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The Law of R.S. 2477 "Public Use" Rights-of-Way in Alaska

by
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I.
INTRODUCTION

This paper reviews the legal principles involved in determining whether a "public use" right-of-way under Revised Statute (R.S.) 2477 has been validly established. The discussion will be primarily limited to the determination of R.S. 2477 public use rights-of-way in Alaska, but examples from other jurisdictions will be cited where there are no relevant Alaska court decisions.

This paper is intended to complement the paper written in 1983 for the Alaska Surveying and Mapping Conference by John W. Sedwick, entitled "The Law of Section Line Easements in Alaska." Although both section line and public use rights-of-way arise from the same federal law (Revised Statute 2477), they have been implemented in considerably different ways, and they have received widely divergent degrees of recognition and certainty from the courts and the general public.

Reference should be made to Mr. Sedwick's paper in order to completely understand how section line rights-of-way across federal public lands in Alaska may have been dedicated

as a matter of law, and how they may still be dedicated on state-owned lands.

II.
BASIC PRINCIPLES OF R.S. 2477

The basic concept of Section 8 of the federal Mining Act of 1866 (which later became "Revised Statute 2477") is that on certain lands owned by the federal government, an offer was extended by the United States to the general public, to establish and use public rights-of-way. One implication inherent in this offer was that these rights-of-way would be lawfully recognized and continued, regardless of the subsequent status and use of the underlying land. How this implication has been implemented in practice is the primary subject which will be discussed in this paper.

Section 8 of the Mining Act of 1866 stated succinctly,

> . . . That the right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

This provision was re-codified in 1878 as Revised Statute (R.S.) 2477. It was later re-codified in 1934 as 43 United States Code Sec. 932. It was repealed in 1976 by Section 706(a) of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. Sec. 1701, et seq.

Two obvious questions arise:

1. How were rights-of-way to be established by public use across lands in Alaska, in acceptance of the grant contained in R.S. 2477?

2. Which of those rights-of-way can be validated and recognized today?

This paper will primarily discuss the first question, since that is the one on which there is the most certainty. The second question, which involves the 1976 FLPMA repeal of R.S. 2477 and right-of-way claims which have not yet been litigated by the claimant or acknowledged by the underlying landowner, has been a subject of considerable activity commencing about 1990. Since that activity has not yet concluded, no attempt will be made to predict its ultimate outcome. However, some general considerations regarding the effect of this current controversy on right-of-way claims in Alaska will be offered.

III.
"PUBLIC USE" RIGHTS-OF-WAY ARE DIFFERENT FROM SECTION LINE RIGHTS-OF-WAY ARISING UNDER R.S. 2477

In order to clarify the relationship of the present paper to the 1983 paper written by John W. Sedwick, it should be understood that throughout the western public lands states, both section line rights-of-way and so-called "public use" (or

"public user"[1]) rights-of-way have arisen from the 1866 federal offer made to the public, to establish rights-of-way across unreserved federal public lands. As the Sedwick paper explained with relation to Alaska (and as was common in most other western states), a territorial or state legislature could take steps to accept the federal right-of-way offer. This was most commonly done by enacting laws which designated all section lines in a particular county, or across the entire state, as centerlines of public rights-of-way of specified width. Alaska first did so by territorial legislation adopted in 1923.

These governmental acts fixed the specific location and width of many public rights-of-way. This type of public acceptance of the federal R.S. 2477 offer has presented a unique series of questions and formulas, particularly in Alaska. See Sedwick paper at pages 25-27. However, none of these considerations is directly relevant to the subject of the present paper. By the terms of the federal right-of-way offer and subsequent court decisions, the 1866 offer could also be accepted by the public at large, or by governmental bodies, by the simple act of actually using a travel route across unreserved federal public domain in a manner which demonstrated

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1 "User" is "the actual exercise or enjoyment of any right or property," Black's Law Dictionary (Rev. 4th ed. 1968), p. 171.

an intent to establish a public right-of-way. Hamerly v. Denton, 359 P.2d 121 (Alaska 1961). This right-of-way could arise regardless of any standard or statutory right-of-way widths, or whether the road or trail conformed to cardinal directions or a surveyed section line. In fact, because the existence or location of section lines plays no part in an R.S. 2477 "public use" right-of-way, questions of whether a surveyed section line exists, and when it was surveyed, need not be considered further with regard to these kinds of easements. It is the public use itself (whether by actual construction or by simple use of a trail or other overland route of travel) which legally creates the R.S. 2477 public use right-of-way.

