V. Section 315 of FLPMA: does it authorize R.S. 2477 disclaimers?

This section discusses the Department of Interior's effort to jam a rectangular peg into a square hole. Interior's unprecedented application of Section 315 of FLPMA raises questions of whether the disclaimer tool is the right one for validating R.S. 2477 rights-of-way. Although an analysis by the General Accounting Office (GAO) predicted that Interior's interpretation of section 315 would barely withstand court scrutiny,[100] this section concludes that a court should invalidate any disclaimer of an R.S. 2477 right-of-way as unauthorized by section 315.

A GAO: Interior's interpretation 315 is colorable

The Federal Lands Management Act of 1976 contained several provisions that sought to clean up over a century of disparate management tools. For example, FLPMA addressed the recordation and abandonment of mining claims[101] and the correction of land patents.[102] Section 315 provided for disclaimers of interests. It authorized the Secretary of Interior:

> to issue a document of disclaimer of interest or interests in any lands in any form suitable for recordation, where the disclaimer will help remove a cloud on the title of such lands and where he determines (1) a ***record interest of the United States*** in the lands has terminated by operation of law or is otherwise invalid; (2) the lands lying between the meander line shown on a plat of survey approved by the Bureau or its predecessors and the actual shoreline of a body of water are not lands of the United States; or (3) accreted, relicted, or avulsed lands are not lands of the United States.[103]

Obviously, subparts (2) and (3) do not apply to R.S. 2477 rights-of-way. Consequently, the critical language is "record interest of the United States."

The Department of Interior never satisfactorily explained how a R.S. 2477 right-of-way could be a "record interest of the United States." One year after DOI promulgated the disclaimer

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[100] GAO letter to Honorable Jeff Bingaman dated February 6, 2004, Number B-300912, Subject: Recognition f R.S. 2477 Rights-of-way under the Department of Interior's FLPMA Disclaimer Rules and Its Memorandum of Understanding with the State of Utah [hereinafter, GAO Report].
[101] FLPMA Section 314, 43. U.S.C. § 1744 (2003).
[102] FLPMA Section 316, 43. U.S.C. § 1745 (2003).
[103] 43 U.S.C. § 1745 (a) (2003) (emphasis added).

of interest rule amendments, the General Accounting Office issued its analysis concerning the legality of the disclaimer rule as applied to R.S. 2477 claims.[104] The GAO reported Interior's view that when an R.S. 2477 right-of-way came into existence, it created a separate interest in real property. R.S. 2477 rights-of-way became the dominant estates over the United States' servient estate in the fee.[105] "[U]pon creation of these two interests, a record interest of the United States terminated: its interest in exclusive use of the surface property over which the right-of-way ran."[106] The GAO concluded that if this analysis were challenged, a court would likely defer to the agency interpretation and not find it unreasonable, arbitrary, or capricious.[107]

B. DOI's interpretation is incorrect and impermissible

Although the General Accounting Office found the Department of Interior's interpretation of section 315 colorable, a more careful analysis reveals that DOI's tortured interpretation is neither correct nor permissible.[108] Of course, as the owner of public lands, the United States may convey interests in public land.[109] FLPMA authorizes the grant of new and limited rights-of-way, which differ dramatically from R.S. 2477 rights-of-way.[110] In FLPMA, Congress prohibited the granting of that unique and historic real property interest in public lands.[111] Although Congress authorized disclaimers of recorded interest under some circumstances, unrecorded R.S. 2477 rights-of-way are not among those circumstances. As

