NOTE

THE ROAD AHEAD: R.S. 2477 RIGHT-OF-WAY CLAIMS AFTER *WILDERNESS SOCIETY V. KANE COUNTY, UTAH*

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TABLE OF CONTENTS

Introduction 193
I. Background and Historical Context 196
A. From Reconstruction to Conservation 196
B. Important Prior Litigation 198
II. The Tenth Circuit's Decision in *Wilderness Society v. Kane County, Utah*. 202
III. The Road Ahead: Future Litigation and the Need for Congressional Action 206
A. The Aftermath of the Wilderness Society Decision 206
B. The Need for Congressional Action 211
Conclusion 213
Postscript 213

INTRODUCTION

More than a century after the West was "won," the battle continues. Instead of gun-slinging cowboys and outlaws shooting it out over competing land claims, the fight has moved into the courtroom and has emerged as a struggle between federal and local authorities over control of public lands. At the center of the controversy is a Civil War-era federal statute granting counties rights-of-way for any highways they established through federal public lands. Despite being repealed over thirty years ago, the ghost of that statute has continued to haunt the western United States through a grandfather clause in the repealing legislation that protected existing rights-of-way. The ambiguity in the original statute about what

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constitutes a "highway," and the lack of any formal process for adjudication have created fertile ground for disputes as local authorities claim rights-of-way over footpaths, old trails, and other routes that stretch even the most liberal definition of a highway.

In the past several decades, litigation over these old highways has created mixed and sometimes contradictory results. Courts have struggled to define the criteria for valid rights-of-way and to delineate their own roles in resolving disputes that often implicate a conflict between state and federal law. Such conflict has often arisen as a result of local and state authorities claiming rights-of-way through national parks, wilderness areas, and other federally protected public lands. On one side of the conflict have been members of local communities who assert a right to use old roads and trails for both commercial and recreational purposes, with the latter often including the use of off-highway vehicles (OHVs), such as four wheelers and dirt bikes. On the other side have been environmental groups and others concerned on one hand about the damage and disruption such uses can cause to ecologically sensitive areas, and on the other about the potential nullifying effects of the existence of even one claimed right-of-way on the possibility of an area qualifying for a protected wilderness designation.

One of the most vexing aspects of the issue is that the original statute granting rights-of-way was, as one court described it, "open-ended and self-executing,"[1] requiring no formal approval or recording process, with rights vesting at the time of construction. The result has been the existence of a huge number of asserted but unverified claims, along with a potentially even larger number of claims not yet asserted[2] and no standard accepted practice for verifying them.

Numerous cases have addressed the right of individual states to employ their own definitions of what constitutes a highway and have considered the roles of both local and federal authorities in administering and perfecting right-of-way claims. Unfortunately, a consensus has not emerged. On the contrary, the Ninth and Tenth Circuits, in whose territories the majority of the claims lie, have reached different and conflicting conclusions about jurisdictional issues.[3] There has been significant disagreement about

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1. Sierra Club v. Hodel (*Hodel II*), 848 F.2d 1068, 1083 (10th Cir. 1988).

2. *See* U.S. DEP'T OF INTERIOR, REPORT TO CONGRESS ON R.S. 2477: THE HISTORY AND MANAGEMENT OF R.S. 2477 RIGHT-OF-WAY CLAIMS ON FEDERAL AND OTHER LANDS 28–29 (1993) (reporting that 1453 R.S. 2477 claims had been recognized by courts and the Department of the Interior, with over 5000 other known claims awaiting adjudication).

3. *Compare* S. Utah Wilderness Alliance v. Bureau of Land Mgmt. (*SUWA II*), 425 F.3d 735 (10th Cir. 2005) (holding that a federal administrative agency did not have primary authority to resolve a right-of-way claim) *with* United States v. Vogler, 859 F.2d 638 (9th Cir. 1988) (holding that government had authority to regulate use of a trail in a national park, even if trail was an established right-of-way).

whether courts or federal land management agencies should be the final arbiters of claims' validity. As one commentator has noted, this is not simply a procedural issue, but one that impacts

> the ability of federal land management agencies to administer the obsolete land grant in a way that harmonizes the intent of the Congress that created it and the intent of Congresses that have since repealed the grant and mandated the management of public lands for various uses, including protecting their primitive condition.[4]

The recent Tenth Circuit opinion in *Wilderness Society v. Kane County, Utah* (hereinafter *Wilderness Society*), which will be the focus of this Note, has attempted to resolve some of those uncertainties. In doing so, it has appeared to shift the landscape of the conflict in favor of environmental protection advocates, but it may have also raised more questions than it has answered. In *Wilderness Society*, the Tenth Circuit held that in the absence of a formal adjudication recognizing its right-of-way claim, a Utah County could not exert control over roads through federally managed lands in a way that conflicted with federal rules. While some have hailed the decision as an important victory for environmental protection, others have decried it as an unwarranted federal interference with rights that vested in the County long ago. However, it is clear that this decision will likely impact the resolution of hundreds or thousands of other similar right-of-way disputes across the western states.

Part II of this Note will examine the background of this controversy, including the historical contexts in which the right-of-way legislation was created and was eventually repealed. It will also provide an overview of the more modern legislation that superseded it and of some of the landmark cases that have established rules (albeit sometimes conflicting ones) about how right-of-way claims are evaluated and how management rights are allocated. Part III will take an in-depth look at the recent Tenth Circuit decision in *Wilderness Society*, providing a critical analysis of both the majority opinion and the lengthy and vigorous dissent. Part IV will discuss the impact that the ruling is likely to have on future similar disputes and will argue for the need for congressional action to establish a unified federal-level approach to resolving the thousands of outstanding right-of-way claims on federal lands throughout the western United States.

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4. Bret C. Birdsong, *Road Rage and R.S. 2477: Judicial and Administrative Responsibility for Resolving Road Claims on Public Lands*, 56 HASTINGS L.J. 523, 525 (2005).