IV.
REQUIREMENTS FOR ESTABLISHING A VALID R.S. 2477 PUBLIC USE RIGHT-OF-WAY

When discussing the elements of a valid R.S. 2477 public use right-of-way in Alaska, it may first be necessary to make one basic assumption. This assumption is that, for purposes of the present discussion only, R.S. 2477 has not been repealed. This assumption is of course contrary to fact, but it offers a convenient way to examine the "pure" concept of an R.S. 2477 public use right-of-way. The effect of the 1976 repeal of R.S. 2477 on public use right-of-way claims which are first raised in 1994 (or even later) will be discussed subsequently.

Assuming (for purposes of the present discussion only) that the federal right-of-way offer made by R.S. 2477 still remains open for acceptance, the following elements are necessary in order for an individual, or a governmental entity, to create a valid R.S. 2477 public use right-of-way:

1. The "public highways" requirement. The 1866 offer was extended for "public highways." As this phrase implies, the type and amount of travel across the public domain which forms the basis of a public use right-of-way under R.S. 2477 must be "public," and not private. For example, travel across the public domain by a single individual, no matter how frequent or long-standing, might not qualify as a "public" use if the right-of-way was clearly restricted to that person only, and did not extend an equal opportunity to the general public. Luchetti v. Bandler, 777 P.2d 1326 (N.M. App. 1989). However, a lightly-used road which is available to the general public may still qualify as an R.S. 2477 public use road. Leach v. Manhart, 77 P.2d 652 (Colo. 1938).

There is no magic number of individuals whose combined use can demonstrate "public" use. Certainly, the creation and use of a right-of-way by several families, or by a number of unrelated individuals, would offer evidence of the "public" nature of the right-of-way.

In Alaska, recognized public use rights-of-way have arisen (and have later been recognized by courts) through the

process of homesteading and other similar land disposals under federal public land laws. As settlement pressures increased, or as new lands became available, travel routes became recognized and used by numerous persons with similar objectives, and they were sufficient in number to collectively constitute the "public." Hamerly v. Denton, id.

There is no requirement that all members of the public using the claimed right-of-way be using it for the same purposes, or to gain access to the same physical objective or destination. However, the existence of at least one identifiable "terminus" or "destination" at each end of the claimed right-of-way has been emphasized in several cases. Shultz v. Dept. of the Army, 10 F.3d 649 (9th Cir. 1993); Dillingham Comm. Co. v. Dillingham, 705 P.2d 410 (Alaska 1985).

Although the road or trail right-of-way must be for general public use, and cannot be strictly private, it is possible to establish an R.S. 2477 public use right-of-way but nevertheless administer it as a restricted-travel road or a toll road. Wilderness Society v. Morton, 479 F.2d 842 (D. C. Cir. 1973); cert. denied, 411 U.S. 917 (1973); Estes Park Toll-Road Co. v. Edwards, 32 P. 549 (Colo. 1893).

2. The "public lands" requirement. At the time public use of a right-of-way is first begun, the federal land which it crosses must be classified as "public land." United

States v. Rogge, 10 Alaska 130 (D. Alaska 1941); aff'd, 128 F.2d 800 (9th Cir. 1942); cert. denied, 317 U.S. 656 (1942). This is an important distinction which may cause some R.S. 2477 public use right-of-way claims to fail.

Implicit in the "public lands" requirement is that the land be federal public land. There is no parallel R.S. 2477 offer in Alaskan state law which would allow a similar creation of public use rights-of-way across state public domain land. In fact, the Alaska Lands Act at AS 38.05.850 requires that such surface uses be carried out under specific permits and approvals.

The federal "public land" requirement means that the land must be federal "public" land. This means that the land must have been a part of the unreserved federal public domain when use of the R.S. 2477 right-of-way first began. If the land was federally owned, but was subject to an existing homestead entry or a mining claim, for example, the land would not be the required federal "public land" open to creation of an R.S. 2477 public use right-of-way. Clark v. Taylor, 9 Alaska 298 (D. Alaska 1938). Only if the mining claim were abandoned or the homestead claim not proved up, could the land revert to "public domain" status.

