

**TAMING AMERICA’S ROGUE ROADS: UNSOLVED R.S.
2477 CLAIMS IN UTAH AND BEYOND**

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INTRODUCTION

The United States boasts some of the world's most stunning vistas, picturesque landscapes, and diverse sceneries. From the Green Mountains in Vermont to the mesas of Utah, the federal government carefully manages and protects many of the most pristine examples of America's beauty.¹ However, these lands are under attack. In the West, local governments are forging roads across federal public lands.² In Utah, well-over 12,000 roads traverse the public's land.³ Utilizing rights-of-way created under a statute enacted over 150 years ago and repealed over 40 years ago, these rogue roads are causing serious problems as they wind through protected federal lands.⁴ Congress, land management agencies, and the judicial system have failed to resolve the growing issue.⁵ Now, as the Utah Federal District Court moves forward in yet another suit to resolve such claims, the court has a chance to put into motion a real solution.⁶ A solution could not be timelier as President Trump's administration aims to open public lands to private development.⁷

This Note will provide a brief history of Revised Statute 2477 (R.S. 2477), explore the relevant case law surrounding the issue in Utah, and survey solutions to resolve the numerous R.S. 2477 claims across the American West. Part I will explore the origin of R.S. 2477, its eventual repeal, and explain why it is the root of so much trouble today.⁸ Part II will

1. See Quoc Trung Bui & Margot Sanger-Katz, *Why the Government Owns So Much Land in the West*, N.Y. TIMES (Jan. 5, 2016), https://www.nytimes.com/2016/01/06/upshot/why-the-government-owns-so-much-land-in-the-west.html?_r=0 (noting the federal government owns and manages 47% of all land in the West).

2. *Garfield Cty. v. United States*, No. 2:10-CV-1073, 2015 WL 1757194, at *3-5 (D. Utah Apr. 17, 2015), certified question answered sub nom. *Garfield Cty. v. United States*, 2017 UT 41, 424 P.3d 46 ("The litigation encompasses more than 20 different cases ('R.S. 2477 Road Cases') now pending in federal court, involves approximately 12,000 roads, and impacts most areas of the State.").

3. See *id.*

4. R.S. 2477, 43 U.S.C. § 932 (1938) *repealed by* Federal Lands Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1782 (2018).

5. See, e.g., Omnibus Consolidated Appropriations Act, Pub L. No. 104-208, 110 Stat. 3009-200, § 108 (1996) ("No final rule or regulation of any agency of the Federal Government pertaining to the . . . validity of a right-of-way pursuant to Revised Statute 2477 . . . shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act.").

6. See *Garfield Cty.*, 2015 WL 1757194, at *5, *10.

7. Juliet Eilperin, *Shrink at Least 4 National Monuments and Modify a Half-Dozen Others, Zinke Tells Trump*, WASH. POST (Sept. 17, 2017), https://www.washingtonpost.com/national/health-science/shrink-at-least-4-national-monuments-and-modify-a-half-dozen-others-zinke-tells-trump/2017/09/17/a0df45cc-9b48-11e7-82e4-f1076f6d6152_story.html?utm_term=.012d060a77fd; Julie Turkewitz, *Trump Slashes Size of Bears Ears and Grand Staircase Monuments*, N.Y. TIMES (Dec. 4, 2017), <https://www.nytimes.com/2017/12/04/us/trump-bears-ears.html>.

8. See 43 U.S.C. § 1769(a) (2018) (reporting that the repeal of R.S. 2477 did not terminate existing rights-of-way issued prior to the act); U.S. Dep't of the Interior Gen. Land Office, *Regulations Governing Rights-of-Way for Canals, Ditches, Reservoirs, Water Pipe Lines, Telephone and Telegraph*

recount the relevant Tenth Circuit case law, which is representative of the broader, national issue. Specifically, this section will examine how the case law has created a legal framework for resolving claims, and scrutinize the validity of that method. Further, Part II will examine the most recent case law to provide a view of where R.S. 2477 claims stand today.⁹ The Utah Supreme Court's answer to the Tenth Circuit's certified question places the ball back in District Court.¹⁰ Part III will explore how the Federal District Court should continue to pursue a clear legal framework to effectively and efficiently deal with unresolved claims.¹¹ Lastly, this Note will briefly survey various proposed solutions—direct or indirect—beyond the courts and advocate for Congressional action through reauthorization of federal agencies to address the claims.¹² After years of uncertainty, the time has come to resolve the R.S. 2477 claims crisscrossing the American West and protect our public lands.

I. BACKGROUND: R.S. 2477 ORIGINS

R.S. 2477 is contextualized by a suite of government actions facilitating the disposal of federal public lands in the western United States.¹³ As the United States spread to span the width of the continent, the federal government enacted numerous pieces of legislation to divvy up the new territory.¹⁴ Pieces of the disposal era's legislative legacy, like the 1862

Lines, Tramroads, Roads and Highways, Oil and Gas Pipe Lines, Etc., 56 Interior Dec. 533, 533-35, 551 (1938) [hereinafter Regulations Governing Rights-of-Way] (showing that, without any sort of recordation of claims, it is incredibly difficult to determine what rights were established prior to the 1976 repeal); see *infra* Part I (discussing the creation and repeal of R.S. 2477).

9. See generally *Wilderness Soc'y v. Kane Cty.* (*Kane I*), 560 F. Supp. 2d 1147 (D. Utah 2008) (determining whether county had R.S. 2477 rights); *Wilderness Soc'y v. Kane Cty.* (*Kane II*), 581 F.3d 1198 (10th Cir. 2009) (determining whether county could manage an R.S. 2477 claim without alerting federal government); *Wilderness Soc'y v. Kane Cty.* (*Kane III*), 632 F.3d 1162 (10th Cir. 2011) (determining whether county could manage an R.S. 2477 claim without alerting federal government); *Kane Cty. v. United States* (*Kane IV*), 772 F.3d 1205 (10th Cir. 2014) (determining whether county had existing R.S. 2477 claim and if it could manage it without alerting federal government); see *infra* Part II (discussing how federal courts have failed to create a legal framework for resolving Utah's R.S. 2477 claims).

10. See *Garfield Cty.*, 2015 WL 1757194, at *5 (certifying question to Utah Supreme Court); see also *Garfield Cty. v. United States*, 2017 UT 41, ¶ 38, 424 P.3d 46, 63 (answering district court's certified question and leaving district court to analyze).

11. See *infra* Part III (discussing how the District Court should proceed, and alternative solutions to remedy the R.S. 2477 quagmire).

12. *Id.* (discussing remedies outside of court and focusing on Congressional action as most promising solution).

13. See generally GEORGE C. COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW*, 58–61 (Robert C. Clark et al. eds., 7th ed. 2014) (reviewing various disposal statutes encouraging the settlement of the West).

14. *Id.*; *S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 740 (10th Cir. 2005), as amended (Oct. 12, 2005) (“During that time congressional policy promoted the development of the unreserved public lands and their passage into private productive hands . . .”).

Homestead Act, aimed to settle the West.¹⁵ Still others encouraged the development of the West's wealth of natural resources, including the necessary infrastructure for resource extraction.¹⁶ Maintaining the broad policy of disposition, the Mining Act of 1866 legalized prospecting on federal land.¹⁷ The law opened federal lands to miner exploration and occupancy.¹⁸ And the statute included a simple, one-line statement giving the right-of-way to construct roads across public lands.¹⁹

This is R.S. 2477. One judge characterized the statute as “a standing offer of a free right of way over the public domain.”²⁰ These rights-of-way became effective upon construction of a road.²¹ Claims required no additional formalities: “no entry, no application, no license, no patent, and no deed on the federal side; no formal act of public acceptance on the part of the states or localities in whom the right was vested.”²² For decades after its passage, R.S. 2477 garnered praise for successfully furthering United States policy.²³ The roads facilitated settlement and increased the value of public lands.²⁴

In the 1970s, the United States shifted to a policy of public land preservation and conservation. Legislation such as the National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), and the Federal Land Management and Policy Act of 1976 (FLPMA), marked the end of the disposal era and its statutes.²⁵ In particular, FLPMA officially repealed R.S. 2477.²⁶ Thus, Congress would no longer recognize new R.S. 2477 claims.²⁷ However, FLPMA did not terminate existing rights-of-way issued prior to the Act.²⁸ The statute froze R.S. 2477

15. See COGGINS, *supra* note 13, at 95–96 (discussing various homestead legislation); Homestead Act, 43 U.S.C. § 161, *repealed by* 43 U.S.C. § 1701–1782 (2018) (allowing citizens to purchase up to 160 acres of land if they met residency and cultivation requirements).