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[104] GAO Report, *supra* note 20.
[105] GAO Report, *supra* note 20, at 20.
[106] *Id.*
[107] *Id.*
[108] I distinguish correct from permissible to reflect the issue of deference, if any, to be given to the agency interpretation. Supreme Court justices differ with regard to whether *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) applies with full force when the controversy involves a pure question of statutory construction. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 512 (1989). In, *INS v. Cardoza-Fonseca*, 480 U.S. 421, (1986), the majority distinguished between pure questions of law and questions involving the application of law to facts. It found the question before it to be a pure question of law, well within the province of the judiciary. The Court construed the act before it by analyzing the plain language, its "symmetry" with other law, and the legislative history. *Id.* at 447-449.
[109] U.S. Const., art. IV, §3, cl. 2.
[110] *See supra* notes 41-46 and accompanying text.
[111] FLPMA § 706(1), 43 U.S.C. §1701 note (2003).

explained below, DOI's interpretation is contrary to the plain language of section 315, contrary to the structure of FLPMA, and contrary to congressional mandates preserving congressional control over any new process that would validate R.S. 2477 highways and any agency action that would possibly remove particular uses of large parcels of federal land.

The first question is whether Congress "has directly spoken to the precise question at issue."[112] The precise question is whether the section 315 controls the validation of R.S. 2477 rights-of-way. In deciding whether Congress has directly addressed the question, "a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning -- or ambiguity -- of certain words or phrases may only become evident when placed in context."[113] In *FDA v. Brown & Williamson Tobacco Corp.*, the FDA issued regulations controlling tobacco products because they contain the drug nicotine and because cigarettes and chewing tobacco were considered drug delivery devices.[114] Although the pertinent statute generally authorized the FDA to regulate drug delivery devices, the Court examined the decades-long history of congressional action relating to tobacco regulation, not the particular provision relied upon by the agency for its regulatory authority. Unlike the approach of the GAO in determining whether section 315, in isolation, could possibly authorize disclaimers of R.S. 2477 highways, the *Brown & Williamson* Court cited the "fundamental cannon of statutory construction that the words of a statute must be read in their context with a view to their place in the overall statutory scheme."[115] The Court restated its duty to "interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious

[112] *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984).
[113] Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).
[114] *Id.* at 127.
[115] 529 U.S. at 134 (quoting, Brown v. Gardner, 513 U.S. 115 (1994)).

whole[.]"[116] *Brown & Williamson* concluded that Congress, through various other statutes over decades, made it clear that FDA was not to regulate tobacco, whether or not such regulation fit within the plain language of the jurisdictional statute when considered in isolation. If a court were to apply *Brown & Williamson* scrutiny to DOI's disclaimer of interest rule, it would invalidate the use of that rule to disclaim alleged interests in R.S. 2477 rights-of-way.

The case against the use of section 315 and the disclaimer rule to validate R.S. 2477 claims is stronger than the case against FDA regulation in *Brown & Williamson* because, unlike the text relied upon by the FDA, the plain language of section 315 does not authorize disclaimers of interest for R.S. 2477 highways. Section 315 authorizes the Secretary to quitclaim public lands, "where he determines (1) a ***record interest of the United States*** in the lands has terminated by operation of law or is otherwise invalid[.]"[117] FLPMA does not define "record interest" or "record interest of the United States." In the entire United States Code, the words "record interest" appear in only two other provisions. [118] There is no indication anywhere that "record interest of the United States" has any peculiar meaning different from the general understanding of the term. Generally, "record interest" means a proprietary interest preserved pursuant to the applicable recording act.[119] The purpose of recording acts is to provide a written public record of proprietary interests to notify potential purchasers of existing claims.[120] "Record interest of the United States," then, means a proprietary interest owned by the United States that is documented pursuant to a recording act. [121]

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[116] 529 U.S. at 134 (citations omitted).
[117] 43 U.S.C. § 1745 (a) (2003) (emphasis added).
[118] 15 U.S.C. § 3603 (9) (2003) (definition of cooperative association); 42 U.S.C. § 7913 (2003)(regarding uranium mill tailings processing cite).
[119] *See* 14 RICHARD POWELL & MICHAEL WOLF, POWELL ON PROPERTY §82.01 (2000).
[120] *See id.* at §82.01[3].
[121] Congress could have used a different term, but it did not. *Compare* "record interest of the United States" *with* "real property in which the United States claims an interest," found in the Quiet Title Act, 43 U.S.C. § 2409a(a) (2003).