The date when the entryman or claimant first initiated a claim to the land (thus segregating it from the public domain and making it unavailable for creation of an

R.S. 2477 public use right-of-way), is very important. Ball v. Stephens, 153 P.2d 207 (Cal. App. 1945); Alaska v. Alaska Land Title Assn., 667 P.2d 714 (Alaska 1983); cert. denied 464 U.S. 1040 (1984). The date when the land was finally patented by the federal government to the claimant is not important, so long as the claim was in fact conveyed, rather than being relinquished back to the federal public domain. It is not uncommon to find a gap of a number of years, or even decades, between an initial homestead entry and the issuance of a patent (whether to the initial entryman or to a subsequent entryman). Nor is it uncommon to find old mining claims in Alaska which have never been patented, but continue to be worked by the claimant, successors in interest, or claim re-locators. The federal public land involved in these examples would not be available for the creation of public use rights-of-way.

However, if the public land records show that an initial land entry or mining claim has lapsed, and the land has subsequently returned to its earlier public domain status, it may be possible to claim that a public use right-of-way which was either started or continued after the land returned to public domain status is a valid public right pre-dating any subsequent entry and conveyance of the underlying land to third parties. Thus, the history of the particular tracts of land crossed by a claimed R.S. 2477 right-of-way is critical in determining whether it was possible for an R.S. 2477

right-of-way by public use to gain a legal foothold in the first instance.

3. The "Not Reserved for Public Uses" Requirement. The final prerequisite which was stated in the 1866 federal offer was that the federal lands involved could not be lands which were "reserved for public uses." This requirement is another aspect of the federal "public domain" question. Many public lands, particularly in Alaska, are owned by the federal government but have been designated for particular public uses or purposes such as national parks, wildlife refuges, national forests, etc. The existence of these "public use" reservations precludes the lands involved from being available for creation of an R.S. 2477 right-of-way. Adams v. United States 3 F.3d 1254 (9th Cir. 1993); Mercer v. Yutan Const. Co., 420 P.2d 323 (Alaska 1966). However, if it can be shown that public use of a right-of-way began before the land was dedicated to the national park, national forest, or other public use, then it may be argued that the right-of-way is valid because the federal offer was accepted before the land became unavailable. Shultz v. Dept. of the Army, id.

There are many types of federal withdrawals and reservations which may make land unavailable for the creation of R.S. 2477 rights-of-way. In addition to the most visible reservations such as national parks, forests, and wildlife refuges created by Congress, there are numerous lesser

withdrawals or dedications which would preclude the creation of an R.S. 2477 right-of-way. Vogler v. United States, 859 F.2d 638 (9th Cir. 1988); cert. denied, 488 U.S. 1006 (1989). Included among these are withdrawals for land selection under the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. Sec. 1601, et seq.; withdrawals for military reservations or for general national defense purposes; and the dedication of designated "school sections" of land for support of the public schools or for land-grant colleges and universities. Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973); cert. denied, 411 U.S. 917 (1973). If the public use of a right-of-way began before surveys designated particular sections as school or university sections, then the right-of-way may be held valid; but if such uses began after the survey was completed and the location of the reserved school sections became fixed, these lands would be unavailable for the subsequent creation of a public use right-of-way under R.S. 2477.

V.
OTHER CONSIDERATIONS

In addition to meeting the prerequisites which are stated in the text of the 1866 federal offer itself, over the past 110 years there have been several refinements of the basic right-of-way offer, as various courts dealt with particular issues and details involved in the creation of R.S. 2477

rights-of-way. Some of the more important details are discussed below.

1. The reason for the public use. There has been little litigation in Alaska which defines the types of public use which can create an R.S. 2477 right-of-way. However, some general observations can be made. First, the use must be for "transportation" purposes, i.e., to go overland from Point A (one terminus) to Point B (the other terminus) on foot, by horseback, by dog sled, or by means of some wheeled or tracked conveyance. (Shultz v. Dept. of the Army, id.). Given the emphasis a recognized, definable "terminus" at each end of the right-of-way, it is not likely that a claimed R.S. 2477 road which generally leads to good hunting, fishing, or recreation country, but which has no concise, defined terminus, may qualify as an R.S. 2477 road. Hamerly v. Denton, id. Dillingham Comm. Co. v. Dillingham, id. Further, at least one court has held that a road for recreational purposes is not a valid R.S. 2477 use, since the original federal offer was made in an era when mining, homesteading and ranching (and not recreation) were primary motivations to "open up" the public domain. Humboldt County v. United States, 684 F.2d 1276 (ith Cir. 1982).