I. BACKGROUND AND HISTORICAL CONTEXT

A. From Reconstruction to Conservation

In 1866, in the wake of the devastation of the Civil War, a major focus of the reconstruction effort was on rebuilding war-torn areas and re-integrating the defeated southern states into the Union. However, as some historians have noted, the truly transformative element of the Reconstruction era was the opening of the American West.[5] The government recognized that to encourage westward expansion, it would be important to establish a network of roads and trails to facilitate access to undeveloped areas, and pursuant to that goal, Congress enacted Reconstruction Statute 2477[6] (R.S. 2477). A simple one-line statement, the text of R.S. 2477 read: "The right-of-way for the construction of highways across public lands not reserved for public purposes is hereby granted."[7] Its inclusion as part of the Mining Act of 1866 is instructive as to its purpose. If the government wanted to encourage the growth of towns and communities in the western states, Congress would have likely reasoned that such growth would follow the development of agriculture and extractive industries. At a time when the western territories seemed vast and limitless, the main priority was putting them to economically beneficial use; the federal government was more than willing to cede rights-of-way to local authorities if they would assume responsibility for constructing and maintaining transportation routes.

Over the next 110 years, thousands of roads were created across the western United States. Some have evolved into major thoroughfares and others have fallen out of use, leaving only faint traces of old wagon wheel ruts in the wilderness. However, because the broad language of R.S. 2477 required only that a state or county must have engaged in some "construction" of a "highway" over non-reserved public lands, even old

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5. *See, e.g.*, HEATHER COX RICHARDSON, WEST FROM APPOMATTOX: THE RECONSTRUCTION OF AMERICA AFTER THE CIVIL WAR (Yale University Press, ann. ed. 2007) (arguing that while the South itself remained little changed, the westward movement spurred far-reaching changes in every aspect of American society).

6. The full title of the statute was "An Act Granting the Right-of-Way to Ditch and Canal Owners over the Public Lands and for Other Purposes." Mining Act of 1866, ch. 262, 14 Stat. 251, *repealed by* Federal Lands Policy and Management Act of 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2744, 2793 (1976) (codified at 43 U.S.C. §§ 1701–1782 (2000)); R.S. 2477, originally section 8 of the Mining Act of 1866, was codified in 1873 as section 2477 of the Revised Statutes and later re-codified in 1938 as 43 U.S.C. § 932 (1938).

7. *Id.*

trails, paths, and other little-used routes remain subject to R.S. 2477 claims.[8]

For much of those first 110 years, the federal government's approach to land management was permissive and hands-off, with few issues arising as local authorities had wide discretion in managing rights-of-way through federal lands.[9] However, beginning in the 1970s, the federal government began to take a more active and conservative approach, as exemplified by the Federal Land Policy and Management Act of 1976 (FLPMA).[10] With the passage of this Act, Congress signaled a significant shift as it "expressly declared as policy that remaining public domain lands would be retained in Federal ownership unless disposal of a particular parcel served the national interest. . . . [And] proclaimed multiple use, sustained yield, and environmental protection as the guiding principles for public land management."[11]

FLPMA redefined the role and responsibilities of the federal Bureau of Land Management (BLM) and overhauled a significant portion of the existing statutory framework governing the use, management, and disposition of federal land.[12] It ended the informal and self-executing R.S. 2477 framework for establishing rights-of-way through public lands, replacing it with a process described by one commentator as "infinitely more onerous,"[13] through which the government considers numerous factors in approving or denying right-of-way permits. The crucial difference, however, was that the government would no longer cede all oversight power; unlike R.S. 2477 rights, permits issued under FLPMA are time-limited and revocable, rather than permanent, vested property rights.[14]

FLPMA also contained a "grandfather" clause that stated: "Nothing in this title shall have the effect of terminating any right-of-way or right-of-use

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8. Litigation has sometimes hinged on the definition of "construction." In Colorado and Utah, for instance, "highways" can be "formed by the passage of wagons, etc. over the natural soil." Wilkenson v. Dep't of Interior of the U.S., 634 F. Supp. 1265, 1272 (D. Colo. 1986).

9. *See* James R. Rasband, *Questioning the Rule of Capture Metaphor for Nineteenth Century Public Land Law: A Look at R.S. 2477*, 35 ENVTL. L. 1005, 1016–19, 1028 (2005) (explaining how the federal government's traditionally hands-off approach left "little occasion to fight about whether an R.S. 2477 right-of-way had been established")

10. 43 U.S.C. §§ 1701–1782 (2006).

11. *The Federal Land Policy and Management Act* (*FLPMA) of 1976: How the Stage was set for BLM's "Organic Act"*, BUREAU LAND MGMT., U.S. DEPARTMENT INTERIOR, http://www.blm.gov/flpma/organic.htm (last visited Nov. 30, 2010).

12. *Id.*

13. Matthew L. Squires, *Federal Regulation of R.S. 2477 Rights-of-Way*, 63 N.Y.U. ANN. SURV. AM. L. 547, 559 (2008).

14. *Id.*

heretofore issued, granted or permitted."[15] With this provision, the seeds of controversy were sown, since with no formal registration or adjudication process, there could be no definitive measure of whether any particular R.S. 2477 claim was validly pre-existing at the time of FLPMA's enactment. The result has been a plethora of asserted claims—over 10,000 in Utah alone[16]—which span the spectrum from clearly valid claims, such as those relating to heavily traveled, paved highways, to highly suspect claims, such as some involving little-used and barely identifiable paths through undeveloped public lands. Opponents have cried foul in response to some claims which appear to have been strategically asserted specifically to defeat efforts to classify some areas as federally protected wilderness areas.[17] Such designations are supported and sought after by environmental advocacy groups, but are typically harmful or fatal to local logging, mining, grazing, or other economic interests.

B. Important Prior Litigation

In the last several decades, a number of significant decisions have emerged from the Ninth and Tenth Circuits that have attempted to establish principles for resolving R.S. 2477 disputes. In addition to general questions about how to recognize and validate claims, courts have also been presented with controversies about the scope of local versus federal authority in managing, maintaining, and improving already-recognized rights-of-way through public lands. This was the issue presented to the Tenth Circuit in 1988 in *Sierra Club v. Hodel* (*Hodel II*),[18] in which a Utah county sought to expand a small dirt road through public land into a much larger multi-lane gravel road. The project was challenged by a coalition of environmental groups that sued both the County and the federal BLM, which was responsible for the undeveloped area adjoining the road.[19] Although the road expansion was predicted to have some detrimental environmental effects on the surrounding area, the Tenth Circuit refused to enjoin the

15. § 1769(a).

16. Rasband, *supra* note 9, at 1010.

17. FLPMA defines a wilderness as a "roadless area of five thousand acres or more." § 1782(a). In some situations, counties have undertaken aggressive attempts to defeat such designations by reopening old, unused routes through public lands. *See, e.g.*, United States v. Nye Cnty., 920 F. Supp. 1108 (D. Nev. 1996) (granting summary judgment to the United States when Nye County attempted to reopen an old road with the effect of disturbing and damaging national forest land).

