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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

KANE COUNTY, UTAH (2), (3), and (4), a Utah political subdivision; and STATE OF UTAH, Plaintiffs (or Plaintiff-Intervenor, as to State of Utah in Kane County (2)), v. UNITED STATES OF AMERICA, Defendant, and SOUTHERN UTAH WILDERNESS ALLIANCE et al., Defendant-Intervenors.	**DEFENDANT UNITED STATES' PRETRIAL BRIEF** Consolidated Case No. 2:10-cv-01073-CW (Consolidated with Case Nos. 2:11-cv-1031-CW and 2:12-cv-476-CW) Judge Clark Waddoups

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Defendant, the United States of America, pursuant to this Court's Second Amended Pretrial Order, ECF No. 551, hereby submits this pretrial brief.

INTRODUCTION

Plaintiffs and other Utah counties have brought over twenty lawsuits, raising thousands of claims, seeking to quiet title for R.S. 2477 rights-of-way across federal public lands. As intended by the Court, this bellwether case presents an opportunity to resolve legal issues, and potentially narrow the remaining claims in dispute, thereby saving millions-of-dollars in local, state, and federal funds. With respect to the claimed routes in this first bellwether trial, the evidence will show that Plaintiffs' claims generally fall into two broad categories: claims for routes that are presently used or open to use by the public, with which the United States has not interfered, and claims for routes that are not generally used beyond ranching or off-highway vehicle recreation. For the first category of routes, there is no jurisdiction because the United States has not disputed title under the Quiet Title Act. For the second category, if the United States has disputed title, the dispute arose long enough ago that Plaintiffs' claims are barred by the applicable statute of limitations.

To the extent the Quiet Title Act confers jurisdiction and the bellwether claims are not otherwise barred by the statute of limitations, Plaintiffs would then have the burden of proving—by clear and convincing evidence—that the claims satisfy the requirements of R.S. 2477. Plaintiffs must prove a valid right arose pursuant to R.S. 2477's statutory elements: (1) construction, (2) of a highway, (3) over federal public lands not otherwise reserved for public purposes. Next, Plaintiffs would have to prove they accepted the R.S. 2477 grant under Utah law, including through ten years of continuous public use and by preparing, in duplicate, plats and a

specific description of the claimed routes. Finally, Plaintiffs would have to prove the right existed and had not lapsed before R.S. 2477's repeal.

Plaintiffs do not appear to have any evidence regarding qualifying construction, including construction by general public use. What evidence there is suggests the federal government or its permittees constructed several of the routes. Nor do most of the routes appear to be highways with destinations other than the routes themselves. Several of the routes also traverse lands that were not federal at the time of construction, or that were reserved for other public purposes. Moreover, multiple routes do not appear in the historical record until shortly before 1976, if at all, such that Plaintiffs could not have accepted any right-of-way through continuous public use. And any evidence of use for other routes is often insufficient to show acceptance of an R.S. 2477 right-of-way under Tenth Circuit precedent. See San Juan Cty. v. United States (San Juan (1)), 754 F.3d 787 (10th Cir. 2014). Finally, the evidence will show that Plaintiffs and the public abandoned some of the bellwether claims, meaning no valid route "existed" for preservation on the date of R.S. 2477's repeal.

To the extent that any of the bellwether claims meet the requirements of both the Quiet Title Act and R.S. 2477, questions of scope would remain. The Tenth Circuit has defined the contours of this issue:

> R.S. 2477 ROWs are preserved "as they existed on the date of passage" of the FLPMA, October 21, 1976. The width of the road, however, is not limited to the actual beaten path as of October 21, 1976. . . . [U]nder Utah law, the width of a public road is that which is "reasonable and necessary under all the facts and circumstances." Thus, the road can be "widened to meet the exigencies of increased travel," including where necessary to ensure safety. However, the 'reasonable and necessary' standard must be read in the light of traditional uses to which the ROW was put. Thus, the proper inquiry is what width is reasonable and necessary in light of the pre-1976 uses of the road.

Kane Cty., Utah v. United States (Kane (1)), 772 F.3d 1205, 1223 (10th Cir. 2014) (emphasis in the original) (internal citation omitted). Thus, to establish scope, Plaintiffs must first prove "the actual beaten path as of October 21, 1976." Id. If Plaintiffs claim the scope is greater than what existed in 1976, they must prove an enhanced scope is both "reasonable and necessary under all the facts and circumstances" and "in light of traditional uses to which the ROW was put." Id.

It appears Plaintiffs will not be able to meet their burden.

