RS 2477:

PUBLIC RIGHTS-OF-WAY IN AN ERA OF ADMINISTRATIVE AVOIDANCE

BY SARAH R. LILJEFELT, ESQ., W. ALAN SCHROEDER, ESQ., THERESE A. URE, ESQ.

In the mid-1800s, congressional policy promoted expansion into the western United States and development of federal lands. In that vein, Congress enacted Revised Statute 2477 (RS 2477), allowing the establishment of public rights-of-way across federal lands.

Determinations of claimed RS 2477 public rights-of-way have become complicated to say the least since the revocation of RS 2477 by the Federal Land Policy and Management Act (FLPMA). Administrative agencies, delegated the responsibility of managing federal lands, cannot, or will not, make binding decisions as to RS 2477 public rights-of-way across those lands. The current legal trend is that only federal courts can determine validity to claimed RS 2477 rights-of-way.

Therefore, the process for determining these public rights-of-way has become extremely lengthy and expensive. This article provides a brief background to RS 2477, explains the history and scope of administrative decisions, and suggests implementation of a means or system for streamlining RS 2477 determinations.

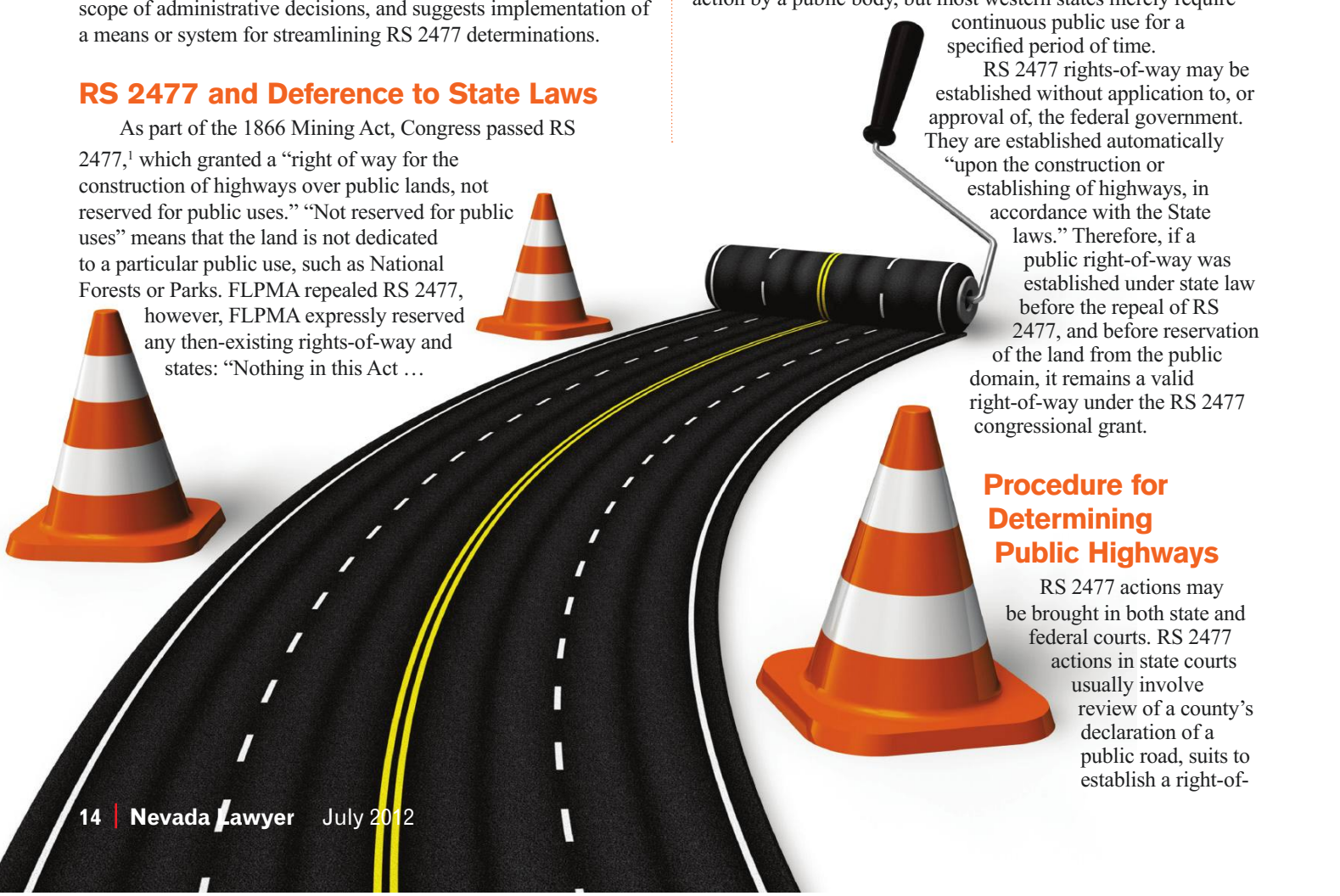
RS 2477 and Deference to State Laws

As part of the 1866 Mining Act, Congress passed RS 2477,[1] which granted a "right of way for the construction of highways over public lands, not reserved for public uses." "Not reserved for public uses" means that the land is not dedicated to a particular public use, such as National Forests or Parks. FLPMA repealed RS 2477, however, FLPMA expressly reserved any then-existing rights-of-way and states: "Nothing in this Act … shall be construed as terminating any valid lease, permit, patent, rights-of-way, or other land use right or authorization existing on the date of approval of this act." Thus, RS 2477 rights-of-way established prior to the passage of FLPMA (October 21, 1976) remain valid.

The laws of the various states determine how RS 2477 rights-of-way may be established within their borders. As stated by the Washington Supreme Court:

> The act of congress already referred to [RS 2477] does not make any distinction as to the methods recognized by law for the establishment of a highway. It is an unequivocal grant of right of way for highways over public lands, without any limitation as to the method for their establishment, and hence a 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; and in this state, as already observed, such highways may be established by prescription, dedication, user [sic], or proceedings under the statute.

