Order Code RS21402
Updated May 22, 2006

Federal Lands, R.S. 2477, and "Disclaimers of Interest"

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Summary

An 1866 statute known as R.S. 2477 granted rights of way for the construction of highways over unreserved public lands. On January 6, 2003, the Department of the Interior published broad new "disclaimer of interest" regulations under § 315 of the Federal Land Policy and Management Act of 1976 and stated that disclaimers would be used to acknowledge R.S. 2477 rights of way. Congress has directed that no rules "pertaining to" recognition or validity of an R.S. 2477 rights of way can be effective unless authorized by Congress, and the use of disclaimers in the R.S. 2477 context may be controversial. More recently, DOI has issued new guidance regarding recognition of R.S. 2477 rights of way that again mentions the use of disclaimers for that purpose. This report discusses R.S. 2477 rights of way, the disclaimer regulations and DOI guidance, the congressional directive, and legislation. It will be updated as warranted.

Background. An 1866 statute that became Revised Statutes § 2477 stated that "... the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."[1] The Federal Land Policy and Management Act of 1976 (FLPMA)[2] repealed this act but also protected valid R.S. 2477 rights of way in existence at the time of repeal. Certain rights of way asserted under R.S. 2477 may be controversial because they run either through undeveloped areas that might otherwise qualify for wilderness designation or across lands that are now private or included in federal reserves (such as parks or national forests).

[1] Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253, codified in 1873 as § 2477 of the Revised Statutes, recodified in 1938 as 43 U.S.C. § 932. For a more complete discussion of R.S. 2477 issues, see CRS Report RL32142, *Highway Rights of Way on Public Lands: R.S. 2477 and Disclaimers of Interest*, by (name redacted).

[2] P.L. 94-579, 90 Stat. 2770, 43 U.S.C. § 1745.

On January 6, 2003, the Department of the Interior (DOI) published new final regulations on "disclaimers of interest"[3] issued under § 315 of FLPMA. These new regulations amend existing disclaimer regulations at 43 C.F.R. Part 1860, Subpart 1864, to allow states, state political subdivisions, and others to apply for disclaimers, dropping requirements from the previous regulations that a claimant must be the owner of record, and creating exceptions to the 12 year statute of limitations. A disclaimer is a recordable document in which the United States declares that it has no property interest in land. The issuance of a disclaimer can help remove a cloud from land title because it has the same effect as though the United States had conveyed any interest it has. The explanatory materials published with the new rule assert that the rule is completely separate from determinations of the validity of "R.S. 2477" rights of way claims, yet also stated that disclaimers would be used to acknowledge R.S. 2477 rights of way. Initially, the DOI executed a Memorandum of Understanding (MOU) with the state of Utah (and negotiations were begun with other states) to acknowledge R.S. 2477 rights of way by issuing disclaimers. Several applications for disclaimers were published but later withdrawn.[4] The relationship between the disclaimer regulations and R.S. 2477 determinations is controversial because Congress in § 108 of P.L. 104-208 stated that no rules "pertaining to" recognition or validity of R.S. 2477 rights of way could be effective unless authorized by Congress.

On March 22, 2006, DOI issued new R.S. 2477 guidance that rests on the 10th Circuit case *Southern Utah Wilderness Alliance v. Bureau of Land Management*.[5] This guidance purports to be a policy document and not to impose binding obligations on the agency or private parties, and therefore DOI asserts that it is not inconsistent with P.L 104-208. The policy repeals previous R.S. 2477 policies and directs that the approach taken in the *SUWA* case be followed even beyond the 10th Circuit jurisdiction. This approach allows a broad role for state law in determining compliance with the elements of a valid R.S. 2477 right of way.[6] DOI directed the termination of the MOU with Utah as "inoperative in light of the *SUWA* decision." It is not clear why this would be so, except that the court in the *SUWA* case distinguished between instances when federal land agencies might need to make R.S. 2477 determinations to carry out executive functions related to the lands — such as planning — from instances involving determinations of legal title to real property. "The latter is a judicial, not an executive, function. It is one thing for an agency to make determinations regarding conditions precedent to the passage of title, and quite another for the agency to assert a continuing authority to resolve by informal adjudication disputes between itself and private parties who claim that they acquired legal title to real property interest at some point in the past." The court noted instances in which the Bureau of Land

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[3] 68 Fed. Reg. 494.