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

19. *Id.* at 1073.

County from proceeding with it. Holding that the scope[20] of R.S. 2477 rights was governed by state law, the court found that the road expansion met the Utah standard defining an R.S. 2477 right-of-way's width as that which is "reasonable and necessary to insure safe travel."[21]

More recently, in 2005 the Tenth Circuit issued another landmark decision in *Southern Utah Wilderness Alliance v. Bureau of Land Management* (*SUWA II*),[22] in which the court held that state, not federal, law governed the determination of the validity of R.S. 2477 claims. In *SUWA II*, several Utah counties commenced grading projects on roads through federally managed lands, creating a threat of environmental disturbances. When the BLM, which had oversight authority for the areas, failed to take responsive action, Southern Utah Wilderness Alliance (SUWA) and other environmental groups brought suit to enjoin the construction activities.[23] SUWA claimed that the BLM violated its statutory duties by failing to protect the land under its care from being damaged and degraded.[24] The BLM then cross-claimed for trespassing against the Counties, which argued in defense that their authority over those roads through public lands was valid under the R.S. 2477 right-of-way framework.[25]

The Tenth Circuit held in *SUWA II* that neither the BLM nor any other federal agency had primary jurisdiction to decide the validity of R.S. 2477 right-of-way claims, but that disputes over such claims needed to be resolved judicially by applying the law of the state in which a claim lay.[26] Two factors impacted the court's decision. First, the court noted that for over a century, the federal government had been reluctant or unwilling to adjudicate R.S. 2477 claims and had only recently reversed course and begun to assert that power.[27] The court stated: "[N]othing in the terms of R.S. 2477 gives the BLM authority to make binding determinations on the validity of the rights of way granted thereunder, and we decline to infer

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20. The court provided the following definition: "The 'scope' of a right-of-way refers to the bundle of property rights possessed by the holder of the right-of-way. This bundle is defined by the physical boundaries of the right-of-way as well as the uses to which it has been put." *Id.* at 1079 n.9.

21. *Id.* at 1084.

22. *SUWA II*, 425 F.3d 735 (10th Cir. 2005).

23. *Id.* at 742.

24. SUWA's complaint charged that the BLM had violated its management responsibilities under FLPMA (43 U.S.C. §§ 1701–1782), the Antiquities Act, (16 U.S.C. § 431–433 (2006)) and the National Environmental Policy Act, (42 U.S.C. § 4321–4335 (2006)). *Id.*

25. *SUWA II*, 425 F.3d at 743.

26. *Id.* at 757.

27. *Id.*

such authority from silence when the statute creates no executive role for the BLM."[28]

Second, the court was cognizant of the inherent conflict arising when an agency such as the BLM asserts authority to resolve a title dispute in which it was itself a contestant:

> 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 interests at some point in the past.[29]

Since, as the court noted, in prior Tenth Circuit cases the BLM had always "appeared as a litigant, without ever suggesting that its administrative determinations are entitled to legally enforceable status as a matter of primary jurisdiction," the court found no basis for concluding otherwise.[30] Although the court did acknowledge the BLM's ability to make initial determinations regarding the validity of R.S. 2477 rights for its own internal purposes, the holding clearly stated that if and when actual title disputes arise, the agency and other parties to the dispute would need to turn to the courts for resolution.[31]

The net effect of this outcome in *SUWA II*, combined with the holding of *Hodel II* regarding use of state-based standards for determining "reasonable and necessary" road management activities, has been that state and local governments have been afforded a great deal of power and latitude in controlling the management of roads through federally-protected lands.[32] Local authorities were left with the ability to assert control over any route that qualified under state law criteria as a valid R.S. 2477 right-of-way and were able to perform any maintenance, improvements, or other changes comporting with a state's interpretation of the "reasonable and necessary" standard.[33]

One other recent decision—*San Juan County v. United States*[34] from the Tenth Circuit in 2007—bears mentioning as well for its treatment of the

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28. *Id.*
29. *Id.* at 752.
30. *Id.* at 753.
31. *Id.* at 748.
32. *Hodel II*, 848 F.2d 1068, 1084 (10th Cir. 1988), *overruled on other grounds by* Village of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992).
33. *Id.* at 1084.
34. San Juan County v. United States, 503 F.3d 1163 (10th Cir. 2007).

question of whether private environmental groups have standing to bring action for what is essentially a title dispute between state and federal governmental bodies. The *SUWA II* court had sidestepped this question by reasoning that because, in the case before the court, the BLM had standing and argued for the same relief as the environmental groups, a decision about those groups' standing "would in no way avoid resolution of the relevant issues."[35] However, in *San Juan County*, the Tenth Circuit squarely addressed the standing issue, holding that environmental groups that sought to intervene in an R.S. 2477 title dispute between a County and the federal government met the intervention requirement of having "an interest relating to the property,"[36] even if that interest was unrelated to any ownership claim.[37] However, the court also held that despite having a legally cognizable interest, the groups could be denied intervention since that interest could be adequately represented by existing parties (here, the defendant United States).[38] *San Juan County* was decided by a narrow majority and was accompanied by four separate concurring opinions,[39] illustrating the complexity of the issue and the numerous competing perspectives at stake in such decisions. On one hand, judicial efficiency may be better served by limiting intervention in R.S. 2477 claims from outside parties with no direct title claims, but overly strict limitations could also lead to a denial of justice for such groups that do have otherwise-valid interests that are impacted by the outcome of a case. Although it established some important precedents about the right of private groups to intervene in such disputes, one commentator has noted the decision's shortcomings, stating, "*San Juan County* fails to provide a test that would consider the practical demands for balance between expediency and public input in each case."[40]

So, after decades of post-repeal treatment in the state and federal court systems, some guiding principles, but few hard and fast rules regarding R.S. 2477 have been established, and its legacy has continued to be a monkey wrench in the gears of land management in the American West.

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35. *SUWA II*, 425 F.3d at 744.

36. Federal Rule of Civil Procedure 24(a)(2) states that intervention must be allowed for anyone who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2) (2010).

37. *San Juan County*, 503 F.3d at 1201.

38. *Id*. at 1206.