LEGAL BACKGROUND

I. R.S. 2477 AND ITS RELEVANT LEGAL HISTORY

In 1866, Congress passed R.S. 2477 as a means of facilitating public access across unreserved public domain lands. See generally Pamela Baldwin, U.S. Cong. Research Serv., 93-74A, Highway Rights of Way: The Controversy Over Claims Under R.S. 2477, at 3-4 (Jan. 15, 1993). Until its repeal in 1976, the statute provided, in its entirety: "And be it further enacted, that the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." 43 U.S.C. § 932 (repealed 1976); see also S. Utah Wilderness All. v. Bureau of Land Mgmt. (SUWA), 425 F.3d 735, 740 (10th Cir. 2005), as am. on denial of reh'g (Jan. 6, 2006).

On October 21, 1976, Congress enacted the Federal Land Policy and Management Act ("FLPMA"), which, among other things, repealed R.S. 2477. 43 U.S.C. § 1701 et seq., Pub. L. No. 94-579, §§ 701(a), 706(a), 90 Stat. 2743, 2786, 2793 (1976); see also, e.g., SUWA, 425 F.3d at 740. Although it repealed R.S. 2477, FLPMA preserved previously established rights-of-way, specifying that any "valid" rights "existing on the date of enactment would continue in effect." Id. at 741; Pub. L. No. 94-579 § 701(a), 90 Stat. 2743, 2786 (1976). Thus, unless abandoned, any valid R.S. 2477 rights of way are preserved under FLPMA "as they existed on the date of passage, October 21, 1976." Sierra Club v. Hodel, 848 F.2d 1068, 1083 (10th Cir. 1988),

overruled on other grounds, Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970, 973 (10th Cir. 1992).

For R.S. 2477 claims, "the burden of proof lies on those parties seeking to enforce rights-of-way against the federal government." SUWA, 425 F.3d at 768 (internal quotation marks and citation omitted). Regarding the standard of proof, this Court has previously held "that Kane County must prove its R.S. 2477 claims by clear and convincing evidence." Kane Cty., Utah (1) v. United States, 2:08-CV-00315, 2013 WL 1180764, *45 (D. Utah March 20, 2013).

II. QUIET TITLE ACT

The United States cannot be sued absent a waiver of sovereign immunity. Kane (1), 772 F.3d at 1210 (citing Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands, 461 U.S. 273, 280 (1983)). A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." Id. (quoting United States v. King, 395 U.S. 1, 4 (1969)). The Quiet Title Act provides such a waiver:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest.

28 U.S.C. 2409a(a) (emphasis added); Kane (1), 772 F.3d at 1210. Indeed, the Quiet Title Act is the "exclusive means by which adverse claimants [can] challenge the United States' title to real property." Id. (quoting Block, 461 U.S. at 286). For a court to have jurisdiction over a Quiet Title Act claim, the plaintiff must establish (at a minimum) that title to the property is "disputed." Id.

But, "what the [Quiet Title Act] gives it often proceeds to take away." Id. at 1215 (quoting George v. United States, 672 F.3d 942, 944 (10th Cir. 2012), cert. denied, 568 U.S. 943 (2012)). It provides two limitation provisions, one for non-states and one for states. Section 2409a(g), applicable to non-states—including counties—provides:

> Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

28 U.S.C. § 2409a(g). Thus, the twelve-year limitations period for non-states is triggered when a party knows or should know of the United States' claim that would dispute a plaintiff's own claim. Kane (1), 772 F.3d at 1215.

As to states, the Quiet Title Act provides that for land on which the United States has made '"substantial improvements"' or has "'conducted substantial activities pursuant to a management plan,"' actions are barred unless commenced '"within twelve years after the date the State received notice of the Federal claims to the lands."' Id. (quoting 28 U.S.C. § 2409a(i)). "Notice" for states must be either by public communications '"sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands"' or '"by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious."' Id. (quoting 28 U.S.C. § 2409a(k)(1)-(2)).

III. UTAH CODE § 78B-2-201

Utah law provides:

> The state may not bring an action against any person for or with respect to any real property, its issues or profits, based upon the state's right or title to the real property, unless: (1) the right or title to the property accrued within seven years before any action or other proceeding is commenced; or (2) the state or those from whom it claims received all or a portion of the rents and profits from the real property within the immediately preceding seven years.

UTAH CODE ANN. § 78B-2-201.[1] Noting that this state law "may have far-reaching implications" for these R.S. 2477 suits, this Court certified the following question of law to the Utah Supreme Court:

> Are Utah Code § 78B-2-201(1) and its predecessor statutes of limitations or statutes of repose?

Order of Certification, ECF No. 211 at 3. This Court further noted that this "question of law is controlling in the two captioned cases, as well as the other cases pending before this court." Id.