[4] See, e.g., 69 Fed. Reg. 6000 (February 9, 2004), later withdrawn when it became apparent the road in question was federally constructed.

[5] 425 F. 3d 735 (10th Circuit 2005).

[6] Issues remain, however, in that it can be argued that the court looked to the common law meaning of the terms used in R.S. 2477 (including, e.g. that "highway" could include a river), rather than on the historical context and terms of congressional enactments involving roads; merged "acceptance" by a state for purposes of state maintenance and tort liability with acceptance by a state of the terms of the federal grant; and relied on state cases that did not involve the federal government or its interests.

Management and other agencies resolved title questions in court, rather than deciding them.[7]

DOI acknowledged in its 2006 guidance that *SUWA* found that BLM lacks the authority to make binding determinations on the validity of R.S. 2477 rights of way, yet the guidance also states that disclaimers "remain available to settle questions regarding the United States' interest in rights of way. Such disclaimers have the same effect as a quitclaim deed, estopping the United States from asserting a claim to the interest that is disclaimed." Arguably, use of administrative disclaimers in the context of disputed R.S. 2477 highways could constitute a binding administrative determination relating to title and hence may be inappropriate or invalid.[8]

What Are R.S. 2477 Rights of Way and Why Are They Controversial? R.S. 2477 rights of way are those obtained under an 1866 statute, reenacted as § 2477 of the Revised Statutes, and later repealed by § 706 of FLPMA. The 1866 statutory language was succinct, stating simply that "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Section 701 of FLPMA provided that valid rights of way in existence at the time of repeal in 1976 were to be recognized. In most states it was clear which highway beds were valid because there had been an acceptance process under state law (e.g. county maintenance or formal recognition). In a few states, however, there was no clear system of acceptance or recording and the existence and recognition of the highways as a factual matter was not always clear. In these circumstances determining whether a way qualifies as a R.S. 2477 "highway" can be difficult because the meaning of "construction," "highway," and "not reserved" in the federal granting language and the appropriate scope of the role of state law have been controversial. The issues are significant because areas traversed by asserted R.S. 2477 highways may be disqualified from consideration for possible inclusion in the National Wilderness Preservation System, or might now be private lands, or federal reserves such as parks or national forests created after the establishment of the rights of way. On the other hand, validating R.S. 2477 rights of way may increase access to and across the federal lands and facilitate economic development.

FLPMA § 315 Regulations. Section 315(a) of FLPMA authorizes the Secretary to issue disclaimers when a property interest of the United States has terminated or is invalid, and reads in part:

> After consulting with any affected Federal agency, the Secretary is authorized 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

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[7] SUWA, supra, 2005 U.S. App. LEXIS 19381 at * 40.

[8] Yet the court also, in commenting on the issue of burden of proof, stated at *90 in note 20 that "[t]he burden may be different in cases where the R.S. 2477 claim has previously been adjudicated, or where there is a federal disclaimer of interest, memorandum of understanding, or other administrative recognition. We have no occasion in this case to opine on the legal effect of such administrative determinations." Given that a disclaimer has the same effect as a quitclaim deed by the United States, it is difficult to see how the court could conclude on the one hand that an executive agency may not properly decide title issues but then also intimate that agency disclaimers renouncing title could nonetheless affect title adjudications. See discussion of administrative disclaimers, *infra*.