39. *Id.* at 1207 (Kelly, J., concurring), 1210 (McConnell, J., concurring), 1226 (Ebel, J., concurring), 1232 (Lucero, J., concurring).

40. Jacob Macfarlane, *How Many Cooks Does It Take to Spoil a Soup?:* San Juan County v. U.S. *and Interventions in R.S. 2477 Land Disputes*, 29 J. LAND RESOURCES & ENVTL. L. 227 (2009).

II. THE TENTH CIRCUIT'S DECISION IN *WILDERNESS SOCIETY V. KANE COUNTY, UTAH*.

In 2009, the Tenth Circuit Court of Appeals issued an opinion in *Wilderness Society v. Kane County, Utah*[41] that further shifted the landscape of the R.S. 2477 controversy. At issue was what it means for a right-of-way to be "valid and existing" under the clause exempting such rights-of-way from FLPMA's management strictures.[42] Whereas *SUWA II* established that judicial determinations of right-of-way claims would be governed by state law, the question remained as to whether such judicial determination was in fact a prerequisite to exercising "valid" management authority.[43] Traditionally, R.S. 2477 had been a self-executing grant that required no formal approval or registration, but it was, of course, a relic from a different time when Western lands seemed vast and limitless; the Reconstruction-era legislators who passed R.S. 2477 could not have anticipated a future of such intense land-use pressures, where protection and preservation would replace commerce and development as priorities. This past year, in *Wilderness Society*, the Tenth Circuit had the opportunity to speak on this issue of what constitutes a "valid and existing" management right in this modern era.

The controversy began in 2003 when officials in Kane County, Utah removed BLM signs prohibiting OHV use within Grand Staircase-Escalante National Monument (the Monument) and other federal lands.[44] The County had engaged in continuing discussions with the BLM regarding what roads were valid R.S. 2477 routes,[45] but despite a lack of resolution of the question, Kane County began to assert management authority, replacing the BLM signs with its own signs allowing OHV use in previously-prohibited areas. The County backed up its actions with an ordinance passed by the Board of Commissioners authorizing the County "to create a map showing which roads are open to OHV use, or to 'post signs designating lands, trails, streets, or highways open to OHV use.'"[46]

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41. Wilderness Soc'y v. Kane Cnty., Utah (*Wilderness III*), 581 F.3d 1198 (10th Cir. 2009), *reh'g en banc granted*, Wilderness Soc'y v. Kane County, Utah (*Wilderness IV*), 595 F.3d 1119 (10th Cir. 2010).

42. 43 U.S.C. § 1701(h) (2006) ("All actions by the Secretary concerned under this Act shall be subject to valid existing rights.").

43. *SUWA II*, 425 F.3d 735, 757 (10th Cir. 2005).

44. *Wilderness III*, 581 F.3d at 1205.

45. *SUWA II* had held that the BLM could make administrative determinations of R.S. 2477 routes for its own internal management purposes, but that such determinations were not legally binding when title was actually in dispute. *SUWA II*, 425 F.3d 735.

46. *Wilderness III*, 581 F.3d at 1207 (citing KANE COUNTY, UTAH, ORDINANCE. no. 2005-03 (2005)).

After the ordinance was passed, two environmental groups (The Wilderness Society and SUWA), brought a suit in federal district court seeking to enjoin Kane County from opening routes to OHV traffic.[47] The groups also sought a declaratory judgment stating that since the County's authority over the routes had not been adjudicated and was therefore unofficial, its actions were preempted by the conflicting federal rules regarding vehicle usage.[48] In defense, Kane County raised numerous objections including the plaintiffs' lack of standing, their failure to join necessary and indispensable parties (the United States and the State of Utah), and most centrally, the claim that management authority over the routes in question did not require adjudication since it derived from the original R.S. 2477 grant. The federal district court, however, disagreed and granted summary judgment to the environmental plaintiffs in May 2008, holding that unadjudicated R.S. 2477 rights could not defeat a preemption claim.[49] The court did not weigh in on whether the specific right-of-way claims in the case before it were actually valid; on the contrary, the court pointed out that such determination was unnecessary to decide the issue at hand:

> [The decision] need not rest on a determination regarding the veracity of any R.S. 2477 claims the County might have. Rather, the Court need only recognize that the presumption on federal land is that ownership and management authority lies with the federal government and that any adverse claimant, like the County here perhaps, is not entitled to win title or exercise unilateral management authority until it successfully has carried its burden of proof in a court of law.[50]

In declining to resolve the actual question of title to the rights-of-way concerned, the court pointed out that the question was not really before them since the plaintiff environmental groups had no title claim and since the United States, which did have a potential title claim, was not a party. The court also issued an order enjoining Kane County from any further management activities that might "invite or encourage vehicle use on any route or area closed to such use by governing federal land management plan

47. Wilderness Soc'y v. Kane Cnty., Utah (*Wilderness II*), 560 F. Supp. 2d 1147 (D. Utah 2008), *aff'd*, *Wilderness III*, 581 F.3d at 1219.

48. *Id.* at 1152.

49. *Id.* at 1166.

50. *Id*. at 1150–51 (quoting Wilderness Soc'y v. Kane Cnty., Utah (*Wilderness I*), 470 F. Supp. 2d 1300, 1306 (D. Utah 2006)).

or federal law . . . unless and until Kane County proves in a court of law that it possesses a right-of-way to any such route."[51]

Kane County promptly appealed the decision to the Tenth Circuit Court of Appeals.[52] In addition to raising arguments about the plaintiffs' standing and cause of action,[53] the County's central contention was that the district court erred in concluding that the County was preempted from asserting R.S. 2477 rights until those rights are proven in court. In its brief to the Tenth Circuit, Kane County argued the district court's opinion was "entirely unprecedented. . . . [And the opinion] disregarded the entire history of R.S. 2477 jurisprudence in rendering its decision."[54] If rights-of-way did not exist until adjudicated, then the logical outcome of the decision, said the County, was that it would no longer have valid management authority over *any* public roads on federal lands, at least where that authority originally derived from R.S. 2477.[55] Rights-of-way that arise from the self-executing R.S. 2477 grant and that vest upon creation of a road, argued Kane County, are exactly the sort of "valid and existing rights" which are explicitly protected and preserved by FLPMA and other federal land regulations.[56]

In a lengthy opinion issued in August 2009, the Tenth Circuit considered Kane County's appeal and determined, with one dissent, that the district court's decision should be affirmed on all grounds.[57] After examining and disposing of Kane County's other challenges,[58] the Tenth Circuit began its examination of the central preemption question, framing the issue as "a dispute over what it means to manage lands 'subject to valid existing rights' in the absence of an adjudication of such rights."[59]

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51. *Id.* at 1166.