The error in Interior's interpretation of section 315 (as articulated by the GAO), is that it ignores the prerequisite that the interest to be quitclaimed be a "record interest." Whether or not a valid R.S. 2477 right-of-way terminated the United States' legal "interest in exclusive use of the surface property over which the right-of-way ran[,]"[122] no split estate in land was recorded in any recorder's office.[123] Rather, the United States' recorded interest remained a full fee interest. Consequently, there is no recorded partial interest to quitclaim. The argument of DOI, although creative, does not meet the plain language of section 315, which is not surprising because Congress never contemplated the use of section 315 to convey R.S. 2477 rights-of-way.[124]

In another way, the case against Interior's authority to regulate R.S. 2477 rights-of-way under section 315 arguably is stronger than the case against FDA regulation of tobacco because a court need not go beyond FLPMA to find contrary congressional intent. The *Brown & Williamson* Court searched beyond Food Drug and Cosmetic Act to find legislation indicating that Congress intended to exclude tobacco from FDA regulation. By contrast, the structure of FLPMA indicates Congress did not authorize DOI to regulate rights-of-way over federal lands under section 315. FLPMA consists of seven titles.[125] Title V addressed new rights-of-way, delineating many new requirements for rights-of-way over federal land.[126] Titles V and VII preserve existing rights-of-way.[127] Title VII repealed old laws, including specifically R.S.

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[122] GAO Report at 20.

[123] The author assumes it will be difficult or impossible to uncover in any recorder's office a recorded document in which the United States declared U.S. ownership of a R.S. 2477 highway right-of-way. That is because, as a legal matter, only entities other than the United States could have obtained from the United States a grant for a "right of way for the construction of highways over public lands" pursuant to R.S. 2477.

[124] Nothing in the legislative history or structure of FLPMA indicates that Title III generally, or Section 315 specifically, was intended to address R.S. 2477 rights of way. To the contrary, FLPMA addressed rights-of-way elsewhere in Titles V, 43 U.S.C. §§ 1716-1771 (2003), and repealed old right-of-way laws in Title VII. 43 U.S.C. § 1701 note (2003).

[125] Pub. L. No. 94-579, 90 Stat. 2743 - 2794 (1976).

[126] 43 U.S.C. §§ 1716-1771 (2003).

[127] 43 U.S.C. &§ 1769 and 1701 note (2003)

2477.[128] Neither Title V nor Title VII refers to, or incorporates by reference, section 315. Title III (of which Section 315 is a part) does not cross-reference R.S. 2477, specifically, or old rights-of-way generally.[129] Title III does not mention or regulate non-federal rights-of-way over public lands.[130] Consequently, FLPMA's structure maintained strict separation between rights-of-way and disclaimers of interest. Under *Brown & Williamson,* Congress "has directly spoken to" the issue of R.S. 2477 rights-of-way in separate titles and separate sections, which argues strongly against a finding that Section 315 controls unrecorded interests in rights-of-way.

Interior's purported authority to disclaim unrecorded rights of way under section 315 also conflicts with other indirect and direct expressions of congressional intent. The first policy goal declared in FLPMA was to retain public lands in federal ownership.[131] FLPMA sought to protect wilderness in a variety of ways, including a ban against new rights-of-way in wilderness areas,[132] and a bar against selling public lands located in the National Wilderness Preservation System, National Wild and Scenic River Systems and National System of trails.[133] With respect to land use plans, Congress retained strict oversight of any management decision that would eliminate a land use for two or more years on a parcel of one hundred thousand acres or more.[134] Disclaimers of R.S. 2477 rights-of-way would undermine such congressional oversight because the claims, if granted, could eliminate wilderness use of land, forever, on millions of acres.[135] The above provisions together with the explicit congressional ban on R.S. 2477 rulemaking[136] indicate that Congress withdrew any authority in the DOI to issue quitclaim documents for R.S.

