of this Act or other law, in any case in which State owned or privately owned land, . . . is within or is effectively surrounded by one or more conservation system units, . . . the State or private owner or occupier shall be given by the Secretary such rights as may be necessary to assure adequate and feasible access for economic and other purposes to the concerned land by such State or private

tory standard, and in the case of Congress itself, the ability to legislate or regulate under the Property Clause requires only demonstration of "a nexus between the regulated conduct and the federal land, establishing that the regulations are necessary to protect federal property."[218] The determination that a federal regulation is "needful" and "respecting" the public lands is "primarily entrusted to the judgment of Congress, and courts exercising judicial review have supported an expansive reading."[219] The expansive reading demonstrated in *Brown* and *Block* goes beyond protecting the land itself to protecting the *purposes* and *uses* of the land, which opens a panoply of potential nexuses for federal regulation. Though some scholars have suggested a variety of limitations they think should be put on the Property Clause power to prevent the federal government from abusing its open-ended grant, the nexus requirement is the only one based on any judicial precedent.[220]

Not only is there no doctrinal test to lay out the contours of what is "needful" and "respecting" public lands, under the legislative approach, there is no threshold for the degree of regulation Congress may impose on uses that have a "nexus" with federal lands.[221] It is unclear whether the nexus requirement, which the Eighth Circuit imposed on extraterritorial application of the Property Clause, is any more onerous than substantive due process.[222] The Supreme Court's interpretation of the Property Clause, in fact, mirrors the trajectory of substantive due process doctrine over the past century.[223] So, the only limits imposed upon federal agencies

owner or occupier and their successors in interest. Such rights shall be subject to reasonable regulations issued by the Secretary to protect the natural and other values of such lands."). Likewise, only ANILCA requires that when agencies regulate easements that grant access across federal lands to inholdings, their regulations conform to a reasonableness standard. *Id.*; *see also Hale*, 476 F.3d at 699–700.

218. Minnesota v. Block, 660 F.2d 1240, 1249 n.18 (8th Cir. 1981) (citation omitted).

219. United States v. Brown, 552 F.2d 817, 822 (8th Cir. 1977).

220. *See supra* note 170. The proposed "substantial impact" test would require activities regulated off federal lands to "significantly interfere with the use of the park and the purpose for which it was established," but that language, which is the basis for the proposed standard, comes from *United States v. Brown*, not as the holding but as a finding in a report of land-management personnel entered into evidence in the case as a support for the regulation. 552 F.2d at 822.

221. *See Block*, 660 F.2d at 1249 n.18.

222. *See id.*

223. *See e.g.*, Kleppe v. New Mexico, 426 U.S. 529, 544 (1976) (clarifying that Congress did not lack the power to take complete control over the roads had it wished to); Colorado v. Toll, 268 U.S. 228, 230–31 (1925) (holding that Congress had not given exclusive control over the roads in the Rocky Mountain National Park to the NPS).

regulating under the legislative approach are those limitations Congress provides itself in federal law and the vague limits of substantive due process.

Therefore, the legislative approach, which is broad enough to allow extraterritorial application of the Property Clause power, ends up subjecting state lands to federal-agency control, just as borrowing state law to define the terms of R.S. 2477 rights-of-way, which allows modification of routes onto previously untouched federal lands, subjects federal lands to state control. Indeed, if the legislative approach to the Property Clause did not give the federal government superseding control over state property rights, it would not be an effective source of authority for regulation of R.S. 2477 rights-of-way, since the rights-of-way are themselves state property rights. This capacity of federal land managers to extend their regulatory tentacles onto state and private lands raises the hackles of many western states and counties that feel unfairly burdened with high percentages of federal lands in their states—resulting in correspondingly high federal-agency meddling in their affairs. The fact that current case law provides no rule limiting the Property Clause's extraterritorial reach is troubling.

B. Doctrinal Arguments for the Legislative Approach

Despite the concerns it raises about excessive federal government control in state matters, the legislative approach is still the correct approach for federal courts to take because it reflects the approach taken by the Supreme Court and does not stymie federal land managers in the accomplishment of their conservation-oriented mandates. As mentioned above, the Supreme Court clarified in *Kleppe* that the federal government has broad Property Clause power to supersede state law regarding federal land or anything thereon.[224] The controversy in *Kleppe* was similar to those that might arise in the R.S. 2477 context: appellees asserted that since the state had not completely ceded its jurisdiction over the land to the federal government, the federal government did not have exclusive jurisdiction to regulate horses and burros on the land, and their regulation should therefore be subject to state law.[225] Similarly, one might argue that since the state has not ceded the R.S. 2477 rights-of-way to the federal government, it lacks exclusive jurisdiction to regulate the rights-of-way beyond what state law allows. The Court in *Kleppe*, however, made clear that the state's retention

224. *Supra* notes 101–02 and accompanying text.

225. *Kleppe*, 426 U.S. at 543.

of some jurisdiction over the land "is completely beside the point."[226] When state laws conflict with "legislation passed pursuant to the Property Clause, the law is clear: The state laws must recede."[227] As demonstrated above, the reasoning in *Kleppe*, when combined with the extraterritorial application of the Property Clause in *Camfield*, allows Congress to pass laws governing state and private lands that are equally supreme.[228] Furthermore, federal agency action respecting federal lands has the same force and supremacy over state law.[229]

Even more to the point, the Supreme Court held in *Colorado v. Toll* that the creation of the Rocky Mountain National Park by Congress did *not* give exclusive control to the NPS over the state-owned R.S. 2477 rights-of-way crossing the park such that the superintendent could restrict commercial vehicle access to only one permitted vendor.[230] This holding, however, was based not on any limitation inherent in the Property Clause, but on the fact that Congress had expressly limited the NPS's authority over rights-of-way in the park's enabling act.[231] Later, in *Kleppe*, the Court revisited *Toll* to clarify that "Congress had not purported to assume jurisdiction over highways within the Rocky Mountain National Park, not that it lacked the power to do so under the Property Clause."[232] In revisiting *Toll*, the *Kleppe* Court did not mention any standard—including state law—limiting Congress's power under the Property Clause to regulate rights-of-way crossing federal lands.[233] In the case of *Toll*, Congress simply had chosen to not delegate that regulatory authority to the NPS. Whatever threshold the Property Clause language—"needful" and "respecting" federal lands—creates, therefore, would have been met in *Toll* by the fact that the rights-of-way crossed fed-