52. *Wilderness III*, 581 F.3d 1198 (10th Cir. 2009), *reh'g en banc granted*, *Wilderness IV*, 595 F.3d 1119 (10th Cir. 2010).

53. While the focus of this note is on the preemption issue, this case also involved significant attention to questions of third-party standing, private rights of action under the Supremacy Clause, and the necessity of joining other interested and potentially indispensable parties (such as the federal government).

54. Brief for Appellant at 25 *Wilderness III*, 581 F.3d 1198 (10th Cir. 2009) (No. 08-4090), 2008 WL 4212652.

55. This would be the case in the majority of instances; as the appellant noted in its brief, "R.S. 2477 provides the only authorization for almost all of the State of Utah's and Kane County's roads in Kane County." *Id.* at 22.

56. *Wilderness III*, 581 F.3d at 1218.

57. *Id.* at 1226.

58. The court found that (1) the environmental groups had a "judicially cognizable interest" that justified the court's intervention, *id.* at 1211 (citing *In re Special Grand Jury 89–2*, 450 F.3d 1159, 1172 (10th Cir. 2006)), (2) sufficient case law supported a right of private action under the Supremacy Clause, *id.* at 1216, and (3) neither the State of Utah nor the federal government were necessary and indispensable parties since the State's interest was identical to the County's and since no title to any actual right-of-way was being determined, *id.* at 1218.

59. *Id.* at 1219.

As did the district court, the Tenth Circuit focused its analysis largely on the allocation of the burden of proving R.S. 2477 rights.[60] It concluded that the district court was correct in basing its decision on the general legal presumption that management rights over a property lie with that property's owner, and that the burden of proving otherwise should fall on the party claiming a right-of-way.[61] Thus, the court explained, Kane County's "claimed rights may well have been created and vested decades ago, but until it proves up those rights, we agree with the district court that its regulations on federal lands that otherwise conflict with federal law are preempted."[62]

Despite the majority's citation to a substantial amount of case law and other authority, there seems to be no overlooking the reality of the outcome, which was that a wholly new and different rule pertaining to R.S. 2477 claims was fashioned. Whereas R.S. 2477 rights had never previously required any formal adjudication, the Tenth Circuit seemed to proclaim in *Wilderness Society* that such rights do not really exist until proven in court. At the very least, it calls into question exactly which "valid and existing" rights are being referred to in FLPMA and related legislation, if not those created by R.S. 2477. It is sure to make local governments pause before continuing their standard practices of managing and maintaining long-established (albeit informally) rights-of-way through public lands.

Circuit Judge McConnell's dissent strongly expressed these concerns and decried what he saw as being an abrupt about-face from established precedent. Judge McConnell argued that whereas prior decisions had held that R.S. 2477 rights could be established without any formal processes,[63] "the majority now concludes that the formality of court adjudication is a prerequisite to the exercise of rights under R.S. 2477. This conclusion flies in the face of this court's holding in *SUWA*, as well as with the decades of jurisprudence on which that decision rested."[64]

Judge McConnell's dissent went on to criticize the majority's view that "creation and vestment of R.S. 2477 rights is not at issue here,"[65] pointing

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60. *Id.* at 1226.

61. Notably, the court's primary authority for this principle was its own decision in *SUWA II*. *SUWA II*, 425 F.3d 735, 768–69 (10th Cir. 2005).

62. *Wilderness III*, 581 F.3d at 1221.

63. *See Wilderness III*, 581 F.3d at 1226–40 (McConnell, J., dissenting) (citing *SUWA II*, 425 F.3d at 741("[T]he establishment of R.S. 2477 rights of way required no administrative formalities: no entry, no application, no license, no patent, and no deed on the federal side[.]"); San Juan Cnty. v. United States, 503 F.3d 1163, 1168 (10th Cir. 2007) (an R.S. 2477 right-of-way "could have come into existence without any judicial or other governmental declaration")).

64. *Wilderness III*, 581 F.3d at 1228 (McConnell, J., dissenting).

65. *Id.* at 1221 (majority opinion).

out that determining creation and vestment is the very root of the issue of whether the County has the right to assert management authority. While acknowledging that merely asserting a claim is not the same as actually having title, the dissent stressed that the majority went too far in awarding relief to the plaintiffs, since neither the existence, nor non-existence of a valid title to the routes in question had been proven:

> If it is true that "Kane County cannot defend a preemption suit by simply alleging the existence of R.S. 2477 rights of way," as the majority says (Maj. Op. 1221), it should also be true that the plaintiffs cannot win a preemption suit by simply alleging the opposite. Until one side or the other proves its claims, there is no basis for judicial intervention on either side.[66]

The dissent concluded on a policy note, lamenting the way in which a third party was able to "hijack" the process of "comity and cooperation" that usually exists between different levels of government in resolving disputes such as the one in Kane County.[67] When disputes arise over particular rights, the dissent argued, parties may seek legal resolution through avenues such as the Quiet Title Act, or they may avoid litigation through concessions and cooperation.[68] It was noted that in the present case, for example, the BLM's choice to refrain from enforcing travel restrictions on disputed routes and the County's rescission of the problematic ordinance, were examples of the different governmental bodies attempting to diffuse conflict. "When two parties in interest show restraint," said Judge McConnell, "outside interests should not be permitted to foment litigation."[69]

III. THE ROAD AHEAD: FUTURE LITIGATION AND THE NEED FOR CONGRESSIONAL ACTION

A. The Aftermath of the Wilderness Society *Decision*

In the wake of the Tenth Circuit's decision in *Wilderness Society*, environmental advocates cheered the apparent victory for their cause,[70] and

66. *Id.* at 1239 (McConnell, J., dissenting).
67. *Id.* at 1239–40 (McConnell, J., dissenting).
68. *Id.* at 1239 (McConnell, J., dissenting).
69. *Id.* (McConnell, J., dissenting).
70. One of the plaintiffs' attorneys described the decision as "a great day for the protection of our national parks, monuments and wilderness areas in Utah and across the country." *Appeals Court*