The Utah Supreme Court answered that certified question. Garfield Cty. v. United States, 2017 UT 41, 424 P.3d 46. It held "that the plain language of both versions of the statute reveals them to be statutes of repose." Id. at ¶ 1. If that was the end of that case, "then the R.S. 2477 Road Cases pending before this court would be barred." Order of Certification at 5; see also Garfield Cty., 2017 UT 41 at ¶ 1 ("The application of this interpretation to the State's R.S. 2477 rights of way leads to the result that the State effectively and inevitably lost title to any such rights of way after seven years without any opportunity to prevent such loss."); id. at ¶ 69 (dissenting judge quoting the sponsor of a Utah bill discussing the certified question stating "[i]f the assertion is correct . . . then these cases would all be barred"). But that was not the end because the Utah Supreme Court found that such a conclusion would result in "the automatic expiration of the State's title to R.S. 2477 rights of way" which would be "absurd and could not have been intended by the legislature." Id. at ¶ 1. "Because of the absurdity that results from applying section 201 and its predecessor as statutes of repose in this context, [the court]

[1] This statute applies to claims against any "person." As defined under the Utah Code, the term "person" is an exceedingly broad one that encompasses the United States. See UTAH CODE ANN. § 68-3-12.5(14)(j)-(k) ("person" under the Utah Code includes "a government office, department, division, bureau, or other body of government" and "any other organization or entity").

construe[d] these statutes as statutes of limitations with respect to R.S. 2477 right of way claims." Id.

Thus, for R.S. 2477 claims, UTAH CODE ANN. § 78B-2-201(1) and its predecessor statutes have been reformed into a seven-year statute of limitations. While this reformed state law does not—and could not—abrogate, modify, or purport to supersede the Quiet Title Act's statute of limitations, it constitutes a separate limitation on the authority of the State to file actions for title to real property. See Trail Mountain Coal Co. v. Utah Div. of State Lands & Forestry, 921 P.2d 1365, 1372 (Utah 1996) ("A plain reading of the statute reveals that it applies to actions brought by the state as a consequence of the state's claim of right to real property or issues or profits derived from real property."). State law, in defining the state's powers as a body politic, can place further limits upon the circumstances in which the state is authorized to bring suit. Order of Certification at 5.

This state-law provides a shorter limitations period—making claims time-barred seven years after they accrue. Thus, to the extent there has been a "disputed title," and that dispute first occurred more than seven years before the filing of this case, Plaintiffs are barred from bringing those claims by Utah law.

ARGUMENT

I. THE QUIET TITLE ACT DOES NOT PROVIDE JURISDICTION OVER CERTAIN ROUTE CLAIMS.

A. There Is No Disputed Title for Certain Claims.

At least five of the fifteen bellwether claims appear to fail the fundamental requirement of the QTA that there be "a disputed title."[2] 28 U.S.C. § 2409a(a). These claims are:

[2] As discussed below, for most or all of the remaining claims, there may have been a dispute, although the first such dispute is old enough that the claim may instead be barred by

K1300/K1300D – Elephant Cove

K4200 – Kitchen Corral

K8200 – Sit Down Bench

K8600 – Little Valley

K9000 – Hole-in-the-Rock

The roads associated with these claimed rights-of-way are (and have been) open to public motor vehicle use under the governing federal transportation plans, and Plaintiffs have failed to identify any claim by the United States of an adverse right. In the absence of "a disputed title," there is no waiver of sovereign immunity under the Quiet Title Act and the Court is without jurisdiction over these claims. Accordingly, these claims must be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for failing to fall within the Quiet Title Act's limited waiver of sovereign immunity.[3]

Although Plaintiffs may wish that the United States affirmatively and formally recognize their claimed rights of way, the United States has no duty to make such determinations as part of its land use and travel management planning. See Kane Cty., Utah v. Salazar, 562 F.3d 1077, 1087 (10th Cir. 2009). Declining to make such a determination does not create the title dispute required under the Quiet Title Act. Nor does the mere possibility of future land use and travel management planning decisions. See Suppl. Compl., ECF No. 395 at ¶¶ 12, 16. Unless and until any land use or travel management decision actually creates a title dispute—by expressly

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one or more statutes of limitation. However, to the extent the Court determines that the events at issue for those claims does not in fact rise to "a disputed title," then jurisdiction would be lost on this no "disputed title" basis.

[3] Alternatively, to the extent that the events asserted by Plaintiffs qualify as "a disputed title" for those claims where the United States asserts there is no dispute, other similar and earlier "disputes" would then raise statutes of limitation concerns. Statutes of limitations concerns are addressed in the next section.

disputing title or by an indirect action or assertion that actually conflicts with Plaintiffs' R.S. 2477 claims—the mere possibility of a speculative future dispute cannot be sufficient to confer jurisdiction under the Quiet Title Act. See Alaska v. United States, 201 F.3d 1154, 1164-65 (9th Cir. 2000). Indeed, even reasonably regulating a roadway is not sufficient to create a title dispute because "regardless whether the trails in question are public highways under R.S. § 2477, they are nonetheless subject to the [relevant Federal agency's] regulation." Clouser v. Espy, 42 F.3d 1522, 1538 (9th Cir. 1994); see SUWA, 425 F.3d at 747 (citing Clouser, 42 F.3d at 1538).