226. *Id.*

227. *Id.*

228. *See* Camfield v. United States, 167 U.S. 518, 525–26 (1897); Minnesota v. Block, 660 F.2d 1240, 1249 (8th Cir. 1981); United States v. Brown, 552 F.2d 817, 822 (8th Cir. 1977); *see also* United States v. Lindsey, 595 F.2d 5, 6 (9th Cir. 1979) (noting that state title to land did not deprive United State of regulatory control over defendants who violated federal law requiring permits for fires); United States v. Moore, 640 F. Supp. 164, 166 (S.D. W. Va. 1986).

229. *See* Hunt v. United States, 278 U.S. 96, 100 (1928) (holding that the Secretary of Agriculture had authority derived from the United States' power to protect its lands and property to direct that large numbers of deer be killed on federal lands despite state-law prohibitions).

230. 268 U.S. 228, 230–31 (1925).

231. *See id.* at 230.

232. Kleppe v. New Mexico, 426 U.S. 529, 544 (1976).

233. *Id.*

eral lands.[234] So according to *Kleppe*, Congress does have the power, under a legislative approach to the Property Clause, to "assume jurisdiction" over a state's rights-of-way crossing federal lands.[235]

There is no question, then, that the Supreme Court endorses the legislative approach and recognizes that it is powerful enough to accomplish federal regulation of both federal and state lands despite conflicts with state law. The question is if a court might use either the proprietary or legislative approach to uphold a federal regulation, why choose the broader legislative over the narrower proprietary in cases where the outcome would be the same? Past Supreme Court decisions suggest that when under the proprietary approach state legislation may hinder the federal government's ability to protect its lands, courts should use the legislative approach to preemptively authorize the federal action. This rule is encapsulated in an often-quoted passage from *Camfield*: "A different rule would place the public domain of the United States completely at the mercy of state legislation."[236]

The facts in *Camfield*, *Hunt v. United States*,[237] and *Utah Power & Light Co. v. United States*[238] bear out this rule. The Court in *Camfield* characterized the fencing scheme as "clearly a nuisance" and recognized that the federal government has the rights of any proprietor of land in a state to prevent nuisance.[239] However, the Court did not look to state nuisance law for approval of Congress's action. Instead it recognized that the federal government had authority under the Property Clause similar to the police power of the states to establish for itself what types of activity impinging on federal lands constituted a nuisance.[240] A rule that cabined the federal government's power over its lands within the boundaries of state nuisance law would put federal land management at the "mercy of state legislation."[241]

In *Hunt*, the Governor of Arizona contended that the Secretary of Agriculture had violated Arizona game law by ordering the killing of deer within federal reserves.[242] The briefs of counsel made

234. U.S. CONST. art. IV, § 3, cl. 2.
235. *See Kleppe*, 426 U.S. at 544.
236. 167 U.S. 518, 525–26 (1897).
237. 278 U.S. 96, 99–100 (1928).
238. 243 U.S. 389, 403 (1917).
239. *Id.* at 524–25.
240. *Id.* at 525.
241. *See id.* at 525–26.
242. *Hunt*, 278 U.S. at 99–100.

clear that the Secretary's action was defensible under the state game law because "a private proprietor may kill wild game when necessary to protect his property, and . . . state game laws, if construed to prevent it, would be invalid."[243] The Court even found "[t]hat [the action] was necessary to protect the lands of the United States within the reserves from serious injury."[244] But the Court avoided reliance on state law and instead held that the Secretary had authority conferred on him by Congress, and Congress's power to protect the lands and property of the United States "does not admit of doubt."[245] Again, though the Court did not spell out this consideration, subjecting the Secretary's authority to regulate game on federal land to the state game law, though it might allow his action in this instance, would put his future action at the mercy of the state legislature.

Finally, in *Utah Power & Light Co.*, electric utilities found squatting on federal lands claimed their rights should be tested by state law.[246] However, the Court refused to perform any analysis of the utilities' claimed state-law rights because doing so would imply a limitation on Congress's power to "prescribe the conditions upon which others may obtain rights in [the lands]."[247] Not only does Congress have the power pursuant to the Property Clause to make rules and regulations respecting federal land, "the power of Congress is exclusive and . . . only through its exercise in some form can rights in lands belonging to the United States be acquired."[248] Therefore, any jurisdiction the state may have over federal lands "does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them."[249] Based on this language, courts should apply the legislative approach when dealing with questions of protection, use, and disposition of rights on federal lands, because a contrary rule would put the federal land "completely at the mercy of state legislation" and state common law.[250]

Doctrinally, as we have seen, federal law respecting federal lands is always supreme.[251] State law does not inherently constrain

243. *Id.* at 99.
244. *Id.* at 100.
245. *Id.* (citing *Camfield*, 167 U.S. at 525–26).
246. 243 U.S. 389, 403 (1917).
247. *Id.* at 405.
248. *Id.* at 404.
249. *Id.*
250. *Id.* at 405 (quoting *Camfield*, 167 U.S. at 526).
251. Kleppe v. New Mexico, 426 U.S. 529, 543 (1976).

the scope of the Property Clause power in Congress or as delegated to federal agencies.[252] When either a proprietary or legislative approach could uphold an R.S. 2477 regulation, courts should take the legislative approach because R.S. 2477 rights-of-way directly involve questions of protection, use, and rights in federal lands, which, if given over to state control, put federal lands at the mercy of future state legislation or changes in common law.