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[128] FLMPA § 706(a), 43 U.S.C. § 1701 note (2003) (repeals R.S. 2477).
[129] Pub. L. No. 94-579, 90 Stat. 2743, 2762-2772 (1976).
[130] *Id.*
[131] 43 U.S.C. § 1701(a)(1) (2003).
[132] 43 U.S.C. § 1761(a)(1) (2003).
[133] 43 U.S.C. §1713 (a) (2003).
[134] 43 U.S.C. § 1712(e)(2) (2003).
[135] *See supra* notes 61-65 and accompanying text.
[136] *See supra* notes 68-69 and accompanying text.

2477 rights-of-way that may permanently defeat wilderness uses in millions of acres of public lands.[137] DOI's tortured interpretation of Section 315 is inconsistent with these congressional mandates. Consequently, under *Brown & Williamson,* DOI's interpretation of Section 315 as authorizing disclaimers of R.S. 2477 rights-of-way is not entitled to deference.

VI. Utah / DOI Memorandum of Understanding

Before President Bush appointed him Administrator of the Environmental Protection Agency, Utah Governor Mike Leavitt entered into a Memorandum of Understanding (MOU) with the Department of Interior pertaining to R.S. 2477 claims.[138] This section analyzes the MOU from two perspectives. First, it argues that the MOU is a "rule" in violation of the congressional ban on rulemaking[139] and section 310 of FLPMA.[140] Second, it notes the MOU's failure to incorporate explicitly those substantive standards required by R.S. 2477 and FLPMA that have been the most difficult for counties to prove. This part argues that any administrative validation of an R.S. 2477 right-of-way that lacks substantial evidence in the administrative record of all statutory elements will be vulnerable to legal challenge.

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[137] *See also* GAO Report, *supra* note 100, at 9-10, n. 14, *citing* 141 Cong. Rec. S17530-08 (1995) (quoting Senator Hatch regarding rulemaking pertaining to R.S. 2477: "we are beyond a regulatory fix on this subject).

[138] On June 11, 2002, the White House announced the appointment of Governor Leavitt to the Homeland Security Advisory Council. http://www.whitehouse.gov/news/releases/2002/06/20020611-6.html (last visited March 5, 2003). The MOU is dated April 9, 2003. The White House Announced the appointment of Governor Leavitt to Administrator of EPA on August 11, 2003. http://www.whitehouse.gov/news/nominations/767.html (last visited March 5, 2003).

[139] *See supra* notes 68-69 and accompanying text. Three months before signing the Utah MOU, the Department of Interior, promulgated amendments to rules controlling the issuance of disclaimers of interest. 68 Fed. Reg. 494 (2003) (amending 43 C.F.R. part 1860). During the rulemaking, public comments questioned the authority of BLM to promulgate the amendments because of the congressional ban on rules "pertaining to the recognition, management, or validity" of R.S. 2477 rights-of-way. *Id.* at 495 & 496. BLM acknowledged the ban, but insisted the "rulemaking pertains only to disclaimers and not to any assertions made by various entities for R.S. 2477 claims." *Id.* at 496, 497-498. Despite BLM's concession that it may not promulgate rules pertaining to the recognition, management or validity of R.S. 2477 claims, BLM changed the disclaimer rules to assist and encourage counties to submit applications for disclaimers of interests to validate R.S. 2477 rights-of-way. In fact, in a remarkable display of forked-tongue dexterity, BLM also asserted, in the very same preamble, that "BLM may issue a recordable disclaimer of interest to disclaim the United States' interest in a highway right-of-way under R.S. 2477. *Id.* at 496

[140] 43 U.S.C. § 1740 (2003).