This issue of "a disputed title" as a jurisdictional requirement was a major subject of the Tenth Circuit's decision in Kane (1). At that time, "[t]he issue of what is required to satisfy the QTA's 'disputed title' requirement [wa]s one of first impression in this circuit." Kane (1), 772 F.3d at 1211. But after Kane (1), this issue has largely been resolved. Kane (1) "begin[s] with the established principle that waivers of sovereign immunity are to be read narrowly and conditions on the waiver are to be 'strictly observed.'" Id. (quoting Block, 461 U.S. at 287). The Tenth Circuit rejected Plaintiffs' then-proposed "cloud on title" standard "as incompatible with the rule that conditions on a waiver of sovereign immunity are to be specifically observed." Id. at 1212 (citing Block, 461 U.S. at 287). Instead, the Tenth Circuit held "that to satisfy the 'disputed title' element of the QTA, a plaintiff must show that the United States has either expressly disputed title or taken action that implicitly disputes it." Id. "Under this standard, a plaintiff need not show the United States took direct action to close or deny access to a road—indirect action or assertions that actually conflict with a plaintiff's title will suffice. Nor is the United States shielded by sovereign immunity where it previously disputed a plaintiff's title but does not do so presently." Id. "However, actions of the United States that merely produce some ambiguity regarding a plaintiff's title are insufficient to constitute 'disputed title.'" Id.

In applying this standard to specific claims, the Tenth Circuit held the omission of a claimed route from U.S. maps did not create a "disputed title" where that omission merely created an "ambiguity." Kane (1), 772 F.3d at 1213. The court also held that an answer to a complaint stating "the United States lacks sufficient information to form a belief as to the truth of the allegations" does not create a "disputed title," even though such an answer "is treated as a denial" under the Federal Rules of Civil Procedure. Id. at 1213-14. And the "grant of Title V permits to private entities" was similarly insufficient to create a "disputed title" when those permits take no position on, and impose no conditions inconsistent with, Plaintiffs' R.S. 2477 claims. Id. at 1214.

The Tenth Circuit decided Kane (1) after Plaintiffs filed the complaints at issue here. Although Plaintiffs have since filed a Supplemental Complaint, ECF No. 395, they have not used this filing to allege a "disputed title" consistent with Kane (1). Nor have they dismissed any claims, which would be expected given the stricter standard made clear in Kane (1). Plaintiffs' claims remain based on an over-expansive view of Quiet Title Act jurisdiction. One that the Tenth Circuit has already rejected in Kane (1).

Under the Quiet Title Act, federal courts cannot adjudicate title in the absence of a specific title dispute. The Quiet Title Act requires a concrete dispute involving specific and undue interference with a particular claimed right-of-way. This limitation is especially critical here. The adjudication of R.S. 2477 rights-of-way is an exceedingly complex, resource-intensive, and time-consuming matter, and "litigants are driven to the historical archives for documentation of matters no one had reason to document at the time." SUWA, 425 F.3d at 742. These bellwether claims are a small fraction of the approximately 12,000 alleged R.S. 2477 right-of-way claims currently pending in this Court. Using this bellwether process to reduce the pending

claims by eliminating those with no "disputed title" will enforce the limitations imposed by Congress on the waiver of sovereign immunity, allow the parties to winnow the pending claims before expending significant resources, and further allow the Court to manage this voluminous litigation.

B. If There Is a Disputed Title, the Quiet Title Act's 12-year Statute of Limitations Divests Jurisdiction over Certain Claims.

The roads associated with the remaining bellwether claims may have "a disputed title." 28 U.S.C. § 2409a(a). However, for some of these claims, it appears that any disputes happened long enough ago that the claims are barred by the QTA's statute of limitations, 28 U.S.C. §§ 2409a(g), (i), and (k).[4] These road claims are:

K4500 – Willis Creek

K6280 – Rushbeds

K6290 – Rushbed Springs

K1410

The road associated with the Willis Creek claimed right-of-way (K4500) is open to public motor vehicle use under the governing federal management plan. However, at least as early as 1997, the United States disputed Plaintiffs' title. The road associated with the Rushbeds and Rushbed Springs claimed rights-of-way (K6280 and K6290) have been posted as closed since at least 1992. And since 1981 any travel over the claimed K1410 route has been subject to restrictions wholly inconsistent with an R.S. 2477 right-of-way: use must be temporary, reclaimable, reclaimed, and must meet wilderness criteria after reclamation. Because these events are beyond

[4] Of course, any claim barred by the QTA's twelve year statute of limitations would also be barred by the shorter seven year statute of limitations under Utah law, Utah Code § 78B-2-201(1). This state law limitation is discussed below.

the QTA's twelve-year statute of limitations, these claims are time barred. Accordingly, there is no waiver of sovereign immunity under the QTA, no jurisdiction over these claims, and they should dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for failing to fall within the QTA's limited waiver of sovereign immunity.[5]

The QTA's statute of limitations is analogous to the "disputed title" issue, and case law interpreting the limitations period helps to illuminate the contours of both of these issues. "[W]hat the QTA gives it often proceeds to take away. While the QTA waives the government's immunity and affords plaintiffs a relatively generous twelve years to bring suit, the trigger for starting that twelve-year clock running is an exceedingly light one." George, 672 F.3d at 944. "But it is a necessary one because we are required to strictly construe the twelve-year limitation period in favor of the United States." San Juan (1), 754 F.3d at 793. "In essence, until the management activities were inconsistent with the claimed right-of-way, they did not provide the notice necessary to start the running of the limitation period." Id. at 794.