C. Policy Argument Against Subverting Federal Legislation with State Law

An examination of the policy arguments in favor of the legislative approach demonstrates how taking the proprietary approach to regulation of R.S. 2477 rights-of-way would put the federal lands "at the mercy of state legislation."[253] The first argument is that the proprietary approach in the R.S. 2477 context lets states essentially amend federal legislation in ways incompatible with Congress's intent.

A federal law that looks to state law to elucidate its terms is nothing new.[254] In many cases, relying on state law offers federal lawmakers flexibility to respond to the individualized needs of various states.[255] However, relying on state law also may give state legislatures the power to alter the reach of a federal law beyond the flexibility envisioned by Congress.[256] It is difficult enough to determine what deference Congress intended to give state law when the intent to incorporate state law is expressed in the statute. In the case of R.S. 2477, Congress made no mention of state law, nor is there any legislative history to suggest intent to rely on state law.[257]

252. Hunt v. United States, 278 U.S. 96, 99–100 (1928); *Utah Power & Light Co.*, 243 U.S. at 405.

253. *Camfield*, 167 U.S. at 526.

254. *See, e.g.*, Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 108 (1991) ("[F]ederal courts should incorporate *state* law into federal common law unless the particular state law in question is inconsistent with the policies underlying the federal statute."); Wilson v. Omaha Indian Tribe, 442 U.S. 653, 671–72 (1979); United States v. Kimbell Foods, Inc., 440 U.S. 715, 727–28 (1979); United States v. Sharpnack, 355 U.S. 286, 293–94 (1958) (discussing express assimilation of state law into federal law); Jerome v. United States, 318 U.S. 101, 104 (1943) ("At times it has been inferred from the nature of the problem with which Congress was dealing that the application of a federal statute should be dependent on state law.") *See generally* David B. Edwards, Note, *Out of the Mouth of States: Deference to State Action Finding Effect in Federal Law*, 63 N.Y.U. ANN. SURV. AM. L. 429, 429, 429–30 (2008).

255. *See* Edwards, *supra* note 254, at 429–31, 443–45.

256. *See id.* at 451–53.

257. *See* S. Utah Wilderness Alliance v. Bureau of Land Mgmt. (*SUWA II*), 425 F.3d 735, 762 (10th Cir. 2005) (noting that while all of the sections around the

However, as discussed above, the Tenth Circuit did determine that "borrowing" state law to define the perfection and scope of rights-of-way granted under R.S. 2477 was appropriate,[258] though based entirely on judicial and administrative precedent.[259] The narrow approach the Tenth Circuit used to allow "borrowing" of state law to define perfection and scope, however, fails when applied to the broader question of agency regulation of valid R.S. 2477 rights-of-way, because limiting federal regulation according to state law would undermine the purposes and policies evident in federal statutes.

In order to "borrow" state law to define perfection and scope, the *SUWA II* and *Hodel II* courts had to consider whether borrowing state law would "frustrate federal policy or functions."[260] In determining that it would not, the *SUWA II* court considered only the purpose and policy of R.S. 2477 and not of any other subsequent federal land-management legislation.[261] Though this narrow approach is arguably inconsistent with *Wilson v. Omaha Indian Tribe*, the main Supreme Court precedent for "borrowing" that the Tenth Circuit cites, it can, perhaps, be justified since R.S. 2477 is the direct and sole source of the federal grant of the rights-of-way and is, therefore, the statute to look to for evidence of federal purposes and policies relevant to perfection and scope.[262] When considering whether to use state law to constrain a federal agency's regulatory authority over rights-of-way however, courts must consider the purposes and policies behind many other statutory sources of agency

grant of rights-of-way in R.S. 2477 reference either state or federal law, "Section 8 refers to neither state law nor federal law"); Sierra Club v. Hodel (*Hodel II*), 848 F.2d 1068, 1080 (10th Cir. 1988) ("The silence of section 8 reflects the probable fact that Congress simply did not decide which sovereign's law should apply."), *overruled on other grounds by* Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992).

258. *See supra* Part I.B.

259. *See SUWA II*, 425 F.3d at 762 ("Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy." (quoting United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979))).

260. *Id.* at 763 (quoting Wilson v. Omaha Indian Tribe, 442 U.S. 653, 672 (1979)).

261. *Id.* (noting that borrowing state law "cannot derogate from the evident purposes of *the* federal statute") (emphasis added); *id.* at 767–68 ("To the extent adoption of a state law definition would frustrate federal policy *under R.S. 2477*, it will not be adopted.") (emphasis added).

262. *See Wilson*, 442 U.S. at 673–74 (considering whether incorporation of state law in defining avulsions and accretions affecting riparian property rights would injure broad "federal trust responsibilities or . . . tribal possessory interests").

regulatory authority over the federal lands at issue. Unlike the accommodating and antiquated purposes of R.S. 2477, the purposes and policies governing many subsequent statutes—statutes enabling federal agencies and providing conservation mandates—would be frustrated by borrowing state law to cabin the agencies' authority over R.S. 2477 rights-of-way.[263]

In fact, the Tenth Circuit's decisions in *Hodel II* and *SUWA II* illustrate the potential conflicts that challenge the purposes and policies of federal statutes and rules.[264] Under the proprietary approach, the regulations an agency can impose are limited by the easement's scope under state law.[265] For example, the liberal scope of R.S. 2477 rights-of-way, as construed by the Tenth Circuit, precludes any federal regulation of R.S. 2477 rights-of-way that would impair a county's right to develop the route to accommodate increased traffic safely.[266] Therefore, closing a road to motorized vehicular traffic, which might be perfectly reasonable under a national park enabling act and NPS regulations, would be out of the question if the route were an R.S. 2477 right-of-way in Utah.[267] Since the proprietary approach forces federal land managers to determine the appropriateness of federal land-use regulation according to the purpose and scope of rights-of-way under state law as opposed to the conservation needs of the land under federal statute, it literally puts the management of sensitive federal lands at the mercy of state law.