16. See COGGINS, *supra* note 13, at 97–100 (discussing federal land policy toward timber, mining, and railroads).

17. Mining Act of 1866, ch. 262, 14 Stat. 251, *repealed by* 43 U.S.C. §§ 1701–1782.

18. *Id.*

19. *Id.*; R.S. 2477, *supra* note 4.

20. *Streeter v. Stalnaker*, 85 N.W. 47, 48 (Neb. 1901).

21. Regulations Governing Rights-of-Way, *supra* note 8, at 551.

22. *S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 741 (10th Cir. 2005), *as amended* (Oct. 12, 2005)

23. See, e.g., *Flint & P.M. Ry. Co. v. Gordon*, 2 N.W. 648, 653 (Mich. 1879) (discussing policy of R.S. 2477 and other disposal statutes).

24. *Id.*

25. National Environmental Policy Act, 42 U.S.C. §§ 4321–4370a (2018); National Forest Management Act, 16 U.S.C. §§ 1600–1614 (2018); 43 U.S.C. § 1701–1782.

26. 43 U.S.C. § 1761.

27. *Id.*

28. *Id.* at § 1769(a).

claims as they were in 1976.²⁹ Rights established prior to the 1976 repeal are incredibly difficult to determine without prior recording.³⁰

Combining the questionable validity of R.S. 2477 claims with the resentful—even hostile—attitude of the arid West creates the problems we see today. There are many instances where citizens of western states have clashed with the federal government over federal land ownership and management.³¹ In the 1970s, the “Sagebrush Rebellion” embodied the Western preoccupation by promoting traditional and local economic interests over federal controls.³² In the 1990s, the “County Supremacy” movement echoed this hostility toward federal agencies managing large swaths of western lands.³³ These attitudes live on. In 2016, militant ranchers made headlines for taking control of the Malheur National Wildlife Refuge in Oregon.³⁴ The armed ranchers and militiamen illegally held the refuge in protest of federal regulation of grazing permits.³⁵

This resentment runs through western populations and is felt in their representative bodies.³⁶ A good example of this attitude is the action of the Utah Legislature.³⁷ Utah’s rural communities are continually “dissatisfied with federal land management decisions, blaming environmental regulation, litigious advocacy groups, and recreational users of public lands for stifling local economies long dependent on ranching, logging, and mining.”³⁸ As a result, the Utah Legislature passed the Utah Transfer of Public Lands Act of 2012.³⁹ The Act unsuccessfully demanded that the federal government cede federally owned lands to the State of Utah by 2014, despite consistent studies

29. *Sierra Club v. Hodel*, 848 F.2d 1068, 1078 (10th Cir. 1988), *overruled on other grounds en banc* by *Vill. of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992).

30. *See* *S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 741 (10th Cir. 2005), *as amended* (Oct. 12, 2005) (“[N]o entry, no application, no license, no patent, and no deed on the federal side; no formal act of public acceptance on the part of the states or localities in whom the right was vested.”).

31. *See* Robert L. Fischman & Jeremiah I. Williamson, *The Story of Kleppe v. New Mexico: The Sagebrush Rebellion as Un-Cooperative Federalism*, 83 U. COLO. L. REV. 123, 125–26 (2011) (discussing Westerners’ resistance to and frustration with federal land ownership and management, as exemplified through the Sagebrush Rebellion); Michael C. Blumm & James A. Fraser, “Coordinating” with the Federal Government: Assessing County Efforts to Control Decisionmaking on Public Lands, in 2017 PUB. LAND & RESOURCES L. REV. 1 (outlining the various expressions western hostility toward federal land management has taken over the years).

32. Fischman & Williamson, *supra* note 31, at 160, 162.

33. Blumm & Fraser, *supra* note 31, at 2.

34. *Id.* at 3.

35. *Id.*

36. *Id.*; *see, e.g.*, H.B. 148, 59th Leg., Reg. Sess. (Utah 2012) (demanding that federal lands within Utah be ceded to the State).

37. H.B. 148.

38. Blumm & Fraser, *supra* note 31, at 4–5.

39. H.B. 148.

proving Utah administratively and financially incapable of managing those lands.⁴⁰

A long-held resentment fuels continued action by citizens of these states and local governments against federal control of Western lands.⁴¹ As shown, citizens and governments are willing to act at the fringe of legality, if not through means entirely illegal, to protest federal land ownership and management.⁴² In the context of this Note, the rebellious spirit of Utah's counties and citizens certainly animate the continued assertion and defense of R.S. 2477 claims across federal lands.⁴³ Each R.S. 2477 claim is a step toward reclaiming lands from the federal government. However, the courts are now left to determine whether this latest incarnation of Western rebelliousness is within the bounds of the law.

II. THE PROBLEM: R.S. 2477 AND POST-FLPMA CASE LAW

A. R.S. 2477 Claims Before and After FLPMA

Prior to 1976, when Congress enacted FLPMA, state courts largely decided R.S. 2477 claims based on state law.⁴⁴ Further, most pre-FLPMA litigation focused on disputes between private landowners.⁴⁵ The passage of FLPMA marked a change to more contentious litigation, more narrow interpretations of R.S. 2477, and ultimately, more claims.⁴⁶ In light of this, the Department of the Interior (DOI) made an effort to consolidate records of claims through regulation of local and state governments.⁴⁷ However, by the 1980s, the effort fizzled.⁴⁸ With it, the opportunity for efficient resolution of claims faded.⁴⁹ Without an efficient, nationally applicable framework for resolution, states have struggled to resolve these claims.

40. Blumm & Fraser, *supra* note 31, at 4–5.

41. *Id.*

42. See Fischman & Williamson, *supra* note 31, at 162 (discussing hostility toward federal land management and “uncooperative federalism” movement); Blumm & Fraser, *supra* note 31, at 2–3 (discussing manifestations of western hostility).

43. Blumm & Fraser, *supra* note 31, at 2–3.

44. 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, 1026 (2005).

45. *Id.* at 1028.

46. *Id.*; Tova Wolking, *From Blazing Trails to Building Highways: SUWA v. BLM & Ancient Easements Over Federal Public Lands*, 34 ECOLOGY L. Q. 1067, 1075–76 (2007).

47. Management of Rights-of-Way and Related Facilities on Public Lands and Reimbursement of Costs, 44 Fed. Reg. 58,106, 58,106 (proposed Oct. 9, 1979) (proposed rulemaking).

48. Rights-of-Way, Principles and Procedures; Amendment, 47 Fed. Reg. 12,568, 12,568–70 (proposed Mar. 23, 1982) (codified at 43 C.F.R. pt. 2800, subsequently repealed); Wolking, *supra* note 46, at 1076.

49. Wolking, *supra* note 46, at 1076.

Now, over 150 years after Congress enacted the Mining Law of 1866, local governments are claiming and fighting to validate R.S. 2477 rights-of-way.⁵⁰ In Utah alone, county governments claim over 12,000 roads.⁵¹ This vast web of claims traverses thousands of miles of Utah's federally owned landscapes.⁵² These are not ordinary roads and highways. The majority of R.S. 2477 roads do not lead to schools, businesses, or even neighboring communities.⁵³ Instead, many R.S. 2477 roads are simply ruts in the dirt—even cow paths—rather than paved roads or highways.⁵⁴ Thus, the practical value of such roads may be unclear. But R.S. 2477 claims still pose a certain threat.