To accept the RS 2477 grant, some states require official action by a public body, but most western states merely require continuous public use for a specified period of time. RS 2477 rights-of-way may be established without application to, or approval of, the federal government. They are established automatically "upon the construction or establishing of highways, in accordance with the State laws." Therefore, if a public right-of-way was established under state law before the repeal of RS 2477, and before reservation of the land from the public domain, it remains a valid right-of-way under the RS 2477 congressional grant.



Procedure for Determining Public Highways

RS 2477 actions may be brought in both state and federal courts. RS 2477 actions in state courts usually involve review of a county's declaration of a public road, suits to establish a right-of-

way across private land for access, or as a defense to a claim of trespass. If the action involves land that is owned by the federal government, however, the current legal method for establishing a right-of-way is to bring suit or make a counterclaim under the Quiet Title Act in federal court. Such claims must be brought under the Quiet Title Act because it waives sovereign immunity "to adjudicate title disputes involving real property in which the United States claims an interest."

Although federal agencies, such as the Department of the Interior's Bureau of Land Management (BLM) and the Department of Agriculture's United States Forest Service (USFS), are generally responsible for managing public lands and National Forest System lands, administrative agencies often do not exercise the authority to make binding determinations regarding the validity of RS 2477 rights-of-way. This, in the view of these authors, frustrates all interested parties from answering the most fundamental question regarding the rights-of-way: whether or not an RS 2477 right-of-way exists. Such parties include the agencies lawfully managing the federal lands, the claimants of the rights-of-way and the opponents of the rights-of-way.

After the passage of FLPMA in 1976, the BLM solicited the submission of maps showing the locations of claimed public highways. In some cases, the BLM reviewed the submissions and either acknowledged the rights-of-way or did not acknowledge them. Some acknowledged rights-of-way were serialized and noted on master title plats (the land status records of the federal government).

In 1988, then-secretary of the Department of the Interior, Donald P. Hodel, issued a policy memorandum for administrative recognition of RS 2477 rights-of-way. The memorandum defined the key terms in RS 2477: "construction," "highway" and "not reserved for public uses," and determined that the federal government has no duty or authority to adjudicate RS 2477 claims. However, Hodel also recognized that, in order to properly manage public lands, administrative agencies must be able to identify the existence of public highways. Therefore, Hodel directed the establishment of internal procedures to accomplish these determinations.