Additionally, if the states have unregulated control over when to claim R.S. 2477 rights-of-way and how to modify and improve them under state common law, they can strategically undermine federal conservation efforts on federal lands through state legislation claiming or expanding the routes. The effect on WSA management and Wilderness Area ("WA") designation is perhaps the most apparent. Old, abandoned routes crisscross much of the West, but they often do not fall under the applicable federal agencies' definitions of a "road," which usually require they be of a certain width and suitable for motorized vehicles.[268] For the purposes of R.S. 2477, however, the definition of a "highway"—under state law—

263. *See, e.g.*, *infra* notes 270–71 and accompanying text. R

264. *See supra* Part I.B.

265. *See supra* Part II.B.i.

266. *See supra* notes 72–75 and accompanying text.

267. *See supra* text accompanying notes 143–44.

268. *See* 36 C.F.R. § 212.1 (2007) (defining "road" as "[a] motor vehicle route over 50 inches wide, unless identified and managed as a trail"); 43 C.F.R. § 19.2(e) (2007) (defining "roadless area" as "reasonably compact area of undeveloped Federal land which possesses the general characteristics of a wilderness and within

may even include footpaths.[269] With the ability, under the proprietary approach, to expand and improve an R.S. 2477 right-of-way from a trail (not considered a "road" by the agency) to a gravel road (clearly a "road" by the agency's definition), states and counties have the power to subvert federally mandated protection of an area's wilderness characteristics by essentially adding roads to a "roadless" area.[270] By blading old trails in WSAs, states and counties can effectively ensure that the area is not suitable for designation as a permanent WA by Congress.[271] So, under the proprietary approach, both the management and future suitability of federal lands for wilderness protection are at the mercy of the states.

Responding to a report of the House Appropriations Committee requesting a report on R.S. 2477,[272] the DOI concluded that the lack of clear standards and uncertainty about existing claims and their regulation,

> could prevent the federal government from providing full protection to important geographic features and biological, cultural and physical resources. This would pose a particularly significant threat to resource values in National Parks, Wildlife Refuges, Wilderness and WSAs, Wild and Scenic River corridors, Areas of Critical Environmental Concern, or other areas that require special-management practices to protect important resources. . . . [T]he ability of federal managers to implement management plans and meet the requirements of federal laws (protecting various reservations and environmental val-

which there is no improved road that is suitable for public travel by means of four-wheeled, motorized vehicles intended primarily for highway use").

269. *See supra* notes 66–67 and accompanying text.

270. *See* 16 U.S.C. § 1131(c) (2000) (defining "wilderness" as an area "without permanent improvements" and that "generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable"); *id.* § 1132(c) (defining "wilderness" as a roadless area of 5,000 acres or more); U.S. FOREST SERVICE, FOREST SERVICE HANDBOOK 1901.12 ch. 71.1 (Jan. 31, 2007) (stating that criteria for placement on the potential-wilderness inventory include "[a]reas [that] do not contain forest roads . . . or other permanently authorized roads") (internal citations omitted).

271. Wilderness designation significantly affects the management of federal lands because new mining and logging operations, roads, motorized vehicles, and mechanized activity are largely prohibited in wilderness areas. 16 U.S.C. §§ 1131(c), 1133(c)–(d). Furthermore, under FLPMA the DOI must prevent any new surface impairments in WSAs that would affect wilderness area suitability and manage current uses to avoid "unnecessary or undue degradation" of the wilderness characteristics of the area. 43 U.S.C. § 1782(c) (2000).

272. H.R. REP. NO. 102-901, at 2 (1992) (Conf. Rep.).

ues) would be compromised if they are required to continue indefinitely recognizing R.S. 2477 rights-of-way.[273]

The proprietary approach to R.S. 2477 rights-of-way, therefore, introduces uncertainty into the management of federal lands inasmuch as it gives states the power to alter the reach and effectiveness of federal legislation. It, therefore, limits the federal government's ability to provide protection, regulate use, and determine the disposition of rights on the federal lands underlying and surrounding the rights-of-way, which, according to *Utah Power & Light Co.* and *Camfield*, is beyond the jurisdiction a state can have over federal lands.[274]

D. Policy Argument against Variation among States Undermining Uniform Federal Land Management

A second policy argument against the proprietary approach is that it undermines uniform agency approaches to federal land management. Differing state laws regarding highway construction, acceptance of federal grants, and scope of easements can have radically different effects on R.S. 2477 rights-of-way from state to state, forcing federal agencies to tune their land-management approaches uniquely to each state.

The number of R.S. 2477 rights-of-way perfected in a given state can vary enormously based on whether public use is an adequate means of highway construction and how much public use is required. In several of the states with the most federal lands, no actual construction or maintenance is required, but the passage of vehicles or traffic over the route during a statutorily set period of time can be enough to constitute public acceptance of a right-of-way.[275] Other states, however, do not recognize creation of rights-of-way based on public use and require some form of government action or even a specific act of acceptance to perfect an R.S. 2477

273. Lockhart, *supra* note 20, at 323 (quoting DOI REPORT, *supra* note 8, at 34–35). R

274. Utah Power & Light Co. v. United States, 243 U.S. 389, 405 (1916); Camfield v. United States, 167 U.S. 518, 526 (1897).

275. *See* UTAH CODE ANN. § 72-5-104 (2000) (This provision in Utah law allowing public use to perfect public rights-of-way dates to the nineteenth century. *See* Compiled Laws of Utah § 2066, sec. 2 (1888)); S. Utah Wilderness Alliance v. Bureau of Land Mgmt. (*SUWA II*), 425 F.3d 735, 770–71 (10th Cir. 2005); Wilkenson v. Dep't of Interior, 634 F. Supp. 1265, 1272 (D. Colo. 1986) (quoting Leach v. Manhart, 77 P.2d 652, 653 (1938)); Blonquist v. Blonquist, 516 P.2d 343, 344 (Utah 1973); *see also* cases cited *supra* note 62.

right-of-way.[276] Even among states that recognize perfection of rights-of-way based on public use, the type of use required varies from state to state. In Colorado and Utah "highways" can be "formed by the passage of wagons, etc., over the natural soil."[277] Colorado, in fact, has adopted such a broad definition of what constitutes a "highway" that even a footpath can be considered a highway.[278] Other states, however, have expressly required higher standards, including actual construction, maintenance, or passage of motorized vehicles.[279]

These differences among states regarding perfection of rights-of-way result in very disparate numbers of potential R.S. 2477 right-of-way claims from state to state, with states allowing the most lax forms of public use acceptance having much higher numbers of claims than other states.[280] Therefore, under the proprietary approach, federal agencies that must evaluate R.S. 2477 claims and, if valid, take them into account in land-management planning will have to dedicate a disproportionate share of their resources to the states with the most claims. These differences among states would rule out any uniform approach to dealing with the claims and, therefore, make land-management planning at a national level more difficult.