A. MOU is an unlawful rule.

The Department of Interior and Utah entered into a Memorandum of Understanding,[141] which purports to establish a process to acknowledge roads by issuing recordable disclaimers of interest.[142] In determining the validity of R.S. 2477 rights of way, the MOU recited that Interior will not use existing DOI standards.[143] Instead, Interior listed certain "characteristics," which omit statutory elements.[144] One question is whether the MOU constitutes a "rule" in violation of the congressional ban against rulemaking "pertaining to the recognition, management, or validity of a right-of-way pursuant to Revised Statute 2477[.]"[145]

A rule is "an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy describing the organization, procedure or practice requirements of an agency[.]"[146] The most important aspect of the definition is the element of "future effect."[147] Clearly, the MOU is an agency statement "of general or particular applicability and future effect" because it establishes a process and sets standards for resolving future claims, as distinguished from an adjudication that would resolve a present claim regarding particular segments of particular highways. Consequently, the MOU meets this portion of the definition of what constitutes a "rule."[148]

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[141] http://www.ut.blm.gov/rs2477/default.htm (last visited January 30, 2004). BLM considers the Utah agreement a model; it has invited other states to submit proposed agreements "that are generally consistent with" the Utah MOU. http://www.doi.gov/news/moutalkingpoints.htm (last visited January 30, 2004)

[142] MOU § 4.

[143] MOU §7 states that the policy dated January 22, 1997 (Babbitt Memo) "shall be inapplicable."

[144] MOU §3.

[145] Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-200 (1996). According the GAO report, *supra* note 100, it does violate the ban.

[146] 5 U.S.C. § 551(4) (2003).

[147] 3 J. STEIN, G. MITCHELL AND B. & P. MEZINES, ADMINISTRATIVE LAW §13.02[4] (1997) and authorities cited therein.

[148] *See also* GAO Report at 11, which cites Lefevre v. Secretary, Dep't of Veterans Affairs, 66 F.3d 1191, 1196-76 (Fed. Cir. 1995)("The determination was a rule because. . . it prescribed the basis on which the Department would adjudicate every claim").

On the other hand, not all guidance documents and policy statements that apply to the future constitute rules. Nonbinding action that merely expresses an agency's interpretation, policy or internal practice or procedure is not a "rule."[149] The critical difference is that a rule binds the agency and affected persons;[150] a rule cannot be changed by the next administration without the required public procedures.[151] The Utah Memorandum of Understanding takes the form of a contract with a list of recitals preceding the substantive provisions, which start under the heading, "NOW, THEREFORE, THE PARTIES STIPULATE AND AGREE AS FOLLOWS[.]" Paragraph 14 of the MOU bolsters this clear and binding contract language. Paragraph 14 states that the MOU "shall not be construed as creating any right or benefit, substantive or procedural, enforceable a law or in equity by a party against" Utah, its counties or the United States. By omitting a similar provision stating that the MOU creates no enforceable rights as against the United States, the MOU purports to tie the hands of future administrations. Consequently, the MOU binds the United States like a rule (perhaps even more so) and unlike a changeable policy statement.

Another characteristic of a "rule" under the Administrative Procedure Act is that it must "implement, interpret or prescribe law or policy or describe[] the organization, procedure or practice requirements of an agency[.]"[152] If the statement establishes a new binding norm, it is a