2. The location of the R.S. 2477 right-of-way. An R.S. 2477 right-of-way is located where the public use occurred which has created it. Sprague v. Stead, 139 P. 544 (Colo.

1914); Nicolas v. Grassle, 267 P. 196 (Colo. 1928). In other words, the evidence of public use, as reflected by road construction or merely tracks across the ground, locates the R.S. 2477 right-of-way. It need not be located with reference to any lines on a map (except of course contour lines), nor is it tied to the location of protracted or surveyed section lines. Generally speaking, where the public use has occurred will determine where the right-of-way is located.

The recent decision in the Shultz case has introduced a new element in the R.S. 2477 equation: a recognition that, particularly in Alaska, travel routes must necessarily conform to the realities of summer travel or winter travel. In other words, what may be a feasible travel route in the summertime may not be feasible in the winter, and vice versa. As the court in Shultz pointed out, there may exist more than one acceptable and valid R.S. 2477 right-of-way between two recognized points, depending upon the season. However, a court determination that both a summer route and a winter route have been validly created may not support use of the valid summer route in the winter, for example. Since it is the extent of actual use which gives rise to the right-of-way, if winter use

did not occur on the summer route, then the summer route would be, strictly speaking, valid for that season of the year only.[2]

It therefore appears likely that an R.S.2477 right-of-way may be located (according to the season) in more than one place, depending upon the actual use which has historically occurred. However, this may not mean that in recognizing and validating such a right-of-way, the public or the land management agency has a right to choose the "best" route for the right-of-way, or to choose a single compromise route, or to designate the "most feasible" route. This is simply because where the public use has actually occurred determines where the recognized right-of-way is located.

Even if the validity of an R.S. 2477 right-of-way is unquestioned, the agency managing the underlying land may have no legal obligation to relocate the right-of-way to a more

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[2] In reality, as the court in Shultz recognized, a winter route may legitimately use frozen swamps, streams, etc. as a natural travel route. This consideration introduces an interesting "Alaskan" aspect to the R.S. 2477 issue, since a winter R.S. 2477 route may incorporate frozen water bodies such as swamps, lakes and rivers, while a summertime R.S. 2477 right-of-way could not do so. Virtually all of the reported cases on R.S. 2477 rights-of-way deal with "overland" travel, not travel over water in its liquid state (though at least theoretically, if over-water travel were a segment of a combined water and land route, the entire route might qualify as a valid R.S. 2477 right-of-way). Many of the court cases which have defined R.S. 2477 issues to date have come from the arid western states, where extensive summer or winter travel on non-navigable water bodies is not a significant factor.

feasible route, or a more direct route, or any other route where the original, qualifying right-of-way use did not occur. The agency may, within its statutory authority, designate a new right-of-way to avoid terrain and environmental problems, but this will not be an R.S. 2477 right-of-way. Adams v. United States, id. It will be subject to the permits and controls which the agency requires over any of its non-R.S. 2477 rights-of-way.

3. Extent of Use Necessary to Qualify as a Valid Right-of-Way. There must exist some basic level of public use which a travel route must receive, in order to qualify it as a valid R.S. 2477 right-of-way. Lindsay Land & Live Stock Co. v. Churnos, 285 P. 646 (Utah 1930). The level and extent of use have been the subject of numerous cases arising in state courts throughout the western public land states, although this subject has not received much discussion in Alaska. This issue often arises when it becomes necessary to determine the exact width of an R.S. 2477 right-of-way.[3] Questions about the

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[3] Unlike section line rights-of-way arising under R.S. 2477 (where territorial and state legislatures accepted the federal right-of-way offer by designating a certain width for rights-of-way along section lines), there is usually no statute which arbitrarily determines how wide a "public use" R.S. 2477 right-of-way is. It is the nature and extent of the use which validate and define the right-of-way, and not usually any legislative enactment. However, some states have passed statutes defining the width of all previous public use rights-of-way, or those which are located in the future. Alaska does not have a specific statute which defines unclassified public use right-of-way widths, although a statute enacted in 1963 (AS 19.10.05) specifies official, classified road widths as being 100 feet. Because this statute is applicable only to existing or officially proposed highways, its legal effect is questionable.

extent of qualifying use may arise after the existence of a valid right-of-way is proven, but a dispute subsequently arises over the width of that right-of-way. This often occurs when efforts are made to widen and improve the route, to make it passable by conventional passenger vehicles.