The Tenth Circuit has clearly held that satisfaction of the QTA's statute of limitations, and whether an action qualifies as one for which the United States has waived its sovereign immunity, are jurisdictional prerequisites to a QTA action against the United States. See Kane (1), 772 F.3d at 1215; San Juan (1), 754 F.3d at 792; Rio Grande Silvery Minnow v. Bureau of Reclamation, 599 F.3d 1165, 1175-76 (10th Cir. 2010). As a jurisdictional limitation, the statute of limitations under the QTA must be strictly construed in favor of the sovereign. Block, 461

[5] Alternatively, to the extent that these events do not trigger the QTA's statute of limitations, then there would also be no "disputed title" for those claims. In that case, as discussed above, jurisdiction would be lacking for that reason, and dismissal would remain proper.

U.S. at 287; Kane (1), 772 F.3d at 1215; San Juan (1), 754 F.3d at 793; Knapp v. United States, 636 F.2d 279, 282 (10th Cir. 1980).

As to most claims brought under the QTA, including claims brought by counties, the statute limits its waiver of sovereign immunity to actions commenced within twelve years of the "date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." 28 U.S.C. § 2409a(g); see also Kane (1), 772 F.3d at 1215; San Juan (1), 754 F.3d at 793. As to actions commenced by states, Congress amended the QTA in 1986 to create a separate statute of limitations that bars state claims as to certain lands that are not commenced within twelve years of "the date the State received notice of the Federal claims." 28 U.S.C. § 2409a(i); see also Kane (1), 772 F.3d at 1215.[6] This "notice" to a state shall be: "(1) by public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or (2) by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious." 28 U.S.C. § 2409a(k); see also Kane (1), 772 F.3d at 1215; San Juan (1), 754 F.3d at 795. "As with the general limitation period, the only notice sufficient to start the [state's] limitation period is notice of an adverse claim." San Juan (1), 754 F.3d at 795-96 (emphasis in original). But, "[f]or states, the trigger is different because it requires more than fair notice; it [also] requires substantial activity by the United States. Id. at 795. Such "substantial activity" may be found where: (1) "the United States or its lessee or right-of-way or easement grantee

[6] New subsections 2409a(i) and (k) were added as part of the 1986 amendments to the QTA enacted as a legislative response to Block in which the Supreme Court held that the QTA's 12 year statute of limitations, formerly set forth at 28 U.S.C. § 2409a(f) and now re-codified at section 2409a(g), was applicable to states. Block, 461 U.S. at 292. See Pub. L. No. 99-598, 100 Stat. 3351 (1986). Former Section 2409a(f) was re-codified as Section 2409a(g) in 1986. The QTA also includes different statute of limitations provisions for state claims to "defense facilities" and "submerged lands." See 28 U.S.C. §§ 2409a(h), (j).

have made substantial improvements or substantial investments," or (2) the United States has "conducted substantial activities pursuant to a management plan such as range improvement, timber harvest, tree planting, mineral activities, farming, wildlife habitat improvement, or other similar activities." 28 U.S.C. § 2409a(i).

In determining "the date that the plaintiff or his predecessor in interest knew or should have known of the claim of the United States" under the QTA, the courts utilize a reasonableness test. "All that is necessary is a reasonable awareness that the Government claims some interest adverse to the plaintiff's." Kane (1), 772 F.3d at 1215; Knapp, 636 F.2d at 283; see also, e.g., Vincent Murphy Chevrolet Co., Inc. v. United States, 766 F.2d 449, 452 (10th Cir. 1985); Amoco Prod. Co. v. United States, 619 F.2d 1383, 1388 (10th Cir. 1980). As the Tenth Circuit held in George, 672 F.3d at 944:

> The QTA's limitations period begins running as soon as 'the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.' 28 U.S.C. § 2409a(g). So the clock in our case started not just when Ms. George first knew about the government's claim to an unobstructed easement. Or even when anyone who owned the land before her knew. The clock started running when she or her predecessors objectively should have known about the government's claim to a fence-free road.

In San Juan (1), the Tenth Circuit noted that the reasonable awareness standard would be satisfied if the United States' actions, in closing road segments not claimed, were sufficient to provide notice "of the United States' claim of a right to exclude the public" from the road at issue. San Juan (1), 754 F.3d at 794.