> such lands and where he determines (1) a record interest of the United States in lands has terminated by operation of law or is otherwise invalid; or ....[9]

Section 315(c) states that a recordable federal disclaimer of interest has an *effect* equivalent to a quitclaim deed. The original disclaimer regulations add that although a disclaimer does not actually convey title,[10] presumably because the disclaimer indicates there is no title interest of the United States to be conveyed, it may stop the United States from later asserting a claim to the lands. These regulations also state that the purpose of the procedure is to eliminate the necessity for court action in the circumstances set out in § 315. The previous regulations limited those who could apply to use the procedure to "any present owner of record,"[11] a limitation that does not appear in the statute. The new regulations allow any entity to file an application for a disclaimer, and also provide that although most applicants must file within 12 years of the time they knew or should have known of a claim of the United States, this time limitation does not apply to states. The explanatory materials indicate that this is to make the § 315 regulations consistent with the Quiet Title Act (QTA), which has a strict 12-year limitation, except for states — and "state" has been narrowly construed, such that counties and other subdivisions of a state cannot avail themselves of the exception.[12] However, the new disclaimer regulations also add a definition of "state" as including state political subdivisions and "any of its creations," and "other official local governmental entities." This language is not elaborated on, but appears to include any independent commission or body a state (or possibly a county) might choose to create for any purpose,[13] which implies that these entities may now seek disclaimers even though they could not undertake a suit under the QTA.

Scope of FLPMA §315 Disclaimers. What were the intended uses and scope of § 315? There is little legislative history of § 315, except that it was to be used when the United States had no interest in certain lands, and it was to eliminate the necessity for court action or private relief legislation in that circumstance.[14] Absent more detailed legislative history to indicate the intent of Congress, a court might look to other provisions and to the history of title disputes.

Historically, it was difficult to correct title problems involving the United States. The United States, as the federal sovereign, is immune from suit (but may waive its sovereign immunity), and one cannot "adversely possess" property against the United States and thereby obtain title. Typically, special acts of Congress were used to clear up title problems. The Supreme Court has held that the Quiet Title Act (QTA) of 1972[15] is now the exclusive means by which adverse claimants can challenge the United States'

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[9] 43 U.S.C. § 1745(a).

[10] 43 C.F.R. § 1864.0-2(b).

[11] Former 43 C.F.R. § 1864.1-1(a).

[12] See, e.g., Calhoun County v. United States, 132 F. 3d 1100, 1103 (5th Cir. 1998).

[13] A computer search of the U.S. Code finds no instance where Congress has approved a similar definition of "state."

[14] S.Rept. 94-583 at 50-51 (1975).

[15] P.L. 92-562, 86 Stat. 1176, 28 U.S.C. § 2409a.

title to real property in court.[16] The Court has held that the waiver of sovereign immunity in the QTA is to be construed narrowly in favor of the United States.[17] The QTA mentions that the United States may file disclaimers of interest during the course of a QTA suit, and cases indicate that if a court confirms the disclaimer, further jurisdiction of the court ceases.[18] However, the cases also make clear that the QTA is the exclusive judicial remedy for controverted claims, and that a court may refuse to confirm a disclaimer of interest issued in the context of a QTA suit.[19]

FLPMA was a complicated and detailed statute that developed over several years to consolidate and modernize the statutes on the remaining public domain lands managed by the Bureau of Land Management. One of the major policy changes of FLPMA was to put in place a policy of retention of the remaining federal lands, unless certain facts justifying disposal are present.[20] The general policy of the government is that there must be some authority for the disposal of federal property to be lawful.[21] Issuance of a disclaimer is not a conveyance but indicates that there is no interest of the United States in a particular property. Given the FLPMA policy of retention of lands, an argument may be made that a conservative interpretation of the scope of §315 is prudent, and the process should not be used to determine title. On the other hand, the brevity of § 315 and the sparse legislative history may allow a considerable range of discretion to the Secretary.