Since it is public use which defines both the location and the size of the right-of-way, it would be logical to conclude that the right-of-way may not be very much wider than the use which qualified it as a right-of-way in the first place. Montgomery v. Somers, 90 P. 674 (Ore. 1907); Clark v. Taylor, id. Several court cases have held that generally, an R.S. 2477 road may be wider than a single track or trail, but is usually narrower than an improved 2-lane highway. Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988); City of Butte v. Mikosowitz, 102 P. 593 (Mont. 1909). For example, a trail which was regularly used by wagons (and which had a width suitable for that purpose) was also used seasonally each year to move flocks of sheep from low country to high meadows, and back again. The court held in that case that the established right-of-way was somewhat wider than the width of the wagon

trail -- but was narrower than the width which might be convenient to move unconfined livestock, since they could be moved within a narrower space if necessary. Bishop v. Hawley, 238 P. 284 (Wyo. 1925); Deseret Livestock Co. v. Sharp, 259 P. 2d 607 (Utah 1953). In general, however, a width necessary to accommodate rudimentary two-way vehicular travel has been upheld, so long as it is consistent with adopted state requirements. Sierra Club v. Hodel, id.

4. Extent of Future Use Permissible on an R.S. 2477 Right-of-Way. Questions regarding the width of an R.S. 2477 right-of-way often arise because the original public use (which created the right-of-way in the first instance) was not extensive enough to accommodate newer uses or increased traffic. In simple terms, if a gold-miner's horse trail is held to be a valid R.S. 2477 right-of-way, can a four-lane highway be built on that trail without acquiring additional property or rights from the underlying landowner? The short answer to this question appears to be "no."

Just as the historic fact of public use determines where the R.S. 2477 right-of-way is located, the extent of that historic use, and not possible future uses, generally determines its width. Clark v. Taylor, id. Although the Ninth Circuit Court in the Shultz case indicate that valid rights-of-way may be found on both summer and winter routes, under existing case law this may not lead to the result that an

all-weather highway could be validly built following either the summer or winter route without obtaining necessary additional land or permission from the underlying landowner. However, a trail may in some instances be upgraded to a basic two-lane road, if that is the state standard applicable generally to such routes. Sierra Club v. Hodel, id.

5. Must an R.S.2477 Right-of-Way be "Constructed" to be Valid? The so-called "construction requirement" has arisen from a literal reading of the R.S. 2477 offer: ". . . the right-of-way for the construction of highways . . . is hereby granted." The formal "construction" of an R.S. 2477 highway by spending public funds and using road-building equipment is perhaps required under state law only in Arizona (see Tucson Consol. Copper Co. v. Reese, 100 P. 777 (Ariz. 1909). Such construction activities, if they have occurred, certainly strengthen an R.S. 2477 right-of-way claim. However, simple public use alone can create a valid R.S. 2477 right-of-way, and there no requirement has arisen from the federal offer itself that a right-of-way must be pre-authorized or funded by the public, or that it be "constructed" (i.e., "built" by direct application of labor, equipment and materials). Most western states (except Arizona) adopt this view. Hamerly v. Denton, id.

VI.
VALIDATING R.S. 2477 CLAIMS TODAY

R.S. 2477 was repealed by Section 706(a) of the Federal Land Policy and Management Act (FLPMA), effective October 21, 1976. However, the repeal language preserved valid R.S. 2477 rights-of-way which were in existence on the date of the repeal. The primary task today, nearly 20 years later, is to determine which existing rights-of-way survived the R.S. 2477 repeal. It is clear that after 1976, no new rights-of-way can be established under R.S. 2477, and that new statutory authority such as FLPMA Sec.501 (43 U.S.C. Sec. 1761) and Title XI of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. Sec. 3161, must be followed in order to acquire rights to build or use new rights-of-way across federal lands.