B. The Impact of R.S. 2477 Roads

Many R.S. 2477 roads bisect some of the country's most precious and sensitive environments, like the Grand Staircase-Escalante National Monument (Monument).⁵⁵ President Clinton established the Monument via Proclamation in 1996.⁵⁶ The 1.9 million-acre monument encompasses a large portion of southern Utah's landscape.⁵⁷ The water-scarce region hosts life zones ranging from "low-lying desert to coniferous forests."⁵⁸ President Clinton aimed to preserve the area's remote, primitive, and unspoiled character by designating the lands as a monument.⁵⁹ In doing so, President Clinton noted the area was the last portion of the continental United States to be mapped.⁶⁰ Nearly half of the Monument consists of 16 Wilderness Study

50. *Garfield Cty. v. United States*, No. 2:10-CV-1073, 2015 WL 1757194, at *3 (D. Utah Apr. 17, 2015), certified question answered sub nom. *Garfield Cty. v. United States*, 2017 UT 41, 424 P.3d 46.

51. *Id.* ("The litigation encompasses more than 20 different cases ('R.S. 2477 Road Cases') now pending in federal court, involves approximately 12,000 roads, and impacts most areas of the State.")

52. *Id.*

53. Hoax Highways (RS 2477), S. UTAH WILDERNESS ALL., <https://suwa.org/issues/phantom-roads-r-s-2477/> (last visited Oct. 29, 2019) ("[T]he overwhelming majority of these routes are not 'roads' that lead to schools, stores, or towns. Rather, they are wash bottoms, cowpaths [sic], and two-tracks in the desert . . .").

54. *Id.*

55. U.S. DEP'T OF INTERIOR, BUREAU OF LAND MGMT, GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT APPROVED MANAGEMENT PLAN ix, 46–47 (2000) (discussing the presence of R.S. 2477 claims within the monument's boundaries) [hereinafter GSENM MANAGEMENT PLAN].

56. Proclamation No. 6290, 61 Fed. Reg. 50,223, 50,223 (Sept. 8, 1996) [hereinafter Proclamation 6290]. President Trump's Proclamation on December 4, 2017 effectively destroys the Monument as established by President Clinton. However, roughly half of the area of the original monument will retain its designation as monument land, including much of the Wilderness Study Areas. Proclamation No. 9682, 82 Fed. Reg. 58,089, 58,089 (Dec. 4, 2017) [hereinafter Proclamation 9682].

57. GSENM MANAGEMENT PLAN, *supra* note 55, at iii.

58. Proclamation 6290, *supra* note 56, at 50,224.

59. *Id.* at 50,223.

60. *Id.*

Areas (WSAs), which speaks to the remote, primitive, and unspoiled character of the Monument.⁶¹

While historical, archeological, and cultural aspects of the land are cited as reasons for monument status, the land is also an “outstanding biological resource.”⁶² The designation aimed to protect many endemic species near the Monument.⁶³ The Proclamation notes that “[m]ost of the ecological communities contained in the Monument have low resistance to, and slow recovery from, disturbance,” which makes the ecosystem particularly vulnerable.⁶⁴ Additionally, the Monument is home to a number of species listed as threatened or endangered under the Endangered Species Act.⁶⁵ Thus, any threat to the remote ecosystem must not be considered lightly.

While the R.S. 2477 claims remain unresolved, the Monument is damaged by the roads' existence and use in several ways. First, the R.S. 2477 claims threaten the overall undisturbed and primitive character of the land, as Clinton intended to protect and Trump intends to protect, in part.⁶⁶ Second, motorized access via R.S. 2477 roads threatens unique ecological communities, which are unlikely to recover from damaging disturbance even if claims are later invalidated.⁶⁷ Third, the existence of roads in WSAs will likely preclude their eventual designation as Wilderness Areas.⁶⁸

The Grand Staircase-Escalante National Monument provides an apt example of the threats created by R.S. 2477 claims. Yet, the Monument is only one of numerous public resources in Utah facing such threats.⁶⁹ The need for resolution is clear. With a flood of claims, no true legislative

61. GSENM MANAGEMENT PLAN, *supra* note 55, at 62.

62. Proclamation 6920, *supra* note 56, at 50, 224.

63. *Id.*

64. *Id.*

65. *Fauna of the Grand Staircase-Escalante National Monument, Utah*, <http://www.zionnational-park.com/gsf fauna.htm> (last visited Oct. 29, 2018).

66. See Proclamation 6920, *supra* note 5656, at 50,244 (describing historical importance); Proclamation 9682, *supra* note 56, at 58,089-90 (modifying the monument to the smallest area possible needed to protect the historic and ecological importance).

67. See Proclamation 6920, *supra* note 56, at 50,244 (describing the ecological importance of the monument).

68. See GSENM MANAGEMENT PLAN, *supra* note 55, at 62 (noting land must have certain characteristics to qualify for WSA status). According to the monument management plan, no action may be taken to impair a wilderness study areas future designation as wilderness. *Id.* Thus, the plan bans any surface-disturbance or placement of permanent structures within study areas, in accordance with the Wilderness Act of 1964, 16 U.S.C. § 1131(a). *Id.*

69. See *Utah – List View*, NAT'L PARK SERV., <https://www.nps.gov/state/ut/list.htm?program=parks> (last visited Oct. 29, 2019) (listing the thirteen national parks within Utah); see also *National Monuments & Landmarks*, UTAH.COM, <https://utah.com/national-monuments-landmarks> (last visited Oct. 29, 2019) (listing nine national monuments and other protected landmarks of the Utah landscape).

guidance, and no federal agency authority, courts are left only with a confusing body of case law to determine the validity of these claims.⁷⁰

C. Confusing Kane County Cases

While R.S. 2477 claims significantly impact several states, this Note focuses on recently developed case law in Utah.⁷¹ The federal government owns the majority of Utah's land—approximately 65%—thus explaining the large volume of claims made there.⁷² Because of the prior and developing case law and the number of claims, Utah exemplifies the issues surrounding R.S. 2477—in particular Kane and Garfield Counties. Over the past decades, R.S. 2477 issues have plagued the Tenth Circuit Court of Appeals, federal district courts, and Utah's state courts.⁷³ Despite their frequent interactions, even the most recent case law remains confusing. This is largely because these cases have failed to adequately or substantially address R.S. 2477 claims. In 1988, environmental groups sought to enjoin the widening of an R.S. 2477 highway traversing Garfield County, Utah.⁷⁴ Avoiding the broader issues surrounding R.S. 2477, the court focused on the text of the Statute.⁷⁵ It concluded the widening of the highway fell within the existing right-of-way and failed to address how future courts could assess the validity of such claims.⁷⁶ This case is exemplary of courts' continued reluctance to tackle claims head on.

The first of the confusing Kane County cases began when the Kane County Commissioner asserted ownership of numerous R.S. 2477 claims.⁷⁷ A letter by the Commissioner proclaimed the Kane County claims valid.⁷⁸

70. Omnibus Consolidated Appropriations Act, *supra* note 5 (“No final rule or regulation of any agency of the Federal Government pertaining to the . . . validity of a right-of-way pursuant to Revised Statute 2477 . . . shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act.”)

71. *See, e.g.*, Mark Udall, *There's a Way to End the RS 2477 Road Mess*, HIGH COUNTRY NEWS (June 9, 2003), <https://www.hcn.org/wotr/14049> (describing potential RS 2477 conflicts in various states).

72. David Johnson & Pratheek Rebala, *Here's Where the Federal Government Owns the Most Land*, TIME (Jan. 5, 2016), <http://time.com/4167983/federal-government-land-oregon/> (noting that the federal government owns 64.9% of Utah's land).