In 1993, the Department of the Interior submitted a report to Congress recommending the promulgation of RS 2477 regulations by the agency. Notice of proposed rulemaking was published in 1994. The proposed rulemaking was controversial, and in 1996, Congress responded first by prohibiting the Department of the Interior from using appropriated funds to finalize the rulemaking. Second, Congress passed Public Law 104-108, which states, in part, as follows:

> No final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a rights-of-way pursuant to Revised Statute 2477 (43 USC 932) shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act.

In 1997, then-secretary of the Department of the Interior, Bruce Babbitt, issued a policy memorandum that revoked the Hodel Policy and established that the department would not determine whether an RS 2477 right-of-way existed unless the applicant could show that "a compelling and immediate need for the determination exists." The Babbitt Policy also determined that when the agency makes an RS 2477 determination, "the agency shall apply state law in effect on October 21, 1976, to the extent that it is consistent with Federal law."

The Tenth Circuit decided the case *Southern Utah Wilderness Alliance v. Bureau of Land Management* (*SUWA v. BLM*) in 2005, once again modifying the Department of the Interior's RS 2477 rights-of-way policy. In that case, Southern Utah Wilderness Alliance brought suit against the BLM and several Utah counties for the counties' road grading activities on BLM lands, and BLM filed cross-claims against the counties claiming that their activities constituted a trespass. The counties defended on the basis that their activities were conducted within RS 2477 rights-of-way. The Tenth Circuit held that the BLM does not have jurisdiction to make binding determinations regarding the validity of RS 2477 rights-of-way. However, the BLM may continue to determine the validity of RS 2477 rights-of-way for its own internal purposes and for proper management of public lands, including the issuance of special use permits.

Although under *SUWA v. BLM* claimants must file claims in federal court under the Quiet Title Act to receive a definitive, binding determination of their RS 2477 rights, claimants may seek other actions from federal agencies. The BLM may issue "nonbinding determinations," by which the agency can determine whether it will treat a road as an RS 2477 right-of-way for purposes of access and maintenance. The BLM may also issue "recordable disclaimers" under FLPMA by which the agency disclaims an interest in certain roads. Finally, the BLM may enter into a "road management agreement" with another party covering how the parties will treat and maintain the road at issue.

The RS 2477 rights-of-way administrative actions agencies are authorized to carry out may not be satisfactory to claimants because those actions are not binding and thus are subject to reversal by the agency. Additionally, without a court determination as to validity, the claimant remains open to attack from third parties' claims that the agency and the claimant are violating laws related to management of federal lands. Finally,

continued on page 17

RS 2477: PUBLIC RIGHTS-OF-WAY IN AN ERA OF ADMINISTRATIVE AVOIDANCE

continued from page 15

agencies cannot make any sort of determination regarding roads crossing lands managed by other public agencies, or private land.

Consequences of Federal Court Requirement

Federal laws are enforced by federal agencies. If authorized by Congress, the federal agency in charge of enforcement promulgates administrative rules under the federal statute at issue. Although several federal agencies have the responsibility to manage federal lands, they are without jurisdiction to promulgate federal rules regarding RS 2477 or decisively determine the state of public roads across federal lands. It would appear that only federal courts may determine the validity of claimed RS 2477 rights-of-way across federal lands. Therefore, claimants are forced to bring expensive federal suits to conclusively determine their rights.

For example, the state of Utah and Utah counties filed two suits on November 14, 2011, in United States district court in Utah for adjudication of 804 claimed RS 2477 rights-of-way on Department of the Interior lands. On December 14, 2011, the state of Utah sent the Department of the Interior notices of intent to file actions to adjudicate 18,784 additional claimed RS 2477 rights-of-way. The lands at issue are located in 22 of the 26 Utah counties.

The Utah actions are but one example of how large and complex suits regarding RS 2477 rights-of-way can become. Without an alternative process for validating RS 2477 rights-of-way, all claims must be brought before a federal court judge.