It might seem a large but relatively straightforward task to catalog all R.S. 2477 right-of-way claims in Alaska, to research their past use, and to show that they were used at some time before October 21, 1976.[4] Beginning in 1990, the State of Alaska's "R.S. 2477 Project" has attempted to do this. Its efforts have resulted in the claim that at least

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[4] Whether they were in use in 1976, or had ceased being used years before, raises questions of claimed right-of-way abandonment which have not been answered with any certainty regarding lands remaining in federal ownership.

five hundred R.S. 2477 rights-of-way may be valid across federal land in Alaska, and that an additional 2,000 claims are worth further research.[5] Eleven of the first five hundred claims are presently being prepared for quiet title litigation against the United States.

One significant problem may arise simply from the passage of time. The FLPMA repeal of R.S. 2477 occurred in 1976, but no litigation has yet been filed against the United States to quiet title to any claimed right-of-way across federal land in Alaska. The federal Quiet Title Act (QTA), 28 U.S.C. 2409a, requires litigation to be filed against the United States within 12 years after a claimant "knew or should have known" of the adverse federal ownership interest in the land. This statute applies to the validation of R.S. 2477 claims. Shultz v. Dept. of the Army, 886 F.2d 1157 (9th Cir. 1989); Park County, Montana v. United States, 626 F.2d 718 (9th Cir. 1980); cert. denied, 449 U.S. 1112 (1981).

If the federal government has continued to allow unrestricted use of a claimed R.S. 2477 route, even after the passage of FLPMA in 1976 and ANILCA in 1980, then perhaps the clock has not yet begun to run under the QTA; it may not begin to run until the federal land managers close the claimed

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5 Letter from Sue C. Doggett, Natural Resource Officer, State of Alaska, to author (Feb. 17, 1994)

R.S. 2477 right-of-way to motor vehicles, for example, or require permits or imposes seasonal restrictions. Shultz v. Dept. of the Army, id. However, if ANILCA, for example, designated the land as a national park or a wilderness area where vehicle travel was forbidden, and if these restrictions were promptly enforced, then the clock may have already run out under the QTA. If more than 12 years has passed after a claimed R.S. 2477 route was closed or restricted, no legal claim against the United States by the State or by the road users can be litigated in federal court. The federal government simply has no legal reason to acknowledge that the claimed R.S. 2477 road exists. Park County, Montana v. United States, id.

VII.
CONCLUSION

The list of potential R.S. 2477 rights-of-way in Alaska is very long, and their potential effect on federal land is great.[6] How many of these claims will meet the 12-year QTA

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[6] This paper does not discuss R.S. 2477 rights-of-way created on federal land which has subsequently passed into private ownership, including Native corporate ownership. This would be a matter of state-court jurisdiction, and the federal Quiet Title Act would not apply. However, the legal effect on private property rights of such doctrines as prescription, easements by necessity, and adverse possession may result from litigation between R.S. 2477 claimants and underlying private landowners. Analogous concepts may also apply to state-owned land, so long as the initial R.S. 2477 right-of-way creation occurred when the land was in unrestricted federal ownership.

test is presently unknown. Even if that obstacle is successfully overcome, a showing that each claimed road was a public highway, that it was validly established over federal public domain lands, and that those lands had not already been reserved for public uses, will be necessary. This will obviously be a very time-consuming and expensive task for land managers, lawyers, and the general public.

Under many circumstances, it may be more cost-effective and quick to simply begin the planning, environmental assessment, and permitting processes which present federal laws such as Title V of FLPMA and Title XI of ANILCA require for new roads across federal lands. In particular situations, however, where it appears unlikely that federal approvals would ever be granted for a new road, it may be more feasible to prove the prior existence of a valid R.S. 2477 road which survived the FLPMA repeal and avoided the QTA time limit.

Under these limited circumstances, however, the eventual results (even if quiet title litigation is successful) may give only limited rights to construct and upgraded a road to a level of service which would make such an expenditure of public funds and time worthwhile. Finally, even a validated R.S. 2477 right-of-way across federal lands will remain subject to federal permits and oversight, which may reduce considerably the "open door" aspects of R.S. 2477 which

are urged by its more enthusiastic proponents. Vogler v.United States, id.; Alexander v. Block, 660 F.2d 1240 (8th Cir. 1981); United States v. Jenks, 804 F. Supp. 232 (D.N.M. 1992).