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[149] Batterton v. Marshall, 648 F.2d 694 (D.C. Cir. 1980).
[150] STEIN MITCHELL & MEZINES, *supra* note 147, at §1303[1]; Molycorp, Inc. v. EPA., 197 F.3d 543, 546 (D,C, Cir, 1999).
[151] 5 U.S.C. § 553 (2003); Thomas v. New York, 802 F.2d 1443 (D.C. Cir. 1986), *cert. denied,* 482 U.S. 918(1987) (agency statement binding subsequent EPA administrator constituted a rule).
[152] 5 U.S.C. § 551(4) (2003); *E.g.,* Angle v. United States, 709 F.2d 570 (9th cir. 1983) (Interior Secretary's memo. allowing late filings of claims constituted a rule.); Reynolds Metals Co. v. Rumsfeld, 564 F.2d 663 (4th Cir 1977) (MOU providing that complaints deemed to be EEOC charges was a "rule."), *cert. denied,* 435 U.S. 995 (1978); Herron v. Heckler, 576 F. Supp. 218 (N.D. Cal. 1983) (Provisions of claims manual constituted rules.); Pueblo of Laguna v. Assistant Sec'y of Indian Affairs, 90 I.D. 521 (1983) (DOI procedures to provide uniformity in decision making was a rule.); Shoshone & Arapahoe Tribes v. Commissioner of Indian Affairs, 89 I.D. 200 (1982) (memo purportedly interpreting existing rule regarding benefit eligibility was a "rule").

rule.[153] In contrast, a policy that does not effect a substantive change but simply states what an agency thinks a statute means and only reminds affected parties of existing duties is not a "rule."[154] As described below, the Utah MOU purports to effect substantive changes.[155]

In the MOU, Interior acknowledges its obligation to scrutinize R.S. 2477 claims pursuant to "applicable statutes and regulations and the terms of this MOU."[156] DOI undercuts this acknowledgment, however, by identifying "characteristics" of roads eligible for disclaimers of interest that omit the critical and controversial statutory requirements. Most importantly, the MOU "characteristics" fail to mention explicitly that any highway must have been (1) constructed (2) at a time when the public lands were unreserved. Instead, the MOU requires, "the existence of the road prior to the enactment of FLPMA[.]"[157] Mere "existence" of a road would include both those highways constructed at a time when the public lands were not reserved and roads that were created by beaten paths on reserved or unreserved lands.[158] In light of the controversy over construction, the absence of the word "construction" from the MOU is a telling omission and effects a significant policy reversal. Construction is a necessary condition precedent to perfecting a R.S. 2477 right-of-way and was an essential element to an R.S. 2477 claim during the Clinton Administration.[159] This significant, substantive policy shift meets the final element necessary to find that the MOU is a "rule."

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[153] Pacific Gas & Elec. Co. v. Federal Power Comm'n., 506 F.2d 33 (D.C. Cir. 1974) (Agency policy statement that does not establish a binding norm is not a rule.)
[154] General Motors Corp. v. Ruckelshaus, 742 F.2d 1561 (D.C. Cir. 1984), *cert. denied,* 471 U.S. 1074 (1985).
[155] *See also* Table 1 on the following page.
[156] MOU §4.
[157] MOU § 3(c) (emphasis added).
[158] *See supra* notes 11 & 78-80 and accompanying text. *But see,* Memorandum from BLM Deputy Director Jim Hughes, (June 25, 2003), which lists examples of the "type of information that would assist BLM in processing an application" for a R.S. 2477 disclaimer of interest. http://www.ut.blm.gov/rs2477/bgmemo.htm (last visited January 30, 2004). The non-mandatory list includes a "narrative" as to when the right-of-way was constructed and evidence of how the claimed right of way was established. *Id.*
[159] R.S. 2477; Board of Commissioners of Douglas County Washington, 26 I.D. 446 (1898) (declaration of roads, as compared to construction, not sufficient); Preamble to proposed rules, 59 Fed. Reg. 39216-01, 39219-200 (August 1, 1994); Babbitt Memorandum of 1997; Southern Utah Wilderness Alliance v. Bureau of Land Management, 147 F.

The MOU makes other substantive policy changes that bolster the conclusion that the MOU constitutes a "rule." (Table 1 summarizes substantive changes) The MOU softens the requirement of a "highway." In fact, the drafters, somehow, avoided using the word "highway." The MOU requires that a qualifying road "was and continues to be public and capable of accommodating automobiles or trucks with four wheels and has been the subject of some type of periodic maintenance.[160] As used by Congress, "highway" has always included the concept of a significant public thoroughfare to get people from one place to another,[161] as compared to merely affording off-road vehicle users access to remote areas. The MOU, however, seems to encompass both thoroughfares and any passable route, contrary to the statutory requirement of a "construction of highways" as a condition precedent for granting a right-of-way. Yet another substantive change is that Interior promised to quitclaim the width of the right-of-way as measured by the width of the ground disturbance as of the date of the MOU in 2003, instead of 1976, when FLPMA became law.