73. *See, e.g.*, *Sierra Club v. Hodel*, 848 F.2d 1068, 1073 (10th Cir. 1988), *overruled on other grounds en banc* by *Vill. of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992). (determining whether R.S. 2477 right allowed county road developments through federal land); *S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 740-42 (10th Cir. 2005), *as amended* (Oct. 12, 2005) (discussing the vexing problem of R.S. 2477); *Utah v. United States*, No. 2:05-CV-714-TC, 2008 WL 4170017, at *1 (D. Utah Sept. 3, 2008) (allowing intervention in an R.S. 2477 quiet-title action).

74. *Hodel*, 848 F.2d at 1073.

75. *Id.* at 1084.

76. *Id.*

77. *Kane I*, 560 F. Supp. 2d 1147, 1154-55 (D. Utah 2008).

78. *Id.* at 1155-56.

The County passed an ordinance to remove signs from federal lands and put up their own—indicating the roads were open to off-road vehicles.⁷⁹ The Wilderness Society, a conservation organization, sued the County.⁸⁰ The organization claimed that federal law preempted the County's actions—in other words, the County violated the Supremacy Clause.⁸¹

First, the court noted a presumption of ownership and management of federal land lies with the federal government and that Kane County “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.”⁸² The court ruled the ordinance violated the Supremacy Clause and enjoined the County from encouraging use of federal lands without first validating its R.S. 2477 claims.⁸³ However, the court did not determine the validity of those claims and instead avoided the issue of property rights altogether.⁸⁴ By doing so, the court avoided the heart of the R.S. 2477 issue.

On appeal, the County argued that the Wilderness Society lacked standing to bring the Supremacy Clause claim.⁸⁵ However, the court disagreed.⁸⁶ The Tenth Circuit affirmed the lower court and determined the County had not successfully validated its claims.⁸⁷ The County could defend the preemption claim, but only if the court validated the R.S. 2477 claims.⁸⁸ Until that happened, the County had no right to take actions on those claims.⁸⁹ Again, the court avoided an actual assessment of the R.S. 2477 claims' validity.

Finally, the court granted the County's petition for a rehearing en banc.⁹⁰ The panel vacated the District Court's decision and remanded the case with instructions to dismiss.⁹¹ In doing so, the decision reversed the burden of proof that the County must validate its claim before taking any action.⁹² The dissent criticized the majority's opinion, explaining the negative impact it

79. *Id.*

80. *Id.*; see also *About Us*, THE WILDERNESS SOCIETY, <http://wilderness.org/about-us> (last visited Oct. 29, 2019) (“The Wilderness Society has led the effort to permanently protect 109 million acres of wilderness in 44 states. We have been at the forefront of nearly every major public lands victory.”).

81. *Kane I*, 560 F. Supp. 2d at 1149.

82. *Id.* at 1151 (quoting *Wilderness Soc'y v. Kane Cty.*, 470 F. Supp. 2d 1300, 1306 (D. Utah 2006)).

83. *Id.* at 1165.

84. *Id.* at 1165-66; *Kane III*, 632 F.3d 1162, 1183 (10th Cir. 2011) (Lucero, J., dissenting) (noting lower court did not decide the County's property rights).

85. *Kane II*, 581 F.3d 1198, 1209 (10th Cir. 2009).

86. *Id.* at 1212.

87. *Id.* at 1226.

88. *Id.* at 1221.

89. *Id.*

90. *Kane III*, 632 F.3d 1162, 1164-65 (10th Cir. 2011).

91. *Id.* at 1174.

92. *Id.* at 1171.

would have upon future R.S. 2477 litigation.⁹³ As one commenter aptly noted, the majority missed an opportunity to create a legal framework for resolving these complex issues, and instead only added to the confusion.⁹⁴ After three passes at the County's claims, the courts missed the opportunity.

In a new action, brought several years later, Kane County sought to quiet title on several R.S. 2477 claims using the Quiet Title Act (QTA), resulting in two district court decisions.⁹⁵ Kane County appealed those district court decisions to the Tenth Circuit.⁹⁶ In order to have a disputed title, as the QTA requires, the County must show that the United States explicitly or implicitly disputed the claims.⁹⁷ Ultimately, the court concluded the United States did not dispute the title.⁹⁸ The Supreme Court of the United States denied the petition for writ of certiorari, passing on an opportunity to set a standard for lower courts to resolve R.S. 2477 claims.⁹⁹ For a final time, the Tenth Circuit avoided addressing the numerous R.S. 2477 claims and failed to resolve any claims.¹⁰⁰ While Kane County did set a legal standard for resolution under the QTA, there remains little progress in resolving the growing R.S. 2477 issues.¹⁰¹ Further, despite years of litigation and a legal standard, no clear, overarching policy concerning R.S. 2477 roads has been developed. Now, the District Court, with the help of the Utah Supreme Court, attempts once more to apply the legal standard to resolve only a fraction of the total number of claims.¹⁰²

Currently, most of the R.S. 2477 cases have been stayed due to a comprehensive case management order.¹⁰³ However some remain active.¹⁰⁴ Among them is the consolidated action by Garfield County, including claims

93. *See id.* at 1180 (Lucero, J., dissenting) (“This is a pivotal case which, unless reversed or modified, will have long-term deleterious effects on the use and management of federal public lands.”).

94. *See* Hillary M. Hoffmann, *Signs, Signs, Everywhere Signs: The Wilderness Society v. Kane County Leaves Everyone Confused About Navigating A Right-of-Way Claim Under Revised Statute 2477*, 18 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 3, 31 (2012) (noting the Tenth Circuit's failure to clarify RS 2477 claims “muddied an already very murky body of law”).

95. *Kane Cty. v. United States*, 934 F. Supp. 2d 1344, 1346 (D. Utah 2013); *Kane Cty. v. United States*, No. 2:08-cv-00315, 2013 WL 1180764, at *3-4 (D. Utah Mar. 20, 2013).

96. *Kane IV*, 772 F.3d 1205, 1209 (10th Cir. 2014).

97. *Id.*

98. *Id.* at 1212–15.

99. *Kane Cty. v. United States*, 136 S. Ct. 318 (2015) (mem.).

100. *Kane IV*, 772 F.3d at 1225 (remanding to determine the scope of the R.S. 2477 rights).

101. *See, e.g., Garfield Cty. v. United States*, No. 2:10-CV-1073, 2015 WL 1757194, at *3, *10 (D. Utah Apr. 17, 2015), certified question answered sub nom. *Garfield Cty. v. United States*, 2017 UT 41, 424 P.3d 46 (concerning additional quiet title actions resulting in a certified question to the Utah Supreme Court).

102. *See id.* at *10 (certifying question to the Utah Supreme Court due to uncertainty in law).

103. *Id.*

104. *Id.* at *6.

on over 700 R.S. 2477 roads.¹⁰⁵ As a permissive intervener, the Southern Utah Wilderness Alliance (SUWA) asserted, through a memorandum in support of the United States, that a Utah statute bars the pending cases.¹⁰⁶ Thus, the District Court certified a question to the Utah Supreme Court to interpret the state statute before proceeding.¹⁰⁷

III. MAINTAINING A CLEAR LEGAL FRAMEWORK AND UTILIZING ALTERNATIVE SOLUTIONS

In the summer of 2017, the Supreme Court of Utah offered its opinion on the question certified by the District Court.¹⁰⁸ The court determined that the Utah statute at issue was not a statute of repose, but a statute of limitation.¹⁰⁹ The Utah Supreme Court's decision allows the District Court to proceed in addressing Garfield County's R.S. 2477 claims. Next this Note will walk through the court's analysis and application of the absurdity doctrine on which it bases this conclusion.¹¹⁰ This Note will then address the lengthy dissent, which characterizes the majority's application of the absurdity doctrine as unprecedented and over-expansive.¹¹¹ Finally, this Note will discuss why the majority got it right and helped defend the use of the QTA as the legal method for R.S. 2477 resolution.