Additionally, once rights-of-way are perfected, different state laws regarding how they may be improved and modified would require agencies to structure their approach to management of federal lands on a state-by-state basis, hindering their ability to structure management based on geographic, natural, or other dis-

276. *See, e.g.*, Tucson Consol. Copper Co. v. Reese, 100 P. 777, 778 (Ariz. 1909) (holding that establishment of highways is wholly statutory and requires dedication by the county board); Barnard Realty Co. v. City of Butte, 136 P. 1064, 1067 (Mont. 1913) (stating that legislature amended state law in 1895 to prohibit establishment of a public road by use, unless accompanied by an action on the part of public authorities).

277. *Wilkenson*, 634 F. Supp. at 1272 (citing Cent. Pac. Ry. Co. v. Alameda County, 284 U.S. 463, 467 (1932)); *see* Boyer v. Clark, 326 P.2d 107, 109 (1958).

278. Heath v. Parker, 30 P.3d 746, 750 (Colo. Ct. App. 2000) (citing COLO. REV. STAT. § 43-2-201 (2000); Simon v. Pettit, 687 P.2d 1299, 1305 (Colo. 1984) (Lohr, J., dissenting)).

279. *See, e.g.*, Streeter v. Stalnaker, 85 N.W. 47, 47 (Neb. 1901) (holding that general and long-continued public use in connection with "proof that the public authorities had assumed control over the road, and had worked and improved a portion of it" constituted acceptance of the right-of-way).

280. Utah has threatened to claim ownership of more than 10,000 rights-of-way, Bloch & McIntosh, *supra* note 6, at 489, while Arizona has not claimed any, *see* HighwayRobbery.com, Highway Robbery: Your Lands at Risk, http://www.highway-robbery.org/lands/index.htm (last visited Jan. 28, 2008).

tinctions more relevant to their conservation mandates. Despite some static statutory enactments affecting perfection of rights-of-way,[281] the laws affecting perfection and scope of rights-of-way are often based on common law precedents.[282] Parsing the common law of servitudes on a state-by-state basis is an onerous task for federal agencies because it requires, in the case of each management decision that might affect an R.S. 2477 right-of-way, analysis of that state's constantly evolving aggregate judicial precedent along with, in most cases, the particular history and circumstances of each right-of-way at issue. Again, coupled with the differences in number of R.S. 2477 claims among the states, the different states' laws concerning scope of easements means that, under the proprietary approach, federal agencies would have to dedicate significantly more resources to some states than others, regardless of the proportionate amount of federal lands they contain.

One might argue that it is quite right for federal land-management agencies to dedicate a different amount of resources and attention to different states because the public lands in each state have different characteristics, and the interrelationships between local communities and public lands vary from state to state. The Tenth Circuit, in *SUWA II*, relied in part on such reasoning in determining there was no need for a uniform national standard for perfecting R.S. 2477 rights-of-way.[283] Characterizing the plea for a uniform national standard as "uniformity for uniformity's sake,"[284] the Tenth Circuit also noted that the long history of referring to state law to adjudicate R.S. 2477 disputes along with the moratorium Congress imposed on the BLM to prevent it from promulgat-

281. *See, e.g.*, S. Utah Wilderness Alliance v. Bureau of Land Mgmt. (*SUWA II*), 425 F.3d 735, 768–70 (10th Cir. 2005) (considering Utah common law and statutes relevant to perfection of an R.S. 2477 right-of-way based on the time of alleged perfection).

282. *See id.*; Sierra Club v. Hodel (*Hodel II*), 848 F.2d 1068, 1083 (10th Cir. 1988), *overruled on other grounds by* Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992).

283. *SUWA II*, 425 F.3d at 767 ("Indeed, there is some force to the view that interpretation of R.S. 2477 should be sensitive to the differences in geographic, climatic, demographic, and economic circumstances among the various states, differences which can have an effect on the establishment and use of routes of travel.").

284. *Id.* at 767; *see also* Wilson v. Omaha Indian Tribe, 442 U.S. 653, 673 (1979) (rejecting "generalized pleas for uniformity as substitutes for concrete evidence that adopting state law would adversely affect administration of the federal programs" (quoting U.S. v. Kimbell Foods, Inc., 440 U.S. 715, 730 (1979))).

ing uniform federal standards cut against the alleged need for a uniform standard.[285]

However, the argument that total uniformity in administration of land-management policies across the country would be inefficient and that the federal government should, therefore, tune its land-management plans based on the characteristics of the land and the needs of communities does not prove that adopting state-law definitions in the R.S. 2477 context is the means by which that tuning should take place, let alone that state law should constrain the regulatory authority of land-management agencies. Such an argument assumes that the state laws upon which the perfection and scope of R.S. 2477 rights-of-way are based bear some kind of proportional relationship from state to state to the unique characteristics of the public lands in the states. It is not clear, however, that fifty different standards would produce a result any more fine-tuned or efficient than a single national standard. Indeed, the distinct differences between Arizona and Utah law regarding perfection of rights-of-way call into question any correlation between state law and the proper administration of federal lands, since the characteristics of the public lands in the two states are similar.[286]

Furthermore, there are various benefits in having a uniform federal approach to R.S. 2477 regulation. As discussed above, forcing federal agencies to base their analysis of R.S. 2477 claims and rights on state law limits their discretion to apportion resources among the states according to their management mandates. Furthermore, it gives undue emphasis to state boundaries in the federal management scheme—boundaries that are seldom of natural significance and often do not demarcate federal land unit boundaries. Also, the onerous process agencies will have to undertake to provide a unique approach to R.S. 2477 claims for each state and to monitor constantly developing state common law affecting the scope of the rights-of-way highlights the economies of scale that a uniform standard offers. Finally, the emphasis of federal natural-resource-management since FLPMA has been on establishing uni-

285. *SUWA II*, 425 F.3d at 767 ("Moreover, for over 130 years disputes over R.S. 2477 claims were litigated by reference to non-uniform state standards, a fact that casts serious doubt on any claims of a need for uniformity today.") (citation omitted).