For the reasons set forth above, the MOU qualifies as a "rule" under law. Certainly, the MOU "pertain[s] to the recognition, management, or validity of a right-of-way pursuant to Revised Statute 2477[.]"[162] Consequently, the MOU violates the congressional ban against such

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Supp.2d 1130 (D Utah 2001), *appeal dismissed,* 2003 WL 21480689 (10th Cir 2003) (unpublished opinion). "The Department of Interior has consistently maintained that construction must have taken place." Pamela Baldwin, *Highway Rights of Way: The Controversy Over Claims Under R.S. 2477* CRS REPORT FOR CONGRESS CRS 27 (1993).

[160] MOU § 3(d). Compare this language with the definition of roadless area in 43 C.F.R. § 19.2(e), which includes an area within which "there is no improved road that is suitable for public travel by means of four-wheeled, motorized vehicles intended primarily for highway use." Definition of roadless area implies that if a Ford Mustang can't roll over it, it is not a road. However, the MOU seems to cover jeep trails that would destroy the Mustang.

[161] A thorough discussion of the meaning of "highway" as of 1866 is found in Pamela Baldwin, *Highway Rights of Way: The Controversy Over Claims Under R.S. 2477* CRS REPORT FOR CONGRESS (1993).

[162] Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-200 (1996).

rulemaking.[163] Also, as a "rule" the MOU also violates section 310 of FLPMA, which required APA rulemaking for rules promulgated pursuant to FLPMA.[164]

B. Watchdogging in Utah

At the time of this writing, Utah's Juab County has applied for a disclaimer of interest in the "Weiss Highway."[165] The photos of certain locations along the Weiss Highway show a constructed roadway.[166] Apparently, this first use of BLM's (illegitimate) disclaimer process under the Utah MOU is with a relatively non-controversial road. Nevertheless, the BLM website does not indicate whether the pictures were taken in 2004 or 1975. There is no indication whether the public lands along the entire length of the highway were reserved or unreserved at the time of construction. If and when BLM grants Juab County a Recordable Disclaimer of Interest, there will be a final action subject to review. If the BLM decision granting the recordable disclaimer of interest does not explicitly find that Juab County constructed the highway on nonreserved lands before October 21, 1976, then the decision might be challenged on the grounds that it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[167] If the decision merely recites that the road "meets all legal requirements" but the administrative record does not contain evidence showing construction at a time when the lands were unreserved, then the decision may be challenged as not supported by substantial evidence.[168]

VII. Conclusion.

Certain counties are trying tenaciously to establish rights-of-way over public lands using

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[163] For a further discussion of this topic, which reaches the same conclusion, *see* GAO letter to Honorable Jeff Bingaman dated February 6, 2004, Number B-300912, Subject: Recognition of R.S. 2477 Rights-of-way under the Department of Interior's FLPMA Disclaimer Rules and Its Memorandum of Understanding with the State of Utah.
[164] 43 U.S.C. § 1740 (2003).
[165] http://www.ut.blm.gov/rs2477/claims.htm (last visited Feb. 6, 2004).
[166] http://www.ut.blm.gov/rs2477/weisshighway.htm (last visited March 5, 2003).
[167] 5 U.S.C. §706 (2)(A) (2003).
[168] 5 U.S.C. §706 (2)(E) (2003).