A. Utah Supreme Court Answers

In order to determine if state statutes barred the current action to quiet title on R.S. 2477 claims, the Utah Federal District Court certified the following question to the Utah Supreme Court: whether Utah Code § 78B-2-201(1) and its predecessor are statutes of limitations or statutes of repose.¹¹² If statutes of repose, the current action in the Court of Appeals would be time-barred.¹¹³ However, if statutes of limitations, the action could proceed.¹¹⁴ The court concluded “section 201 and its predecessor are, by their plain language,

105. *Id.* at *1.

106. *Id.* at *8.

107. *Id.* at *10.

108. *Garfield Cty v. United States*, 2017 UT 41, ¶ 1, 424 P.3d 46, 49.

109. *Id.* ¶ 1, 424 P.3d at 49; UTAH CODE ANN. § 78B-2-201 (West 2019).

110. *Garfield Cty.*, 2017 UT 41, ¶ 1, 424 P.3d 46, 49.

111. *Id.* ¶ 40, 424 P.3d at 64 (Voros, J., dissenting).

112. *Id.* ¶ 1, 424 P.3d at 49. The court notes that its interpretation is limited only to Utah Code § 78B-2-201(1) as it existed in 2008—not as amended in 2015. *Id.* ¶ 1, n. 1. The amended statute refers to itself explicitly as a “statute of limitations.” UTAH CODE ANN. § 78B-2-201 (West 2019). Thus, further litigation challenging this court's characterization of the statute may likely be mooted by the amendment.

113. *Garfield Cty.*, 2017 UT 41, ¶ 1, 424 P.3d at 49; *Garfield Cty. v. United States*, No. 2:10-CV-1073, 2015 WL 1757194, at *8 (D. Utah Apr. 17, 2015).

114. *Garfield Cty.*, 2017 UT 41, ¶ 1, 424 P.3d at 49.

statutes of repose. But applying these statutes to the State's R.S. 2477 claims leads to an overwhelmingly absurd result not intended by the legislature."¹¹⁵ Thus, the majority found the statutes must be interpreted as statutes of limitations.¹¹⁶

The absurdity doctrine, a tool of statutory interpretation, allows a court to depart from the literal meaning of a statute.¹¹⁷ However, this tool is limited for use only when a literal reading would yield an absurd result.¹¹⁸ The tool is premised on the idea that a court should recognize legislative intent and assumes that legislators would not intend an absurd result.¹¹⁹ Thus, when an absurd result is apparent, the court may avoid it by departing from a literal reading of the text.¹²⁰

The court determined the plain language created statutes of repose, not limitations.¹²¹ As a statute of limitation, the Utah statute bars the State from bringing a suit, except within seven years after the accrual of the cause of action.¹²² However, as a statute of repose, "the State cannot assert a cause of action related to real property except within the first seven years after the accrual of its right or title to the property."¹²³ The court concluded the language of the statutes clearly created the latter.¹²⁴ Despite unambiguous statutory language, the court rightly decided such a characterization of the statutes yielded absurd results.¹²⁵ Thus, the court held the Utah statute to be a statute of repose according to the plain language.¹²⁶ However, the court avoided this absurd result by characterizing the law as a statute of limitations.¹²⁷

For R.S. 2477 claims, a statute of limitations would have created only "ephemeral property rights."¹²⁸ The court stated that "[p]rior to the enactment of the [QTA] in 1972, the State had no legal mechanism to protect its vested rights of way."¹²⁹ Thus, any road claim under the Mining Law would have lapsed, unless claimed after 1965—seven years prior to the introduction of

115. *Id.* ¶¶ 1, 38, 424 P.3d at 49, 63.

116. *Id.*

117. *Id.* ¶ 22, 424 P.3d at 58.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* ¶ 15, 424 P.3d at 56.

122. *Id.* ¶ 14, 424 P.3d at 55–56.

123. *Id.* ¶ 15, 424 P.3d at 56.

124. *Id.* ¶ 14, 424 P.3d at 55–56.

125. *Id.* ¶¶ 23–24, 424 P.3d at 58–59.

126. *Id.* ¶ 37, 424 P.3d at 63.

127. *Id.* ¶¶ 1, 38, 424 P.3d at 49, 63.

128. *Id.* ¶ 27, 424 P.3d at 60.

129. *Id.* ¶ 25, 424 P.3d at 59.

the QTA.¹³⁰ The court concluded the lack of a legal mechanism to protect R.S. 2477 claims to be an absurd result and determined the intent of the legislature must have been to create a statute of limitation.¹³¹

In his dissent, Justice Voros refuted the majority's conclusion.¹³² Justice Voros found the majority's conclusion of absurdity flawed for two reasons: (1) the Utah statute stood for over one hundred years; and (2) an alternative administrative remedy exists for R.S. 2477 claims.¹³³ The majority effectively dismissed Justice Voros's first criticism, stating that the longevity of a law is not an issue on a case of first impression.¹³⁴ Second, Justice Voros claimed that FLPMA provides an alternative avenue for settling R.S. 2477 claims.¹³⁵ However, Title V of FLPMA does not settle existing claims; rather it simply allows or denies new property rights.¹³⁶ Ultimately, both the majority and dissent failed to consider the absurdity of interpreting the law as a statute of repose in light of Congress's broader intent for R.S. 2477.

The court could have—and likely should have—characterized that result within the broader context of R.S. 2477. Interpreting the Utah law as a statute of repose undermines the very purpose Congress intended R.S. 2477 to serve.¹³⁷ As mentioned, Congress established the Mining Law and R.S. 2477 with a specific goal: to establish roadways across the western United States.¹³⁸ By encouraging the construction of basic infrastructure, Congress intended to promote the settlement and development of the region.¹³⁹ If R.S. 2477 was a statute of repose, the claims and the roads themselves would prove “ephemeral.”¹⁴⁰ Yet Congress intended the network of highways across the West to be permanent fixtures of the landscape.¹⁴¹ Only as permanent fixtures could the roads facilitate the development and population of the region.¹⁴² There is no indication that the Utah legislature desired to undermine the federal government's objective to connect the West.¹⁴³ In fact,

130. *Id.*

131. *Id.* ¶ 26, 424 P.3d at 59–60.

132. *Id.* ¶ 39, 424 P.3d at 64 (Voros, J., dissenting).

133. *Id.* ¶¶ 54, 60, 424 P.3d at 67, 68 (Voros, J., dissenting).

134. *Id.* ¶ 30, 424 P.3d at 61.

135. *Id.* ¶ 61, 424 P.3d at 68 (Voros, J., dissenting).

136. 43 U.S.C. § 1761(a) (2018); *see infra* Part III (exploring the use of Title V of FLPMA in resolving R.S. 2477 claims).

137. Mining Act of 1866, *supra* note 17.

138. *Id.*

139. *Flint v. Gordon*, 2 N.W. 648, 653 (Mich. 1879) (noting the success of R.S. 2477 in facilitating western settlement).

140. *Garfield Cty.*, 2017 UT 41, ¶ 27, 424 P.3d at 60.

141. *Flint*, 2 N.W. at 653 (discussing the success of R.S. 2477 in establishing a network of road to facilitate development of the western United States).

142. *Id.*

143. *Id.*

if the current battle over the claims is an indication, surely the Utah legislature does not wish to destroy those claims.¹⁴⁴ Thus, interpreting the Utah law as a statute of repose undermines the congressional intent for enacting R.S. 2477 and generates an absurd result. This broader perspective only bolsters the majority's opinion and reasoning.