286. *Compare* Tucson Consol. Copper Co. v. Reese, 100 P. 777, 778 (Ariz. 1909) (holding that establishment of highways is wholly statutory and requires dedication by the county board), *with* Lindsay Land & Live Stock Co. v. Churnos, 285 P. 646, 648 (Utah 1929) (holding that public use alone is sufficient to establish a highway).

form standards.[287] A uniform federal approach to R.S. 2477 would, therefore, be more consistent with current policy.[288]

Unlike the *SUWA II* court, which discussed only the reasons why uniformity was not needed, the *Hodel II* court noted that "FLPMA admittedly embodies a congressional intent to centralize and systematize the management of public lands, a goal which might be advanced by establishing uniform sources and rules of law for rights-of-way in public lands."[289] However, like the *SUWA II* court's reasoning in determining that borrowing state law would not undermine federal policy or purposes, the *Hodel II* court decided to measure the need for uniformity based on the time the R.S. 2477 statute was passed, rather than based on contemporary administrative concepts: "[T]he need for uniformity should be assessed in terms of Congress' intent at the time of R.S. 2477's passage."[290] As noted above, however, while this narrow approach might be applied to perfection and scope of the rights-of-way under R.S. 2477, it cannot be taken when analyzing whether state law should constrain the regulatory authority of the agencies because, unlike the terms of R.S. 2477, the agencies' regulatory authority over the rights-of-way is derived from numerous, more modern statutes.[291] Therefore, in the context of agency regulatory authority over valid R.S. 2477 rights-of-way, the need for a uniform national standard is greater than in the narrower context of scope and perfection under R.S. 2477.

The proprietary approach, hence, both undermines federal policy and functions along with uniform federal land management. As in *Camfield*, *Hunt*, and *Utah Power*, using the proprietary approach puts federal lands at the mercy of state legislation.[292] In such situations, when it appears that the state law will constrain federal land managers in accomplishment of their mandates—though perhaps it has not yet—courts should use the legislative approach to preemptively establish the "exclusive" and "full power" of the fed-

287. Sierra Club v. Hodel (*Hodel II*), 848 F.2d 1068, 1082 (10th Cir. 1988), *overruled on other grounds by* Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992).

288. *Id.*

289. *Id.*

290. *Id.* ("The policies supporting FLPMA, however, simply are not relevant to R.S. 2477's construction. It is incongruous to determine the source of interpretative law for one statute based on the goals and policies of a separate statute conceived 110 years later.").

291. *See supra* text accompanying notes 260–63.

292. *See supra* text accompanying notes 237–50.

eral government over its lands.[293] Since it is based on the delegation of the broad Property Clause power to federal agencies, the legislative approach will ensure that federal land managers have the power to carry out their statutory mandates.

E. Allowing Proper State Influence Through Savings Clauses and Takings Law

The legislative approach still allows states and counties some ability to curb agency discretion because in many cases the statutory mandates themselves have limits built in to soften their impact on private and state rights. In some cases, those provisions, often called "savings clauses," may expressly make the state law relevant in determining the limits of agency authority.[294] In other situations, they may not specify that state law is to govern but simply protect "existing rights" in some fashion or another.[295] Those "existing rights" can themselves be construed by courts to include state-common-law-based rights. FLPMA, ANICLA, and other land-management statutes include both types of savings clauses—opening up another avenue for states and counties to challenge agency regulatory authority based on at least some baseline right. The key is in

293. Utah Power & Light Co. v. United States, 243 U.S. 389, 404 (1916).

294. *Id.* at 405 ("[S]tate laws, . . . have no bearing upon a controversy such as is here presented, save as they may have been adopted or made applicable by Congress."); *see, e.g.*, Federal Power Act of 1935, 16 U.S.C. § 821 (2000) (specifying that nothing in the act "shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein"); 43 U.S.C. § 1701 note g (2000) (specifying that the act not be construed as "expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control" and "as a limitation upon any State criminal statute or upon the police power of the respective States. . . .").

295. *See, e.g.*, Wilderness Act, 16 U.S.C. § 1133(c) (2000) (prohibition on commercial enterprises and roads in wilderness areas "subject to existing private rights"); 43 U.S.C. § 1701, notes (a)–(h) (specifying that nothing in the act be construed as "terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization" and that "[a]ll actions by the Secretary concerned under this Act shall be subject to valid existing rights"); *id.* § 1769(a) (repealing R.S. 2477, but stating that "[n]othing in this subchapter shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted"); *id.* § 1782(c) (subjecting the ability of the Secretary to manage Wilderness Study Areas for non-impairment of wilderness values to "the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on" the date of approval of the Act, but also allowing management of such to prevent "unnecessary or undue degradation").

determining what Congress meant by "existing rights," or what rights they intended to preserve in the context of the statute.