"The existence of one uncontroverted instance of notice suffices to trigger the limitations period." Nevada v. United States, 731 F.2d 633, 635 (9th Cir. 1984); see also Park Cty., Mont. v. United States, 626 F.2d 718, 721 (9th Cir. 1980), cert. denied, 449 U.S. 1112 (1981) (single sign constitutes adequate notice). "Even invalid government claims trigger the QTA limitations period." Spirit Lake Tribe v. North Dakota, 262 F.3d 732, 738 (8th Cir. 2001); see also George,

672 F.3d at 946 ("One can be 'subject to or affected by' a governmental regulation claiming a property interest (and thus legally charged with notice of that regulatory claim) even if the regulation later turns out to be utterly invalid . . . . So whether the Forest Service regulations are valid we don't (and don't need to) say. It's enough Ms. George's predecessors were legally charged with knowing of them."); Nevada, 731 F.2d at 635.

In keeping with the "knew or should have known" language of the QTA, 28 U.S.C. § 2409a(g), the courts have further recognized that claims can be time-barred by constructive or inquiry notice, even in the absence of evidence of actual notice. See, e.g., Amoco Prod. Co., 619 F.2d at 1387-88 ("[A]s a matter of federal law, we believe that a party 'should have known' of a claim of the United States at the time he was clearly and properly imputed with constructive notice of that claim . . . ."). Publication in the Federal Register is sufficient to provide such constructive notice of an adverse claim. See, e.g., Yakus v. United States, 321 U.S. 414, 435 (1944) ("The regulations, which are given the force of law, are published in the Federal Register, and constructive notice of their contents is thus given all persons affected by them."); George, 672 F.3d at 944-45 ("[T]he QTA's limitations clock starts running as soon as the federal government publishes a property claim in the Federal Register and a QTA plaintiff or her predecessor in interest is 'subject to or affected by' it. A tough rule to be sure, but unavoidable under the two statutes' plain terms."); Diamond Ring Ranch, Inc. v. Morton, 531 F.2d 1397, 1405 (10th Cir. 1976) ("[P]ublication of the regulations in the Federal Register is constructive notice of their contents."). As the Tenth Circuit explained in George:

> [A] range war isn't necessary to start the Quiet Title Act's limitations clock. The limitations period isn't triggered only when the government acts to enforce its claim—by tearing down a fence, issuing a citation, or the like . . . . In fact, an appreciation of the 'full contours' of the government's assertion or claim isn't even needed to start the QTA's clock. Knapp, 636 F.2d at 283. It is enough if the plaintiff or her predecessor knew or should have known of the existence of some assertion—

> some claim—by the government of an adverse right. Id.; see also Spirit Lake, 262 F.3d at 738 (the claim 'need not be clear and unambiguous') (quotation omitted). And in this respect our case is much like Knapp itself. There we held a QTA claim accrued when the plaintiffs learned of the government's claim to some interest in their land by way of a record search—and long before the government did anything adverse to the plaintiff or definitively asserted its claim to title. 636 F.3d at 283. Records, not actions, were enough to put the plaintiffs on notice there and so they must be here.

672 F.3d at 946-47 (emphasis added).[7] Likewise, the QTA's statute of limitations applicable to a state's claims, 28 U.S.C. §§ 2409a(i) and (k), does not require evidence demonstrating that a state had actual knowledge of the interest asserted by the United States. Rather, similar to Section 2409a(g), Section 2409a(k) provides that notice sufficient to trigger the statute of limitations shall be provided by "public communications . . . reasonably calculated to put claimant on notice of the Federal claim" or "by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious." 28 U.S.C. § 2409a(k); see also San Juan (1), 754 F.3d at 795. Accordingly, for lands that have been subject to the substantial improvements, investments, or activities as described under Section 2409a(i), the United States triggers the statute of limitations as to a state's claim by undertaking action sufficient to satisfy either of the imputed notice triggers described in 2409a(k).[8]

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[7] This "some assertion of an adverse interest" standard for the statute of limitations appears to be the same as the "disputed title" standard for waiver of sovereign immunity under the QTA. See Kane (1), 772 F.3d at 1212 (holding that a "disputed title" is when the United States "expressly disputed title or taken action that implicitly disputes it[,]" such as by "action or assertions that actually conflict with a plaintiff's title"). It would not make sense for this to be a lighter standard, then the QTA's statute of limitations could run before it was even possible to bring suit under the QTA. Cf. Garfield County, 2017 UT 41 ¶¶ 1, 21 (finding it "absurd" that the state statute of limitations could run before it was even possible to bring suit under the QTA). But as "an 'exceedingly light' trigger," it does not seem that this could be a heavier trigger than the "disputed title" standard.