Further, Justice Voros's opinion would undermine the resolution of Utah's R.S. 2477 claims. If the court read the statute according to Voros's interpretation, the unresolved R.S. 2477 claims would be time-barred from resolution under the QTA.¹⁴⁵ Given that the QTA is the standard for resolution, the Act would effectively halt all progress towards resolution.¹⁴⁶ This would only perpetuate the problem, as claimants would likely continue to insist R.S. 2477 roads valid and seek resolution through different channels—like FLPMA's Title V, as Voros suggested.¹⁴⁷ Ultimately, such a decision would only protract the R.S. 2477 issue. In the meantime, these roads would continue to complicate land management and threaten protected environments.¹⁴⁸

The majority correctly interpreted the law as a statute of repose.¹⁴⁹ This interpretation means that “[Utah] has seven years to bring its QTA cause of action from the date the federal government begins to dispute an R.S. 2477 right of way—the date the State's cause of action under the QTA accrues.”¹⁵⁰ Thus, the court answered the question certified in a manner that would allow the pending case in Utah's Federal District Court to proceed.¹⁵¹ Essentially, the Utah Supreme Court successfully defended the QTA as the legal method for resolving R.S. 2477 claims. This decision gives the federal court an opportunity to resolve the R.S. 2477 claims under the QTA.¹⁵²

The Utah Supreme Court's certified answer successfully maintains the life of this case. The District Court should keep this momentum going by resolving the claims before it in a way that will inform other courts and be the first step in creating a policy for resolution.

144. See *supra* Part I (discussing western resentment of federal land management in Utah).

145. *Garfield Cty.*, 2017 UT 41, ¶ 25, 424 P.3d at 59.

146. *Id.* ¶ 26, 424 P.3d at 59–60 (discussing the use of the QTA as tool for protecting and validating claims).

147. *Id.* ¶ 61, 424 P.3d at 68 (Voros, J., dissenting).

148. See Proclamation 6920, *supra* note 56 (discussing the fragile ecosystems of Grand Staircase-Escalante National Monument, negatively impacted by any disturbance).

149. *Garfield Cty.*, 2017 UT 41, ¶¶ 1, 38, 424 P.3d at 49, 63.

150. *Id.* ¶ 37, 424 P.3d at 63.

151. *Id.* ¶ 26, 424 P.3d at 59–60 (answering avoids creating ephemeral property rights).

152. *Kane I*, 560 F. Supp. 2d 1147, 1154-55 (D. Utah 2008); *Kane II*, 581 F.3d 1198, 1210 (10th Cir. 2009); *Kane III*, 632 F.3d 1162, 1183 (10th Cir. 2011) (Lucero, J., dissenting); *Kane IV*, 772 F.3d 1205, 1209 (10th Cir. 2014); *Garfield Cty. v. United States*, No. 2:10-CV-1073, 2015 WL 1757194, at *1 (D. Utah Apr. 17, 2015) (noting 12,000+ claims in Utah).

B. The District Court Should Take the Opportunity to Maintain and Dictate a Clear Legal Framework

The District Court, now bound by the Utah Supreme Court's answer, must apply it to the facts and issues at hand.¹⁵³ As a statute of repose, the claims before the court stand and the litigation must continue.¹⁵⁴ The District Court must utilize this opportunity to offer a clear legal framework under the QTA for the resolution of all outstanding claims and determine the role of third parties in R.S. 2477 litigation.¹⁵⁵

First, the District Court must maintain a clear path for counties to settle unresolved claims. The most obvious route is through the QTA, which is already an established legal standard.¹⁵⁶ The court should endorse the approach taken in this litigation to quiet the title for the claims against the federal government's interest.¹⁵⁷ Bringing an action under the QTA forces the claimant to prove the validity of the R.S. 2477 claim.¹⁵⁸ Thus, this gives the court an opportunity to assess and establish a clear burden of proof for validating R.S. 2477 claims.

Second, the court must evaluate the burden of proof to validate R.S. 2477 claims. In doing so, the court must answer the question of whether a presumption of federal ownership over the disputed land exists.¹⁵⁹ And if so, whether claimants may rebut that presumption.¹⁶⁰ Given the past avoidance of resolving the property issue at the core of R.S. 2477 claims, which burden of proof the court may require is unclear.¹⁶¹ A stricter burden of proof may please environmentalists and federal land management agencies¹⁶² while a

153. *Garfield Cty.*, 2017 UT 41, ¶ 6, 424 P.3d at 50–51.

154. *Id.* ¶ 1, 424 P.3d at 49.

155. Hoffmann, *supra* note 94, at 33 (“When the next R.S. 2477 case reaches the Tenth Circuit, the court should address the issues raised above - the burdens of proof, the nature of an R.S. 2477 claim or defense, and how R.S. 2477 factors into agency management decisions under statutes like FLPMA - and address challenges on the merits of the parties' pleadings.”); Andrew Stone, *The Road Ahead: R.S. 2477 Right-of-Way Claims After Wilderness Society v. Kane County, Utah*, 12 VT. J. ENVTL. L. 193, 209 (2010) (“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.”).

156. 28 U.S.C. § 2409a (2018).

157. *Garfield Cty.*, 2015 WL 1757194, at *1 (Garfield County “seek[s] to quiet title rights in certain roads crossing federal land.”).

158. *Id.*

159. Hoffmann, *supra* note 94, at 32.

160. *Id.*

161. *Kane I*, 560 F. Supp. 2d 1147, 1154-55 (D. Utah 2008); *Kane II*, 581 F.3d 1198, 1210 (10th Cir. 2009); *Kane III*, 632 F.3d 1162, 1183 (10th Cir. 2011) (Lucero, J., dissenting); *Kane IV*, 772 F.3d 1205, 1209 (10th Cir. 2014).

162. Denying claims would preserve lands, like those of Grand Staircase, from degradation from road use. See GSENM MANAGEMENT PLAN, *supra* note 55, at 62 (discussing R.S. 2477 roads in Wilderness Study Areas).

lesser burden of proof will quickly resolve claims and may please Utahans.¹⁶³ The court must carefully balance an interest in timely resolution of claims with the risk of placing too low a burden. As R.S. 2477 roads were established without any sort of documentation, a high burden may limit the number of successful claims.¹⁶⁴

Third, the court should dictate how valid R.S. 2477 roads will coexist with agency land management plans.¹⁶⁵ In Utah, for example, R.S. 2477 roads traverse Bureau of Land Management (BLM) lands (like the Grand Staircase-Escalante National Monument), National Forests, and National Parks.¹⁶⁶ If claims are validated, they may potentially and significantly impact how each of these agencies manages their portion of federal public land.¹⁶⁷ The court should signal just how much control these land managers may have over valid claims through federal lands. According to the case law, land managing agencies have some authority to regulate private property within or adjacent to public lands.¹⁶⁸ However, the court could delineate the extent of this authority which may also clarify the role of management over unresolved claims. If land managing agencies have clear bounds on their authority to regulate valid, and even unresolved claims, clearly delineated authority may reduce the number of disputed claims. Further, clearly delineated authority may encourage Utah counties to bargain with agencies—perhaps giving up pursuit of some claims for the validation (maybe under FLPMA, Title V) of others with more limited regulation.¹⁶⁹

163. Given the resentment Utahans hold against the federal government, reclaiming some of Utah's land would likely be seen as a victory. See Fischman & Williamson, *supra* note 31, at 162 (discussing hostility toward federal land management); see also Blumm & Fraser, *supra* note 31, at 2 (discussing manifestations of western hostility).

164. *S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 741 (10th Cir. 2005), *as amended* (Oct. 12, 2005) (“[N]o entry, no application, no license, no patent, and no deed on the federal side; no formal act of public acceptance on the part of the states or localities in whom the right was vested.”).

165. Hoffmann, *supra* note 94, at 34.

166. Jodi Peterson, *First Settlement Reached in Utah's Contentious Road Claims*, HIGH COUNTRY NEWS (Aug. 21, 2013), <http://www.hcn.org/blogs/goat/first-settlement-reached-in-utahs-contentious-road-claims>.