Kane County—and other supporters of its position—expressed understandable disappointment.[71] However, even the losing side found some bright spots: "We are encouraged that the 10th Circuit majority opinion made it crystal clear that not a single road in the monument has been deemed invalid," said Mark Ward of the Utah Association of Counties,[72] which filed an Amicus Curiae brief on behalf of Kane County.[73]

This mixed reaction indicates the uncertainty that has followed this decision and may foreshadow some of the confusion and chaos to come. Western states and counties are now faced with the dilemma of whether to continue exercising authority over roads that they have managed and controlled for more than a century. On one hand, they must consider the logical extrapolation of the *Wilderness Society* ruling, as noted in Judge McConnell's dissent, which is that if authority over a right-of-way is not valid until proven in court, then every assertion of such authority over an unproven route is technically an act of trespassing.[74] Secondly, and on a more practical note, counties may be ill-advised to continue expending precious public funds to maintain and improve transportation routes, which, if eventually determined to not be valid rights-of-way, could be snatched away from them or, at the very least, might be more appropriately paid for and maintained by federal agencies. The untenable nature of this possibility was pointed out by Kane County in a July 2009 letter to the BLM, in which it said:

> [Kane County] hopes that DOI and BLM administrators are beginning to understand that the federal position that federal agencies have the authority to make all management decisions . . . while the County is obligated to perform menial road maintenance tasks, is unrealistic. The

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Upholds Federal Supremacy over Utah County, ENV'T NEWS SERVICE (Sept. 3, 2009), http://www.ens-newswire.com/ens/sep2009/2009-09-03-094.asp. A representative of Southern Utah Wilderness Alliance also noted its bottom line practical effect, stating, "This case is important because it will thwart the abusive efforts by some counties to hamstring protection of federal lands by merely claiming that old trails, cow paths and streambeds are actually county highways immune from federal law." *Id.*

71. Kane County Commissioner Doug Heaton said, "I think federal government power has been increasing markedly and local government and private citizen power has decreased, and that is not a good thing." Tom Wharton, *Appeals Panel Rules Against Kane County's Sign Swap*, SALT LAKE TRIB., Sept. 1, 2009, http://www.responsibletrails.org/Utah/appeals-panel-rules-against-kane-countys-sign-swap.html.

72. *Id.* Ward seemed to be implying that future litigation to determine the actual title to the disputed rights-of-way could result in their return to County control, if found to be valid and existing R.S. 2477 routes. *Id.*

73. Brief for Utah Ass'n of Cntys. as Amici Curiae Supporting Appellant at 7, *Wilderness III*, 581 F.3d 1198 (10th Cir. 2009) (No. 08-4090), 2008 WL 4386990 at *8.

74. *Wilderness III*, 581 F.3d at 1229 (McConnell, J., dissenting).

> County's role in performing road maintenance is inseparable from its jurisdiction to manage and operate public transportation systems as a public benefit and for the common good, consistent with federal and state law.[75]

There are a huge number of unresolved R.S. 2477 disputes remaining across the western United States, including over 10,000 in Utah alone,[76] along with an unknown number that may be unreported. The question looming after the *Wilderness Society* ruling is how the federal court system can avoid a nightmarish logjam of title dispute actions if Counties conclude that their best approach will be to push all their claims into court for the official adjudication that is now ostensibly a prerequisite for the exercise of valid management authority.

In many cases, that just might be the wise approach for such claimants; although most claims will require a fact-intensive evaluation, the bottom line is that while some will be exposed as bogus, the great majority will be likely to pass muster under generally loose state standards.[77] In Utah, a right-of-way may qualify as valid "when it has been continuously used as a public thoroughfare for a period of ten years."[78] Even within this fairly low-threshold test, there is additional flexibility since "continuous" does not necessarily mean "constant," but only as much as the public has "found it necessary or convenient."[79] Furthermore, to show that a route has been a "public thoroughfare," Utah courts have required only that use not be subject to owners' permission,[80] not be by adjoining landowners,[81] and be along the general—but not necessarily the exact—path of the route.[82] For the majority of the claimed R.S. 2477 rights-of-way in Utah and elsewhere, showing that those conditions have been met for at least the requisite past ten years will not be a difficult or onerous burden. Therefore, in light of the *Wilderness Society* outcome, county authorities may feel compelled to aggressively pursue adjudication of their claimed rights or else risk having

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75. Letter from Daniel W. Hulet, Comm'n Chair, Doug Heaton, Comm'r, & Mark W. Habbeshaw, Comm'r, Kane Cnty. Comm'n, to Selma Sierra, Utah State Dir., Bureau of Land Mgmt. (July 14, 2009), *available at* http://kane.utah.gov/att/38/store/u34_Commission-response-to-Selma-Sierras-letter-of-7-10-09.pdf.

76. Rasband, *supra* note 9, at 1010.

77. One of the essential holdings of *SUWA II* established that state law governs both the perfection and scope of R.S. 2477 rights-of-way. *SUWA II*, 425 F.3d 735, 762 (10th Cir. 2005).

78. UTAH CODE ANN. 1953 § 72-5-104(1) (West 2010).

79. Campbell v. Box Elder Cnty., 962 P.2d 806, 809 (Utah Ct. App. 1998).

80. Heber City Corp. v. Simpson, 942 P.2d 307, 311 (Utah 1997) (citing Morris v. Blunt, 161 P. 1127, 1131 (Utah 1916)).

81. Kohler v. Martin, 916 P.2d 910, 913 (Utah Ct. App. 1996).

82. Lindsay Land & Livestock Co. v. Churnos, 285 P. 646, 649 (Utah 1929).

those rights preempted. As the *Wilderness Society* majority opinion succinctly stated, "Resolution pivots around who moves first."[83]

If there is a flood of legal actions to quiet title in R.S. 2477 rights-of-way, the courts will also be faced with the additional dilemma of determining how much public or third-party participation should be allowed. *Wilderness Society* and other recent decisions[84] have opened the door for environmental groups and other parties with non-ownership interests to be given standing in such cases, but without some limitations the consequences could be messy. Legal disputes between government bodies that might be expeditiously resolved could evolve into complex and protracted court battles through the injection of litigious third parties. As was the situation in *Wilderness Society*, rather than simply seeking to intervene in existing actions, third parties may initiate litigation even where the primary parties in interest have refrained from doing so. Rather than efficiently resolving conflicts, this dynamic is likely to manufacture and exacerbate them, forcing parties to square off in court when they might otherwise work together with the "comity and cooperation" that Judge McConnell described.[85]

The stakes are even higher in the larger context of current legislative proposals. In Fall 2009, H.R. 1925, better known as America's Red Rocks Wilderness Act, was introduced in Congress.[86] It seeks to designate 9.4 million acres of public land in Utah—approximately one-sixth of the state[87]—as wilderness, which would bar any future mining or development, as well as a range of other activities, including OHV access.[88] Although currently only at the committee stage, the bill has already generated intense reactions from both supporters and detractors; notably, some of the most

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83. *Wilderness III*, 581 F.3d 1198, 1219 (10th Cir. 2009), *reh'g en banc granted*, *Wilderness IV*, 595 F.3d 1119 (10th Cir. 2010).