It also is not clear whether the disclaimer process can be used to disclaim less than a full fee title interest in lands, or, if so, whether disclaimers are appropriate in the R.S. 2477 context. The explanatory materials with the new regulations note that there have been only 62 disclaimers issued under § 315 since its enactment in 1976,[22] and none resolved R.S. 2477 issues.

Congressional Language on Regulations "Pertaining To" R.S. 2477. Language enacted by Congress relative to R.S. 2477 may apply to the expansion of the availability of disclaimers to adjudicate and acknowledge R.S. 2477 claims. Following the issuance of proposed R.S. 2477 regulations in 1993 that generated controversy, Congress enacted a prohibition on using appropriated funds to promulgate or implement a rule concerning R.S. 2477 rights of way. This approach was reiterated and broadened in the 1997 Omnibus Appropriations Act which stated:

> 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

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[16] Block v. North Dakota, 461 U.S. 273 (1983).

[17] Id. at 287.

[18] 28 U.S.C. § 2409a(e).

[19] LaFargue v. United States, 4 F. Supp. 2d 580 (E.D. La. 1998).

[20] 43 U.S.C. § 1701(a)(1).

[21] 18 U.S.C. § 641.

[22] 68 Fed. Reg. 498.

> 2477 (43 U.S.C. 932) shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act.[23]

Similar statutory language was deleted from the Interior Appropriations Act for FY1998 in reliance on the assertion that the language in the 1997 Act was permanent law and hence an additional enactment was unnecessary.[24] There have been no further statutory prohibitions since and no further attempts at R.S. 2477 regulations. Committee report language states that the statutory language "does not limit the ability of the Department to acknowledge or deny the validity of claims under R.S. 2477 ...."[25] The Clinton Administration submitted a legislative proposal on R.S. 2477, but it was not introduced.

Arguably, § 108 of P.L. 104-208 technically only prevents rules that set out specific standards for R.S. 2477 rights of way,[26] and is unrelated to the disclaimer rule changes.[27] It can also be argued that the Utah MOU and the new DOI guidance confirm that the new disclaimer regulations are to be a part of a new adjudication process to clear up R.S. 2477 claims.[28] The expansion of parties who may now qualify to file for disclaimers and fit within the waiver of the 12-year limitation on administrative claims, many applications may now be filed for § 315 disclaimers related to R.S. 2477 rights of way.[29] This fact, combined with the DOI use of the 10th Circuit approach to evaluating compliance with the elements of a valid R.S. 2477 grant, may result in the use of the administrative disclaimer process to validate many more R.S. 2477 rights of way than in the past. It is not known whether lawsuits will challenge this process.

Legislation in the 109th Congress. H.R. 3447 would define the crucial terms in the R.S. 2477 grant and would establish agency processes for determining the validity of R.S. 2477 rights of way, subject to judicial review. The bill was referred to three subcommittees of House Resources Committee on July 26, 2005, but no further action has been taken.

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[23] P.L. 104-208, § 108, 110 Stat. 3009-200 (1996).

[24] See H.Rept. 105-337 at 73-74 (1997). The Report indicates that Congress was relying on the Opinion B-277719 of the Comptroller General dated August 20, 1997, concluding that § 108 was permanent law.

[25] H.Rept. 104-625 at 57-58 (1996).

[26] H.Rept. 104-625, at 58 (1996).

[27] Later committee report language indicates that § 108 sought to reserve to Congress approval of alternatives to processing R.S. 2477 claims under the QTA. See discussion of S.Rept. 105-160 (1998) in United States v. Garfield County, 122 F. Supp. 2d 1201, 1236 (C.D. Ut. 2000)

[28] 68 Fed. Reg. 497.

[29] In commenting on the proposal, some counties objected to the costs that will result from their expected filings, indicating that "hundreds" of filings for routes could be involved in some counties. See 68 Fed. Reg. 499-500, referring to comments of Gilpin County, Colorado, Valley County, Idaho, and San Bernadino County, California. In response, BLM noted that the fees may be waived.