Comparison of R.S. 2477 Standards

Statutory Elements	Clinton Administration	DOI / Utah Memorandum of Understanding
Route must be a highway[1]	Route must be a highway in the sense of a public thoroughfare [2]	"Highway" not mentioned. Refers to public roads[3]
Highway must have been "constructed" by grantee[4]	"Construction" means intentional physical act(s) to prepare durable, observable physical modification of land for use by highway traffic.[5]	No mention of "construction." Mentions "some type of periodic maintenance."[6]
Highway must have been constructed on unreserved public land[7]	Constructed when land not withdrawn, reserved or otherwise unavailable.[8]	No mention of the distinction between reserved or unreserved lands.
Construction before October 21, 1976[9]	Construction before October 21, 1976[10]	No mention of construction at any time.
R.S. 2477 right-of-way must have existed as of October 21, 1976.[11]		Existed before October 21, 1976[12]
	[considering the congressional ban,] defer processing R.S. 2477 claims unless compelling need.[13]	Bring them on.[14]
		U.S will disclaim width of "ground disturbance that currently exists" as of April,.2003.[15]
	Revokes 1988 DOI policy[16]	Revokes 1997 DOI policy.[17]

[1] R.S. 2477
[2] January 22, 1997 Memorandum of Secretary Babbitt [hereinafter Babbitt Memo.].
[3] MOU § 3 d.
[4] R.S. 2477
[5] Proposed Regulation, 59 Fed. Reg. 39216-01, 39225 (1994); Southern Utah Wilderness Alliance v. BLM, 147 F. Supp.2d 1130 (D Utah 2001) (upholding Clinton-era construction standard), *appeal dismissed,* 2003 WL 21480689 (10th Cir 2003) (unpublished opinion).
[6] MOU § 3 d.
[7] R.S. 2477
[8] Babbitt Memo.
[9] FLPMA § 701(a) preserved "valid" rights-of-way. 43 U.S.C. §1701 note (2003).
[10] Babbitt Memo
[11] FLPMA § 701(a) preserved valid rights-of-way "existing on the date of approval of this Act." 43 U.S.C. §1701 note (2003).
[12] MOU § 3(c).
[13] Babbitt Memo.
[14] MOU recital no. 11.
[15] MOU § 5.
[16] Babbitt Memo.
[17] Revokes with respect to claims under MOU. MOU § 7.

Table 1 - Comparison of R.S. 2477 Standards

an 1866 law known as R.S. 2477, which was repealed in 1976. Their claims may defeat future designations of wilderness areas and impair the wilderness qualities of existing wilderness areas. The Bush Administration has devised a "disclaimer of interest" scheme to validate R.S. 2477 claims that is inconsistent with the Federal Land Policy and Management Act of 1976. This article has been critical of the new process.

The disclaimer process allows counties to seek a quitclaim-like document for a right-of-way under R.S. 2477. The paper argued that the disclaimer scheme is not authorized by section 315 of Federal Land Policy Management Act of 1976. Section 315 was limited to disclaiming recorded interests of the United States, and a R.S 2477 right-of-way is not a "record interest[s] of the United States." The paper contends that Utah Memorandum of Understanding (MOU), which articulated new and binding standards for validating rights-of-way under the disclaimer process, constitutes a rule in violation of the congressional ban against rulemaking pertaining to R.S. 2477 and the requirement of APA rulemaking. Furthermore, the Utah MOU's criteria for evaluating and validating R.S. 2477 claims omit essential elements of a R.S. 2477 claim. If the Bush Administration grants the claims without evidence or findings on essential elements, then the decisions may be challenged

If the goal of the Bush Administration was to quickly and finally resolve R.S. 2477 disputes through the disclaimer of interest process, it is doomed to fail. By violating the congressional ban on R.S. 2477 rulemaking and encouraging claims that may be deficient, the new disclaimer scheme will result in decisions that are vulnerable to legal challenges. Consequently, the Bush disclaimer scheme will not definitively quiet titles or squelch the long-running battle between wilderness advocates and wilderness opponents over the interpretation and use of R.S. 2477. It only opened a new front in an old war.