Construing savings clauses to incorporate state-law standards, however, is fundamentally different from the proprietary approach, because it requires courts to determine whether state law should inform their construction of the saved "rights" based on the purpose and other provisions in the statute.[296] In making this determination, courts must presume that in areas of traditional state regulation a "federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest.'"[297] However, even in situations where state law was expressly preserved in a federal statute, courts have construed savings clauses narrowly to preempt the state law if the latter comes into conflict with the purposes or other provisions in the statute.[298] In determining

296. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485–86 (1996) ("[T]he purpose of Congress is the ultimate touch-stone in every pre-emption case. . . . Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it. . . . Also relevant, however, is the structure and purpose of the statute as a whole . . . as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.") (internal quotation marks and citations omitted); United States v. Gates of the Mountains Lakeshore Homes, Inc., 732 F.2d 1411, 1413 (9th Cir. 1984) ("The scope of a grant of federal land is, of course, a question of federal law. But in some instances 'it may be determined as a matter of federal law that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances.'" (quoting United States v. Oregon, 295 U.S. 1, 28 (1935))). *See generally* Robert R. Gasaway, *The Problem of Federal Preemption: Reformulating the Black Letter Rules*, 33 PEPP. L. REV. 25, 26–27 (2005) (discussing the problematic nature of the preemption doctrine).

297. Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005) (quoting N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995)).

298. *See* California v. Fed. Energy Regulatory Comm'n, 495 U.S. 490, 497, 506 (1990) (holding, despite a savings clause stating that nothing in the act may affect or interfere with state water law, that based on an admittedly narrow reading of the clause, federal minimum-flow requirements preempted higher state standards); First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n, 328 U.S. 152, 175–78 (1946) (construing a state law savings clause narrowly such that applicants for federal permits did not have to conform to state-law requirements); Riverside Irrigation Dist. v. Andrews, 758 F.2d 508, 513 (10th Cir. 1985) (citing Conn. Light & Power Co. v. Fed. Power Comm'n, 324 U.S. 515, 527 (1945) (holding, despite a savings clause declaring that it is not the policy of the Clean Water Act (CWA) to supersede state authority to allocate water or water rights established by the state, that a federal agency could still deny a nationwide permit based on its superseding duty to consider environmental impacts under the CWA). *See generally* Thomas K. Snodgrass, Comment, *Bypass Flow Requirements and the Question of Forest Service Authority*, 70 U. COLO. L. REV. 641, 660, 678, 691–94 (1999) (arguing that despite a savings clause

whether state law should affect the scope of R.S. 2477 regulations, therefore, one must consider first whether the proposed regulation falls within the ambit of traditional state regulation and, if so, whether it is nonetheless preempted because in conflict with the purpose or specific provisions of the statute.[299]

Though the scope of R.S. 2477 rights-of-way have historically been construed according to borrowed state common law, prescribing the scope of rights-of-way crossing federal lands is not within the realm of traditional state regulation. The authority to regulate federal land is expressly given to Congress in the Constitution itself.[300] Therefore, though a state's police power jurisdiction reaches activities on federal lands, Congress has exclusive power to regulate activities "respecting" the land itself.[301] For example, in *Utah Power & Light Co.*, the Court distinguished several areas of traditional state regulation from the disposition of property rights on federal land:

> [T]he power of Congress is exclusive and . . . only through its exercise in some form can rights in lands belonging to the United States be acquired. True, for many purposes a state has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them.

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in FLPMA preserving "State jurisdiction, responsibility, interests, or rights in water resources development or control," the Forest Service has authority to prescribe bypass flow requirements).

299. It is important to note that this question is also different from the question of whether courts should "borrow" state common law to define the scope and perfection of R.S. 2477 rights-of-way, as the courts in *SUWA II* and *Hodel II* held was appropriate. *See* S. Utah Wilderness Alliance v. Bureau of Land Mgmt. (*SUWA II*), 425 F.3d 735, 762–63, 767–68 (10th Cir. 2005); Sierra Club v. Hodel (*Hodel II*), 848 F.2d 1068, 1081–83 (10th Cir. 1988), *overruled on other grounds by* Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992). In both *SUWA II* and *Hodel II*, the court was concerned with defining the original grant under R.S. 2477, or construing the R.S. 2477 statute itself, and, therefore, concerned with the intent of the Congress that passed R.S. 2477 as opposed to the Congresses that passed FLPMA or any later land management statute. *See SUWA II*, 425 F.3d at 767–78 ("To the extent adoption of a state law definition would frustrate federal policy *under R.S. 2477*, it will not be adopted.") (emphasis added); *Hodel II*, 848 F.2d at 1082 ("The policies supporting FLPMA, however, simply are not relevant to R.S. 2477's construction. It is incongruous to determine the source of interpretative law for one statute based on the goals and policies of a separate statute conceived 110 years later. Rather, the need for uniformity should be assessed in terms of Congress' intent at the time of R.S. 2477's passage.").

300. U.S. CONST. art. IV, § 3, cl. 2.

301. *See* Utah Power & Light Co. v. United States, 243 U.S. 389, 404 (1917).

> Thus, while the state may punish public offenses, such as murder or larceny, committed on such lands, and may tax private property, such as live stock, located thereon, it may not tax the lands themselves or invest others with any right whatever in them.[302]

The Court went on to note that "[f]rom the earliest times Congress . . . has provided for and controlled the acquisition of rights of way over them for highways, railroads, canals, ditches, telegraph lines, and the like."[303] Therefore, there is no need for Congress to make expressly manifest in FLPMA or any other federal land-management statute its intention to supplant state common law in the regulation of easements since regulating easements on federal lands was never within the ambient of traditional state regulation.[304] Over a hundred years of "borrowing" state law does not result in the cession of constitutionally granted jurisdiction over federal lands to the states.

When state common law conflicts with the purpose or an express provision of a federal land-management statute, it should, therefore, be set aside. Taking this approach, the Ninth Circuit, in *Adams I* and *II*, construed provisions in FLPMA and ANILCA regarding easements to preempt common law rights-of-way to in-holdings generally.[305] The provisions required the Secretary to allow for reasonable use and enjoyment of the in-holdings by granting easements, but the easement holders also had to comply with rules and regulations promulgated by the Secretary to govern ingress and egress from the National Forest System.[306] Therefore, since the common law easement the Adamses claimed would have required access allowing "complete and beneficial use" of the in-holdings, the access provided for in FLPMA and ANILCA ensuring only "reasonable use and enjoyment" subject to reasonable regulation was a narrower right.[307] Addressing the conflict between the Adamses' common law easement and the agency's regulatory authority, the court reasoned:

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302. *Id.* (citation omitted).