[8] The "substantial activities" prong of Section 2409a(i) sets forth the lands to which the statute of limitations described under that section applies, but is distinct from the "notice" requirements and does not prescribe any time period in which the listed activities must be

1. K4500 – Willis Creek

The road associated with the Willis Creek claimed right-of-way (K4500) is designated as open to street legal motor vehicle use under the Grand Staircase Escalante National Monument Management Plan issued in 2000. In the Plan, this road is designated as BLM route 530. See Def.'s Trial Ex. 1795.

It appears (and Plaintiffs have asserted) that this road is used by several area landowners "to access their ranches and fields along with livestock" and that those "[l]ocal ranchers have maintained this road." Def.'s Trial Ex. 1793. Under San Juan (1), 754 F.3d at 799-800, it is not clear that Plaintiffs could make any R.S. 2477 claim to such a road. Regardless, in 1997 (well before San Juan (1) was decided), the United States made clear that it did not recognize any R.S. 2477 claim to this road, and thus, explicitly denied Kane County's request to conduct repair work to this road without first seeking approval from BLM.

In 1997, this "[r]oad was washed away for approximately 60 feet." Def.'s Trial Ex. 1793. Although "[l]ocal ranchers have maintained this road[,]" the County proposed that they could do the repair work because the local ranchers' "equipment is currently broke down" and "Kane County will be in the area" anyway. Id. However, BLM's response by letter dated October 3, 1997, Id. at 3-4, made clear that the United States was not recognizing any R.S. 2477 claim to this road. BLM did offer, instead, to allow work to proceed "expeditiously" under "a FLPMA Title V right-of-way." Id. But "[i]f the County [wa]s not willing to accept a FLPMA Title V right-of-way for this proposed work," then the question of whether the County had any other

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completed. In other words, where the requisite notice is provided within the meaning of Section 2409(k), it is irrelevant whether or when the state learns of the "substantial improvements" that make the statute of limitations applicable to a claim. The "substantial activities" aspect is discussed below.

basis to do this maintenance work (such as an R.S. 2477 right-of-way) would require judicial resolution. Id.

Thus, BLM's action in 1997 expressly disputed Plaintiffs' claim of title under R.S. 2477. This dispute occurred 14 years before Plaintiffs filed their complaint claiming title to this claimed route, which was well beyond the statute of limitations. As a consequence, this court no longer has jurisdiction over this claim due to the operation of the applicable statutes of limitations, including the QTA's twelve year statute of limitations, 28 U.S.C. §§ 2409a(g), (i), and (k). Alternatively, to the extent that these events in 1997 are not held to dispute title, then, as discussed above, there would be no jurisdiction because there has not been any "disputed title."

2. K6280 – Rushbeds and K6290 – Rushbed Springs

Witness testimony will establish that signs have been posted closing K6280 to the general public at the Wilderness Study Area boundary since approximately 1992.[9] Plaintiffs' K6290 claim connects to both the K6280 claim and the Cottonwood Road. However, it is expected that witness testimony will not support travel northbound (and uphill) from the Cottonwood Road onto the K6290 claim. Thus, as a practical matter, Plaintiffs' K6290 claim is accessed only from the K6280 claim. Consequently, closure of the southern portion of the Rushbeds claimed right-of-way (K6280) also effectively closes what Plaintiffs have denominated as the separate K6290 claim.

As a consequence, BLM's actions in the early 1990s show the United States disputed Plaintiff's claim of title under R.S. 2477. This dispute sufficiently pre-dates this case such that

[9] In the alternative, Plaintiffs' claim is barred by the seven-year statute of limitations: the northern approximately two miles of the road associated with the Rushbeds claimed right-of-way (K6280) is designated as open under the 2000 GSENM Management Plan. In the Plan, this road is designated as BLM route 422. However, the remaining approximately nine miles of this claimed route is closed to public motor vehicles. See Def.'s Trial Ex. 1491.

there is no longer any jurisdiction due to the operation of the applicable statutes of limitations, including the QTA's twelve year statute of limitations, 28 U.S.C. §§ 2409a(g), (i), and/or (k). Alternatively, to the extent that these events in 1992 are not held to dispute title, then as discussed above there would be no jurisdiction because there has not been any "disputed title."

3. K1410 – An Unnamed and Apparently Recent Intrusion

Plaintiffs' K1410 claim is located in the Parunuweap Canyon Wilderness Study Area. When the United States inventoried that area in 1979-80, Defendant found no road or way that corresponded with the K1410 route, found no other evidence of a historical road or way, and did not designate K1410 as a road or way in the published Wilderness Study Area. See Def.'s Trial Ex. 1545. As a result, under the 1979 Interim Management Plan, any travel on the K1410 claim would need to comply with the wilderness non-impairment standard, which allowed only: (1) temporary use; (2) with impacts to the land that must be reclaimed; and (3) after the temporary use is completed and reclaimed, the land must continue to meet the wilderness criteria. See Def.'s Trial Ex. 1584. This requirement—that any use of the now-claimed route be temporary, reclaimable, and ultimately unnoticed—is wholly inconsistent with preserved R.S. 2477 rights, for the construction of a highway.[10] In other words, BLM's 1980 designation of the Parunuweap Wilderness Study Area without any acknowledgement or identification of the K1410 claim as a road or way, plus the restrictions associated with the non-impairment standard for designated Wilderness Study Areas, represented a dispute of Plaintiffs' claim to title. Plaintiffs engaged in the WSA-designation process and provided specific comments and maps about the Parunuweap