167. GSENM MANAGEMENT PLAN, *supra* note 55, at ix, 46–47.

168. The Supreme Court of the United States stated that “the power over the public lands thus entrusted to Congress is without limitations.” *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976). Further, the Court stated that “it is clear that regulations under the Property Clause may have some effect on private lands not otherwise under federal control.” *Id.* at 546; see *State of Minn. by Alexander v. Block*, 660 F.2d 1240, 1244 (8th Cir. 1981) (“Congress' power must extend to regulation of conduct on or off the public land that would threaten the designated purpose of federal lands.”); *United States v. Vogler*, 859 F.2d 638, 639 (9th Cir. 1988) (concluding the government maintains authority regulate use of an R.S. 2477 right-of-way—regardless of its validity); *Wilkenson v. Dep't of Interior of U.S.*, 634 F. Supp. 1265, 1268 (D. Colo. 1986) (concluding that an established R.S. 2477 could still be regulated).

169. 43 U.S.C. § 1761(a) (2018).

Finally, the court must determine and limit the role of the public and third parties in R.S. 2477 litigation. In the present case before the District Court, the SUWA intervened and prompted the District Court to certify a question of Utah's statutory interpretation to the Utah Supreme Court.¹⁷⁰ While the role of public interest groups—in this case conservation groups—and individuals may be helpful, they may also harm a court's ability to efficiently resolve the flood of claims still pending.¹⁷¹ Intervention by and participation of third parties may only complicate and protract already complex legal disputes.¹⁷² Thus, the court should balance the benefits and disadvantages of allowing a greater or lesser role for such non-parties in future litigation. In order to efficiently resolve the claims and minimize the impact of prolonged uncertainty on land management and the environment, the court may find it best to lessen non-parties' role.

Ideally, the District Court will finally bring order to the chaos of R.S. 2477 litigation. However, it remains a likely possibility that the District Court will fail to maintain and dictate a clear framework for federal courts. Perhaps this is not just because the task is daunting. Instead, the attitudes of western Americans toward federal ownership of local lands may permeate, influence, and undermine the effectiveness of the federal courts.¹⁷³ In the matter of R.S. 2477, the complex legal disputes reflect a broader issue of local governance and federal lands in the West.¹⁷⁴ Given the track record of federal courts dealing with R.S. 2477 in Utah, the stalemate may continue.¹⁷⁵ However, additional remedies to the R.S. 2477 issue exist beyond the courtroom and are worth exploring.

C. Surveying Alternative Solutions Beyond the Federal Courts

Should the federal courts fail to pursue a clear framework for claim resolution, scholars offer many additional solutions that are worth careful consideration in crafting a broader policy for effective R.S. 2477

170. *Garfield Cty. v. United States*, No. 2:10-CV-1073, 2015 WL 1757194, at *1 (D. Utah Apr. 17, 2015), certified question answered sub nom. *Garfield Cty. v. United States*, 2017 UT 41, 424 P.3d 46.

171. *Stone*, *supra* note 155, at 209 (discussing potential issues created by third parties and public participation in litigation of R.S. 2477 cases).

172. *Id.*

173. *See supra* Part I (discussing resentment toward federal government control of western lands).

174. *Id.*

175. *Kane I*, 560 F. Supp. 2d 1147, 1154-55 (D. Utah 2008); *Kane II*, 581 F.3d 1198, 1210 (10th Cir. 2009); *Kane III*, 632 F.3d 1162, 1183 (10th Cir. 2011) (Lucero, J., dissenting); *Kane IV*, 772 F.3d 1205, 1209 (10th Cir. 2014); *see also Garfield Cty.*, 2015 WL 1757194 at *1 (noting 12,000+ claims in Utah).

resolutions.¹⁷⁶ Of the many solutions offered by scholars, those suggesting congressional action to reauthorize the DOI to make rules concerning R.S. 2477 claims hold the most promise.¹⁷⁷ However, any combination of solutions—whether they require Congressional action or not—could help form a cohesive policy for the efficient resolution of R.S. 2477 claims.¹⁷⁸

To begin, there are a number of largely inadequate solutions that only partially resolve the R.S. 2477 quagmire. First, road maintenance agreements between the BLM and claimants fail to resolve the problem.¹⁷⁹ Instead, these informal agreements merely “maintain the status quo of the road.”¹⁸⁰ Thus, the agreements are severely limited to use only for roads the federal government does not wish to contest.¹⁸¹ All other R.S. 2477 claims would remain contested, as they are now.¹⁸² Further, the agreements are informal and thus not a permanent solution.¹⁸³ The agreements offer only an indefinite delay of ultimate resolution. For these reasons, the agreements alone offer little in the way of progress towards resolution.

Second, nonbinding administrative agency decisions do not impact or establish any enforceable property rights.¹⁸⁴ Again, their use would be limited to situations where the federal government only desired a small degree of control over roads, but not title.¹⁸⁵ Similar to road maintenance agreements, the application of these nonbinding decisions would be limited only to lesser-contested claims and offer a temporary solution. Third, a tiered agency arbitration only addresses the least contentious road claims.¹⁸⁶ While

176. See Wolking, *supra* note 46, at 1101–03, 1097–98 (discussing the use of road maintenance agreements, the Quiet Title Act, and FLPMA, Title V to resolve claims); Lucas Satterlee, *Pristine Solitude or Equal Footing? San Juan County v. United States and Utah's Larger Bid to Assert Control Over Public Lands in the Western United States*, 92 DENV. U. L. REV. 641, 667 (2015) (discussing tiered agency arbitration); Stone, *supra* note 155, at 214 (discussing the potential role of the Supreme Court of the United States in resolving claims).

177. Lindsay Houseal, *Wilderness Society v. Kane County, Utah: A Welcome Change for the Tenth Circuit and Environmental Groups*, 87 DENV. U. L. REV. 725, 743 (2010) (discussing the use of national, unified standards for resolving claims); 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, 252 (2009) (suggesting Congress remove moratorium on agency rulemaking in regard to R.S. 2477); Wolking, *supra* note 46, at 1104 (discussing uniform Congressional standards and allowing agency rulemaking).

178. See Houseal, *supra* note 177, at 743 (discussing the use of national, unified standards for resolving claims); Macfarlane, *supra* note 177, at 252 (suggesting Congress remove moratorium on agency rulemaking in regard to R.S. 2477); Wolking, *supra* note 46, at 1104 (discussing uniform Congressional standards and allowing agency rulemaking).

179. Wolking, *supra* note 46, at 1097–98.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 1098.

185. *Id.*

186. Satterlee, *supra* note 176, at 667.

practical for lesser-disputed claims the solution on its own would have too little impact overall.¹⁸⁷ More hotly contested claims would still require the case-by-case review of a court.¹⁸⁸

Finally, working within the existing legal framework, the coordination of federal government agencies and local governments is unlikely to succeed.¹⁸⁹ As discussed above and exemplified by the numerous contentious claims, tension between agencies and local governments will likely remain too high to allow for productive discourse.¹⁹⁰ Only if the circumstances change, motivating one party or the other to seek a better outcome through cooperation, will coordination be a viable option.

Several other approaches address the resolution of more claims, but each have their own significant drawbacks. As Utah Supreme Court Justice Voros mentioned, FLPMA's Title V offers a solution.¹⁹¹ Under FLPMA, the BLM may grant rights-of-way for R.S. 2477 roads.¹⁹² FLPMA guides the BLM as its organic act.¹⁹³ According to FLPMA, the BLM has the authority to create rights-of-way over the land it manages.¹⁹⁴ However, like any management decision, it must not violate the legal mandates for management, nor an individual management plan for a specific piece of BLM land—like the Grand Staircase-Escalante National Monument Management Plan.¹⁹⁵ The bottom line is that the BLM can authorize a right-of-way, and that right-of-way could be an unresolved R.S. 2477 claim. A decision like this would still be open for public comment.¹⁹⁶ Thus, the R.S. 2477 debate simply finds a new forum within BLM management decisions, rather than the courts.¹⁹⁷ Further opportunity for public comment will likely slow the resolution process.¹⁹⁸

There are also opportunities for resolving claims under the QTA.¹⁹⁹ While binding, the process is more time consuming and costly than any other

187. *Id.*

188. *Id.*

189. Blumm & Fraser, *supra* note 32, at 49.

190. *See supra* Part I (discussing resentment toward federal government control of western lands).