84. *See* San Juan County v United States, 503 F.3d 1163 (10th Cir. 2007) (holding that environmental advocacy groups may have standing based on a recognizable interest in the outcome of R.S. 2477 title disputes and may intervene in suits if that interest is not adequately represented by the federal government or other existing parties).

85. *Wilderness III*, 581 F.3d at 1239 (McConnell, J., dissenting). There are indications that the relationship between Kane County and the BLM is less acrimonious than might be suspected. One article has described interactions between the two entities as "surprisingly cordial." Brian Hawthorne, *The Paria Canyon Road: The Next Chapter in the RS 2477 Saga*, BLUE RIBBON MAG., June 2009, http://www.sharetrails.org/magazine/article.php?id=1759.

86. America's Red Rock Wilderness Act of 2009, H.R. 1925, 111th Cong. (2009).

87. The total acreage of the State of Utah is 54.338 million acres. *Geography Statistics: Land Acreage: Total (Most Recent) by State*, STATEMASTER.COM, http://www.statemaster.com/graph/geo_lan_acr_tot-geography-land-acreage-total (last visited Sept. 11, 2010).

88. Richard Shaw, *What Would the Red Rocks Bill Affect?*, SUN ADVOC., Oct. 6, 2009, http://www.sunad.com/index.php?tier=1&article_id=16844.

vocal critics have been congressional delegates from Utah.[89] The interplay between such legislative efforts and resolution of outstanding R.S. 2477 efforts is complex and potentially volatile, and the Tenth Circuit now appears to have further complicated matters by turning established R.S. 2477 jurisprudence on its head, casting uncertainty on even the most well-established claims, and placing the hurdle of piecemeal adjudication in the path of any potential solution.

All of this has left interested stakeholders looking for the way forward. There are numerous alternatives for resolving outstanding R.S. 2477 claims, but all have their drawbacks and none will provide a ready-made solution for the tens of thousands of unresolved claims. For instance, for county and state right-of-way claimants to bring suit under the Quiet Title Act,[90] which the *Wilderness Society* majority described as "the sole avenue" for resolving claims,[91] they must be prepared for a lengthy, complex, and expensive legal process, and one that has not proven to be consistently effective, especially in Utah.[92] Title V of FLPMA also provides a process for granting rights-of-way, but state claimants have eschewed it as a poor substitute for R.S. 2477 rights, since under the FLPMA scheme the rights are less permanent, involve continued federal oversight, and are granted through a process that invites public participation and includes an environmental evaluation (both of which often make outcomes uncertain).[93] Arbitration has also been suggested as a solution for R.S. 2477 claim resolution,[94] since it could be an efficient way to resolve a large number of claims that are not hotly disputed. However, arbitration has its downsides in that it blocks public participation, sets no guiding precedents, and guarantees no uniformity in resolving claims.[95]

What does seem clear is that in recent years, the most conspicuous non-player in the R.S. 2477 drama has been Congress. Not only has Congress

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89. *Utah Representatives Express Views on Red Rock Wilderness Bill*, SUN ADVOC., Oct. 15, 2009, http://www.sunad.com/index.php?tier=1&article_id=16917.

90. Quiet Title Act, 28 U.S.C. § 2409a(a) (2006).

91. *Wilderness III*, 581 F.3d 1198, 1219 (10th Cir. 2009), *reh'g en banc granted*, *Wilderness IV*, 595 F.3d 1119 (10th Cir. 2010).

92. Utah brought a large number of Quiet Title Act claims in 2000 but abandoned them three years later upon entering into discussions with the Department of the Interior around alternate resolution methods. One commentator has suggested that this history shows how the Quiet Title Act has been mainly effective as a tool for bringing the federal government to the negotiating table. Tova Wolking, *From Blazing Trails to Building Highways: SUWA v. BLM & Ancient Easements over Federal Public Lands*, 34 ECOLOGY L.Q. 1067, 1103 (2007).

93. *Id.* at 1101.

94. *See, e.g.*, Macfarlane, *supra* note 40, at 244 (explaining that arbitration may be a more "innovative solution[] for resolving disputes in agency programs").

95. *Id.* at 245–51.

failed to enact any legislation that would offer a solution regarding outstanding R.S. 2477 claims, but it made such a solution essentially unattainable in 1996 when it enacted a permanent moratorium on federal agency rulemaking on the subject, pending further congressional action.[96] However, such action has not been forthcoming; since that time, numerous legislative proposals have been developed but none have survived passage through both houses. Most notable among these have been the ''Revised Statutes 2477 Rights-of-Way Settlement Act'' introduced by Utah and Alaska legislators in 1995,[97] and the "R.S. 2477 Rights-of-Way Act of 2003" introduced by Colorado legislators in 2003.[98] The problem has been that none of the proposed legislation has been balanced enough to garner the requisite bipartisan support; the 1995 bill gave too much latitude to states in resolving claims, and the 2003 attempt was described as "not deferential enough."[99]

B. The Need for Congressional Action

Congress must continue to search for a balanced solution that reconciles the value that right-of-way claims hold for states with the public interest goal of protecting and wisely managing undeveloped public lands. The goal should be to establish some national, uniform standards for resolving R.S. 2477 claims; despite the *SUWA II* court's warning against "uniformity for uniformity's sake"[100] (in consideration of the unique circumstances and dynamics in every state), a nationally standardized approach will indeed be a step in the right direction.