Alternative Processes

RS 2477 requires deference to state laws for determination of whether an RS 2477 right-of-way exists. One alternative to the long, arduous federal court process is for the federal courts or Congress to recognize this deference to state law and use state law processes for validation of RS 2477 rights-of-way. For instance, Idaho Code 40-204A outlines a state process for validating public rights-of-way. A person may petition the Board of County or Highway District Commissioners (whichever has jurisdiction) to initiate validation proceedings, or the commissioners may initiate the proceedings on their own if certain elements are met. The petitioner may be required to pay for the costs of validation (likely far less expensive than federal litigation), and an appeal process is provided by Idaho Code 40-208.

Alternatively, if a state does not have a process for validating public rights-of-way, then persons should be able to submit applications to federal agencies for determinations of rights. As the body of government charged with administering federal lands, federal agencies are uniquely situated to handle and adjudicate the processing of public rights-of-way claims. Moreover, determination of public rights-of-way is already necessary for comprehensive federal land management, which is why federal agencies make internal decisions about such rights-of-way in the absence of authority to make binding determinations. Federal courts could still hear appeals from the administrative decisions involving RS 2477 claims via judicial review under the Administrative Procedure Act. This alternative, however, would require that Public Law 104-108 be withdrawn or overruled by Congress.

Conclusions

RS 2477 claims are difficult to resolve. Often claims involve facts more than 100 years old. The standards for whether a highway is created will vary from state to state. Moreover, claimants must go through lengthy and expensive federal court proceedings to decisively determine public rights-of-way.

Federal agencies also struggle with their lack of control over recognition of public rights-of-way across federal lands. Federal agencies are charged with the task of managing federal lands; however, Congress has precluded federal agencies from making regulations regarding RS 2477 rights-of-way, and the agencies themselves, have frustrated or prohibited agency personnel from making binding determinations under the rules cited herein, often merely through changes in administration. At best, the agencies are forced to make internal, non-binding determinations in order

continued on page 18

RS 2477: PUBLIC RIGHTS-OF-WAY IN AN ERA OF ADMINISTRATIVE AVOIDANCE

continued from page 17

to carry out their management directives, though they have done so with little support and guidance, leaving claimants, opponents and the agencies in costly federal court litigation.

A logical and less-complicated solution would be for the federal courts or Congress to defer to the various states' public rights-of-way validation processes where such processes exist. Alternatively, federal agencies should be able to make public rights-of-way determinations, adjudicated through administrative appeals to the likes of the Office of Hearings and Appeal of the Department of the Interior, with the federal courts available for judicial review. These processes would allow claimants to obtain certainty as to public rights-of-way without incurring great expense in seeking federal court determinations in the first instance.

The purpose behind the passage of RS 2477 was to grant public access across federal lands as an incentive to settle the western states. Based on historic access routes, settlement occurred. As historic routes require maintenance, it is necessary to determine the rights of the public to perform such maintenance and to continue using the routes for not only landowners, but the public at large, particularly those that are physically challenged and cannot access or otherwise enjoy many parts of the federal lands without road access. Based on the purpose of the grant and its history, the process for seeking a determination of rights should not be as laborious as is currently the case. The states and federal agencies should be able to determine public rights-of-way in a less formal and less expensive manner.

Sarah R. Liljefelt is an associate attorney at Schroeder Law Offices, P.C. Liljefelt focuses her practice in the areas of water rights, real property law and litigation. She graduated cum laude from Northwestern School of Law of Lewis & Clark College in June 2010, and is licensed to practice law in Oregon and California.

W. Alan Schroeder has been a partner at Schroeder & Lezamiz Law Office, LLP in Boise, Idaho since 1990. Schroeder has litigated land use issues before the U.S. Department of the Interior; U.S. Department of Agriculture; U.S. District Courts for Idaho, California, Nevada, Oregon, Utah, Washington and Wyoming; U.S. Court of Appeals for the Eighth, Ninth, Tenth,and D.C. Circuits; the U.S. Court of Federal Claims, and the United States Supreme Court.

Therese A. Ure. is the managing attorney in Schroeder Law Offices' Reno, Nevada office. Ure has focused her law practice in water rights and public lands laws. She is a member of both the Oregon and Nevada State and Federal Courts, and is a member of the Ninth Circuit Court of Appeals.

1. All references and citations for this article are available on the State Bar of Nevada's website at www.nvbar.org/articles > July 2012 > Public Right of Ways > Citations.