191. *Garfield Cty. v. United States*, 2017 UT 41, ¶ 60, 424 P.3d 46, 68 (Voros, J., dissenting); 43 U.S.C. § 1761(a) (2018).

192. 43 U.S.C. § 1761(a).

193. *Id.* § 1732 (FLMPA requires the BLM “manage the public lands under principles of multiple use and sustained yield” and “take any action necessary to prevent unnecessary or undue degradation of the lands.”).

194. *Id.*

195. GSENM MANAGEMENT PLAN, *supra* note 55, at x.

196. 43 U.S.C. § 1761(a).

197. Wolking, *supra* note 46, at 1101.

198. 43 U.S.C. § 1761(a).

199. *Garfield Cty. v. United States*, No. 2:10-CV-1073, 2015 WL 1757194, at *1 (D. Utah Apr. 17, 2015), certified question answered sub nom. *Garfield Cty. v. United States*, 2017 UT 41, 424 P.3d 46.

option.²⁰⁰ The previously discussed case concerns approximately 700 roads in Garfield County.²⁰¹ Even if the lengthy litigation successfully resolves each of the Garfield County roads, over 11,000 unresolved claims would persist throughout Utah, which is proof of the slow pace of resolution under this method.²⁰²

Alternatively, a United States Supreme Court opinion could offer some sort of resolution to the controversy.²⁰³ However, no R.S. 2477 claim has reached the Supreme Court since the 1976 passage of FLMPA.²⁰⁴ Should the Supreme Court find itself a R.S. 2477 case, as one scholar said, “any purely judicial resolution of this situation will be incomplete and imperfect.”²⁰⁵

Finally, many scholars agree that an ultimate resolution lies with the source of the problem: Congress. Yet those same scholars disagree on what form of congressional actions best deals with R.S. 2477 claims.²⁰⁶ Some scholars have urged for Congress to establish national unified standards for resolving claims.²⁰⁷ The standards must include some sort of time limitation and a clear evidentiary burden for claimants.²⁰⁸ As with any comprehensive piece of legislation, no matter the subject, it is unlikely to find success. Further, such comprehensive legislation is unlikely to overcome a Republican Congress and White House, nor the vocal opposition of states like Utah, which stand to lose more land and control to the federal government.²⁰⁹ In light of unlikely comprehensive legislation, proposed congressional action must come in the form of a smaller stroke of the pen.

One congressional solution stands out from the crowd: reauthorizing the Department of Interior to promulgate rules on R.S. 2477.²¹⁰ Reauthorization is a simple solution with a profound effect. Far less complex than comprehensive legislation, reauthorization has a much better chance of becoming a reality. Agencies may make rules to eliminate frivolous and less-contested claims.²¹¹ For more contentious claims, the agency could expedite resolution, ensure agency public accountability, and maintain an option for

200. Wolking, *supra* note 46, at 1103.

201. *Garfield Cty.*, 2015 WL 1757194, at *1.

202. *Id.*

203. Stone, *supra* note 155, at 214.

204. *Id.*

205. *Id.*

206. Compare Stone, *supra* note 155, at 214 (discussing legislation establishing clear standards for resolved R.S. 2477 claims), with Wolking, *supra* note 46, at 1104 (discussing the solution of removing the moratorium on agency rulemaking), and Macfarlane, *supra* note 177, at 252 (discussing the reauthorization of the DOI as a solution to resolve the R.S. 2477 issue).

207. Stone, *supra* note 155, at 212.

208. Wolking, *supra* note 46, at 1104; Houseal, *supra* note 177, at 743.

209. Houseal, *supra* note 177, at 743.

210. Wolking, *supra* note 46, at 1104; Macfarlane, *supra* note 177, at 252.

211. Macfarlane, *supra* note 177, at 252.

judicial review.²¹² Removing the moratorium on agency rulemaking will alleviate judicial pressure and lead to a swift resolution of R.S. 2477 claims.

Further, reauthorization could be combined with a number of non-congressional actions. Cumulatively, these solutions could swiftly resolve a large number of claims in Utah and beyond. The judicial system would be left with the most contentious claims, rather than the current sea of claims. Together, these solutions would empower federal agencies and courts to effectively resolve claims and protect publicly held lands from degradation resulting from invalid R.S. 2477 claims.

CONCLUSION

As the number of R.S. 2477 claims grows, so does the threat to federally owned public lands in the West.²¹³ Recent case law in Utah exemplifies the confusing and unresolved state of the R.S. 2477 problem.²¹⁴ The scale of R.S. 2477 has only grown in the decades since the repeal of the law.²¹⁵ Further, the issue encompasses a broader battle for local governance in Western states dominated by federally held lands like Utah.²¹⁶ The absence of resolution undermines land management and threatens the delicate environment found on the public's land.²¹⁷

Following the certified answer of the Utah Supreme Court, the Federal District Court must make the most of the opportunity to maintain a clear legal framework for resolving claims under the QTA. Additionally, Congress must not wait to act to protect public lands from these rogue roads and should reauthorize the DOI to promulgate rules on R.S. 2477.²¹⁸ Combined with any number of non-congressional solutions, it may be possible to finally address R.S. 2477 en masse.

212. *Id.*

213. *Garfield Cty. v. United States*, No. 2:10-CV-1073, 2015 WL 1757194, at *1 (D. Utah Apr. 17, 2015), certified question answered sub nom. *Garfield Cty. v. United States*, 2017 UT 41, 424 P.3d 46.

214. *See, e.g., Kane I*, 560 F. Supp. 2d 1147, 1154-55 (D. Utah 2008) (noting changing laws created conflict with local government); *Kane II*, 581 F.3d 1198, 1210 (10th Cir. 2009) (deciding whether local government can manage R.S. 2477 rights without alerting federal government); *Kane III*, 632 F.3d 1162, 1183 (10th Cir. 2011) (Lucero, J., dissenting) (deciding whether local government can manage R.S. 2477 right without alerting federal government); *Kane IV*, 772 F.3d 1205, 1209 (10th Cir. 2014) (determining whether local government has R.S. 2477 right and if it can manage it without alerting federal government).

215. *Garfield Cty. v. United States*, 2017 UT 41, ¶ 4, 424 P.3d 46, 50 (“There are accordingly now multiple cases pending before multiple judges of the Utah federal district court regarding at least 12,000 claimed R.S. 2477 rights of way, with each right of way claim involving unique facts.”).

216. *See supra* Part I (discussing resentment toward federal government control of western lands and offering examples of how that tension manifests itself into actions).

217. *See supra* Part II (discussing how even unresolved R.S. 2477 claims are complicating land management of Grand Staircase-Escalante National Monument.).

218. *Wolking, supra* note 46, at 1104; *Macfarlane, supra* note 177, at 252.

A solution to protect our public lands is more needed than ever. According to leaked documents, previous Secretary of Interior Zinke recommended that President Trump reduce the size of at least 10 national monuments, which cover a significant portion of Utah and contain numerous R.S. 2477 claims.²¹⁹ On Dec. 4, 2017, President Trump followed Zinke's advice, dramatically reducing the size of two Utah monuments: Bears Ears and Grand Staircase-Escalante.²²⁰ In light of this Administration's intent to open up federal public lands to business and undermine conservation efforts, Congress must act.²²¹ Finally resolving R.S. 2477 claims would set a precedent for the continued conservation of public lands in the face of ever-growing threats.

219. Eilperin, *supra* note 7.

220. Turkewitz, *supra* note 7.

221. *Id.*