303. *Id.*

304. *See* Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005) (requiring a clear manifestation to preempt traditional state law).

305. Adams v. United States (*Adams I*), 3 F.3d 1254, 1258–59 (9th Cir. 1993), *aff'd*, (*Adams II*), 255 F.3d. 787, 794 (9th Cir. 2001).

306. *Adams I*, 3 F.3d at 1258 (citing 16 U.S.C. § 3210(a) (2000); 43 U.S.C. §§ 1761(a), 1764(c) (2000)).

307. *See id.* at 1259 (emphasis omitted).

> Although the Adamses may have such an easement under common law, we need not analyze this issue. Where the United States owns the servient estate for the benefit of the public, there are additional concerns focused on preservation of the land. Common law rules are applicable only when not preempted by statute. Congress has affirmatively spoken in this area through the Alaska National Interest Lands Conservation Act and the Federal Land Policy and Management Act.[308]

Upholding its earlier decision, the Ninth Circuit later held, "[A]ll common law claims are preempted by ANILCA and FLPMA where, as here, the United States owns the servient estate for the benefit of the public."[309]

So at least in the context of in-holdings, being saved from "termination" in FLPMA does not mean a right-of-way that was once construed based on state common law cannot be reduced in scope to allow for more restrictive agency regulation.[310] Federal land managers examining their authority to regulate valid R.S. 2477 rights-of-way should, therefore, consider which purposes and provisions in FLPMA preempt the broad scope granted to dominant estate owners under the common law of servitudes.

Clearly FLPMA's savings clauses must mean something; at the very least, pre-existing rights-of-way cannot be completely eviscerated, or taken.[311] The rights must have some content, whether borrowed from state law, expressly provided for in statute, or derived in part from the purpose and other provisions in the statute. Whatever that content is will allow states and counties to continue to play a role in the management of federal lands and to ensure some degree of access, though they will not be able to hold federal land-management agencies hostage in the performance of their statutory duties. The legislative approach, therefore, is supported by Supreme Court precedent, lets federal land managers accomplish their mandates, and allows states and counties the degree of influence Congress intended.

308. *Id.* (citation omitted).

309. *Adams II*, 255 F.3d 787, 794 (9th Cir. 2001). It should be noted that ANILCA does not have a rights-of-way savings clause like FLPMA. *See* 16 U.S.C. § 3125 (2000).

310. *See Adams II*, 255 F.3d at 794.

311. *See id.* at 794–95 (holding that a denial of a permit to use a right-of-way is not a taking unless it prevents "'economically viable' use of the land in question").

CONCLUSION

To date, only federal permit requirements on R.S. 2477 rights-of-way have been adjudicated. With counties like Kane county in Utah aggressively exploring the limits of their power over federal lands under R.S. 2477,[312] the as-yet moderate regulations of these rights-of-way are likely to change. As mentioned above, the regulations of R.S. 2477 rights-of-way upheld in the Tenth Circuit have not exceeded the regulatory power of a servient estate owner. Those in the Ninth Circuit are only slightly more onerous. Under the traditional common law of servitudes, an easement owner's use can develop over time to accommodate advances in technology and increased traffic. Therefore, under the proprietary approach, opening the routes to OHV use should be a reasonable modification within the scope of the easement. If BLM or NPS regulations restrict vehicular access on R.S. 2477 rights-of-way opened by county ordinance, the proprietary approach will not provide a sufficient rationale to uphold the agencies' regulatory authority. It is likely, therefore, that the Tenth Circuit will have the opportunity to clarify its approach and either recognize the broad legislative approach or strike down the regulation under the proprietary approach.

As a final note, regardless of the approach the Tenth Circuit takes, it will draw criticism because of the argument for federalism embedded in the R.S. 2477 debate. The underlying political implications of allowing federal land managers to regulate valid R.S. 2477 rights-of-way are made clear by Congress's reaction to the DOI's 1994 proposed rules clarifying the permissibility of such regulations.[313] In its findings section, the DOI noted:

> [W]hen Congress passed laws creating the National Park System and the National Wildlife Refuge System, it imposed new, more protective management standards on these categories of Federal land and directed the Department to uphold these standards. When most parks or refuges were created, pre-existing rights including rights-of-way usually were not terminated, but became subject to the new management regime. For example, the courts have interpreted the authority of the National Park Service to include regulation of pre-existing R.S. 2477 rights-of-way across National Parks. . . .

312. *See supra* text accompanying notes 1–5, 94–97. **R**

313. *See* Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39216, 39218 (proposed Aug. 1, 1994).

> R.S. 2477 must be read against these requirements. While existing rights pursuant to R.S. 2477 were not terminated, their preservation did not provide prospective, unrestricted authority to create or improve highways without regard for the purposes of these land management systems, or other environmental and resource protection laws. That is, rights-of-way validly acquired pursuant to R.S. 2477 remain subject to regulation under the Federal laws that govern the underlying and adjacent Federal lands.[314]

Before the DOI proposed rules could be approved, however, Congress enacted a permanent moratorium declaring, "No final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to Revised Statute 2477 *(43 U.S.C. 932)* shall take effect unless expressly authorized by an Act of Congress."[315] Congress's reaction to the DOI's proposed rule demonstrates that the question of the proper scope of federal agencies' regulatory control over R.S. 2477 rights-of-way reflects a larger political battle over which Congress wants control.

A strong circuit court or Supreme Court decision unequivocally upholding the broad legislative approach to allow R.S. 2477 regulation would be an unavoidably politicized anti-federalist holding. Conversely, any decision that backpedals from *Camfield* and *Kleppe* would cede power over federal lands to the states. Either way, courts are faced with not just a decision about four-wheelers on old desert roads, but a decision that maps out the contours of the Constitution's Property Clause and adds a weight to the balance of power between federal and state governments.

314. *Id.* (citations omitted).

315. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 108, 100 Stat. 3009-1, 3009-200 (1996).