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ENDNOTES

Description from Text of Article	Reference/Citation
Revised Statute R.S. 2477	Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253, *codified at* 43 USC § 932, *repealed by* Federal Land Policy and Management Act of 1976 ("FLPMA"), Pub. L. No. 94-579, § 706 (a), 90 Stat. 2743.
Definition of "not reserved for public uses"	*Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735, 784 (10th Cir. 2005).
FLPMA repealed R.S. 2477	Pub. L. No. 94-579, § 701(a), 90 Stat. 2743, 2786.
State law governs establishment of R.S. 2477 right-of-ways	*Sierra Club v. Hodel*, 848 F.2d 1068, 1083 (10th Cir. 1988); *Southern Utah Wilderness Alliance v. BLM*, 425 F.3d 735, 768 (2005).
Washington Supreme Court quote re state law governing creation of R.S. 2477 right-of-ways	*Smith v. Mitchell*, 21 Wash. 536, 540, 58 P. 667, 668 (1899).
State requirements for creating R.S. 2477 right-of-ways vary from requiring official action, to mere public use for a period of time	*Southern Utah Wilderness Alliance*, 425 F.3d 735 at 770.
Federal government does not need to approve R.S. 2477 right-of-ways	43 CFR § 2822.1-1 (1979); 43 CFR § 244.55 (1939); *Sierra Club*, 848 F.2d at 1078.
Suits against the federal government concerning disputes in real property must be brought under the Quiet Title Act	28 U.S.C. § 2409a; Block v. North Dakota, 461 U.S. 273, 275 -276 (1983); Michel v. United States, 65 F.3d 130, 131 (9th Cir. 1995). *See, e.g.*, The Wilderness Society v. Kane County, Utah, 632 F.3d 1162 (2011).
Administrative agencies do not have authority to make binding determinations regarding validity of R.S. 2477 right-of-way claims	There is a point of view that the BLM can make a binding determinations via the Recordable Disclaimer regulations (43 CFR Part § 1864.0-1), and that the USFS can made a binding determinations in the context of assessing access for a landowner (36 CFR § 251.114(f)(1)).
Post-FLPMA, BLM solicited maps showing locations of claimed public highways	US Bureau of Land Management Idaho State Office, *Road Management and Maintenance Guidelines for Public Lands in Idaho* 6 (November, 2002).

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Hodel Policy for R.S. 2477 right-of-ways	Secretary of the Interior, *Departmental Implementation of Southern Utah Wilderness Alliance v. Bureau of Land Management, 425 F.3d 735 (10th Cir. 2005); Revocation of January 22, 1997, Interim Policy; Revocation of December 7, 1988, Policy* attachment 1, p. 2 (March 22, 2006).
DOI notice of proposed rulemaking for R.S. 2477 right-of-way regulations	59 Fed. Reg. 39216 (August 1, 1994).
Congress's prohibition on using federal funds to finalize R.S. 2477 rulemaking	Public Law 104-134, § 110, 110 Stat. 321-177 (1996).
Public Law 104-108	Public Law 104-208, § 108, 110 Stat. 3009 (September 30, 1996). The General Accounting Office determined that Public Law 104-208 § 108 has the status of permanent law. GAO Opinion B-277719 at 1 -5 (August 20, 1997).
Babbitt Policy for R.S. 2477 right-of-ways	Secretary of the Interior, *Interim Departmental Policy on Revised Statute 2477 Grant for Right-of-Way for Public Highways; Revocation of December 7, 1988 Policy*, attachment 2-1, p. 2 (January 22, 1997); available at: http://www.highway-robbery.org/documents/1-22-1997_memo_from_Bruce_Babbitt_RS2477_policy.pdf.
SUWA v. BLM discussion	*Southern Utah Wilderness Alliance*, 425 F.3d 735.
Utah suits regarding R.S. 2477 right-of-way claims	Public Lands News, Vol. 37, No. 3, 8-10 (James B. Coffin ed., February 3, 2012).
Federal agencies are uniquely situated to handle and adjudicate the processing of public right-of-ways claims	*See, e.g.*, 43 .FR § 4.1, wherein the USDI, Office of Hearings and Appeals, has historically and efficiently adjudicated public land matters.