Such a uniform approach would involve, among other things, establishing standardized definitions of terms such as "highway," "construction," and "use," which are central to interpreting R.S. 2477 and related laws and regulations. This would mean retreating somewhat from the path tread by the Tenth Circuit in its decisions holding that the validity and scope of R.S. 2477 rights are determined based on state law standards. Settling claims using state law as a guide can be problematic because it requires an examination of both the particular facts of the claim under review as well as an in-depth study of the evolving case law of the state

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96. "No final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to Revised Statute 2477 . . . shall take effect unless expressly authorized by an Act of Congress." Department of Interior and Related Agencies Appropriations Act of 1997, Pub. L. No. 104–208, § 108, 110 Stat. 3009-181, 3009-200 (1996).

97. S. 1425, 104th Cong. (1996).

98. H.R. 1639, 108th Cong. (2003).

99. Wolking, *supra* note 92, at 1104.

100. *SUWA II*, 425 F.3d 735, 767 (10th Cir. 2005).

where the claim lies. This requires massive efforts and expenses for federal agencies involved in litigating these claims and results in significant disparities in resource allocation between states, often without correlation to the amount of land under dispute.[101] Additionally, as one commentator has noted, "it gives undue emphasis to state boundaries in the federal management scheme—boundaries that are seldom of natural significance and often do not demarcate federal land unit boundaries."[102] Establishing national standards would help avoid the guessing game that now exists regarding likely outcomes by letting potential litigants on both sides more accurately gauge the strength of their claims before taking them to court.

Congress should lift the moratorium on agency rulemaking and allow the Department of the Interior (DOI) to promulgate a system for resolving R.S. 2477 claims. Giving a federal agency primary jurisdiction to determine the validity of claims would alleviate the potential bottleneck of claimants being forced to go through the federal court system, since DOI could have the freedom to institute a variety of options for claim resolution. These options could be available based on some categorization or ranking of claims, ranging from well-established and non-controversial claims, which might be validated with some simple procedural certification, to the most difficult or hotly disputed claims, which might require arbitration or some other more formal (but still more expedient and efficient than adjudication in federal court) hearing process. The major point of contention in establishing rules for such a process is likely to be the allocation of burdens of proof—whether states would be required to prove the existence of R.S. 2477 rights, or whether the burden would be on the federal government to disprove such rights. Another thorny issue could be agreeing on how much outside participation from environmental groups and other interested parties should be allowed; in this area, rules should strive for a balance between efficiency and recognition of valid public interests. These and other issues would require some pragmatic and bipartisan compromising, but such compromising is likely to be the only route out of the deadlock that has paralyzed Congress and kept the situation around R.S. 2477 claims in such disarray for so long.

Of course, putting power for rulemaking and decisionmaking in the hands of federal land management agencies raises the conflict-of-interest issue noted by the court in *SUWA II*[103] since those federal agencies would ostensibly also be parties to claim disputes. Congress would need to take

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101. Squires, *supra* note 13, at 603.
102. *Id.* at 604.
103. *SUWA II*, 425 F.3d at 752.

this into consideration and implement some safeguards, perhaps by specifying criteria signaling potential abuses of discretion and allowing for appeal or review in such instances.

CONCLUSION

For much of its long history, R.S. 2477 was a fairly benign statute. It has only been since the federal government has adopted a more conservative and restrictive land management approach in recent decades that it has emerged as the cause of a highly volatile controversy. On a practical level, that controversy involves the status of old roads of all shapes and sizes, and the rules regarding how they may be used. In the bigger picture, though, what is being debated is the allocation of power between federal and state governments.

There are times when the United State can operate as fifty individual states and times when the United State must be one nation, and the R.S. 2477 debate is an expression of the tension between those two paradigms. States should rightly have some discretion in managing lands within their borders, but when those lands are as precious, unique, and emblematic of our national character and heritage as some of the areas at the heart of the R.S. 2477 controversy, it is only fitting that this discretion have some limits. Federal courts have struggled to define a coherent and consistent scheme for resolving disputes around R.S. 2477 claims, and the recent Tenth Circuit decision in *Wilderness Society* seems to have muddied the waters even further. It is time for us to act as a nation to develop a national solution for R.S. 2477 that allows for a fair, balanced, and efficient resolution of the many thousands of outstanding claims and controversies throughout the western United States.

POSTSCRIPT

On February 5, 2010, the Tenth Circuit granted Kane County's petition for an *en banc* rehearing of the issues decided in *Wilderness Society*.[104] The parties submitted supplemental briefs addressing whether the panel erred in upholding the environmental plaintiffs' standing, whether a private cause of action based on the Supremacy Clause was appropriately allowed, and whether the panel's approach to determination of Kane County's claimed

104. *Wilderness IV*, 595 F.3d 1119, 1119 (10th Cir. 2010).

R.S. 2477 rights ran counter to established law on the subject.[105] Oral arguments were held in May 2010, and a decision will likely be announced in the coming months.

A reversal by the *en banc* court could return the contested roads to Kane County's control and according to one of the environmental attorneys, could "undermine the ability of federal land managers to protect these places that we all love and which have been protected for a long time, including Utah's national parks."[106] Conversely, if the *en banc* court upholds the panel's ruling, the result would be "devastating" to Kane County and its 6000 residents, according to Kane County Commission chairman Douglas Heaton, who argued: "Ranchers need these roads to get to their ranches, and recreationalists will be severely impacted. It would be really a catastrophe to liberty and to the rural way of life."[107]

Whichever party comes out on the losing end may choose to pursue an appeal with the United States Supreme Court, and if certiorari is granted, then a final resolution of the R.S. 2477 controversy could potentially emerge at last. However, any purely judicial resolution of this situation will be incomplete and imperfect; the controversy is the product of Congress' actions (and inactions) over the past century and a half. Regardless of the outcome of this case, the real responsibility still lies with Congress to act now to bring about a uniform legislative solution that will put the R.S. 2477 dispute to rest once and for all.

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105. Appellee's Supplemental Brief on Rehearing En Banc at 1 *Wilderness IV*, 595 F.3d 1119 (10th Cir. 2010) (No. 08-4090), 2010 WL 1705600 at *7; Appellant's Supplemental Brief on Rehearing En Banc at 1 *Wilderness IV*, 595 F.3d 1119 (10th Cir. 2010) (No. 08-4090), 2010 WL 1058738 at *7.

106. Elizabeth Ziegler, *10th Circuit Hears Kane County's Appeal for Roads and Trails on National Monument*, KCPW (May 4, 2010), http://kcpw.org/blog/local-news/2010-05-04/10th-circuit-hears-kane-countys-appeal-for-roads-and-trails-on-national-monument.

107. *Id.*