[10] The routes addressed in Kane (1) are distinguishable because they were designated as roads or ways in the published wilderness study area. Accordingly, the designation of the wilderness study area explicitly did not conflict with the existing, noted, routes, and did not prevent the public from continuously using those routes as a highway. See 772 F.3d 1205, 1218.

WSA. See Def.'s Trial Exs. 1545 and 1547 (commenting on the larger Environmental Impact Statement for the state-wide WSA process). Those comments and maps, however, are silent regarding the K1410. Id. Accordingly, there is no longer any jurisdiction due to the operation of the applicable statutes of limitations, including the QTA's twelve year statute of limitations, 28 U.S.C. §§ 2409a(g), (i), and/or (k).[11]

C. The Quiet Title Act's Statute of Limitations Also Bars the State's Claims

As noted above, the QTA provides a slightly different statute of limitation for claims made by States. "For states, the trigger is different because it requires more than fair notice; it requires substantial activity by the United States[.]" San Juan (1), 754 F.3d at 795 (citing 28 U.S.C. § 2409a(i)). But this potential additional hurdle is overcome here for either or both of two reasons: (1) the State appears to only have a claim split from and derivative to that of the County; or (2) there have been "substantial activities by the United States" here. Moreover, as discussed below, state law provides both a shorter limitations period, and one that applies equally to the State and the County, and does not require "substantial activities," making this inquiry ultimately irrelevant.

1. The State Did Not Obtain its Derivative Interest Until After the County's Claims Were Barred by the Statute of Limitations

Under Utah law, the State's interest in these R.S. 2477 claims is derivative to the County's claim. See Am. Compl., ECF No. 21, at ¶ 36 (citing UTAH CODE ANN. §§ 72-3-103(3) and 72-3-105(3)); see also State of Utah's First Am. Compl. in Intervention, ECF No. 57, at ¶¶ 4, 28, 31 (citing UTAH CODE ANN. §§ 72-5-302(2), 72-5-103(2)(b), and 72-3-105). Significantly,

[11] The United States furthered these restrictions on travel off of designated ways in 2000 when it prohibited cross-country use. See Def.'s Trial Ex. 1588 (issued under BLM's authority in 43 C.F.R. part 8340). Alternatively, if these restrictions are ruled consistent with R.S. 2477 rights, then it is likely the United States has never disputed title because it was not aware of Plaintiffs' K1410 claim prior to this suit.

that derivative interest was not created until 2000. That date is after the County had been precluded from bringing a QTA claim under 28 U.S.C. § 2409a(g) for K1410. Because of the derivative nature of the State's interest, once the County's claim was time-barred, there is no need to consider the QTA's state-specific provisions of Sections 2409a(i) and (k).

The first statutory enactments purporting to give the State an ownership interest in rights-of-way for county roads were Sections 72-3-105(3) and 72-5-103(2)(b), which were originally enacted in 2000. See 2000 Utah Laws Ch. 324 (S.B. 249) at §§ 4, 6.[12] Under these statutes, the State and County "have joint undivided interest in the title to all rights of way" for county roads, thus the State is now a joint owner of the County's R.S. 2477 claims. But because this newly created State interest is split from and derivative to that of the County, these statutes could not create a cause of action by the State where the County's QTA claims were already time-barred. The State cannot enact legislation that would circumvent the QTA's statute of limitations by creating a new cause of action in the State for previously time-barred claims belonging to the County. See Roark v. Crabtree, 893 P.2d 1058, 1061 (Utah 1995) ("[A] defense of statute of limitations is a vested right . . . ."). Nor can the State retroactively impose new burdens on the United States by requiring it to satisfy the additional requirements of Sections 2409a(i) and (k) as to purported State interests that did not previously exist and as to which the United States previously had no basis to provide notice of an adverse claim. See San Juan (1), 754 F.3d at 799 (noting that "when Congress repealed R.S. 2477, it chose to preserve only those rights-of-way existing on the date of repeal, October 21, 1976," and that later events could not "retroactively

[12] Prior to these enactments, Utah law provided: "The state and its political subdivisions have title to the R.S. 2477 rights-of-ways," but did not purport to give the State title to County rights-of-way, or vice versa. See 1993 Utah Laws 2d Sess. Ch. 6 H.B. 6) at § 3 (enacting § 72-5-302(2) as an amendment to § 27-16-103).

broaden the public's eligibility for R.S. 2477 rights-of-way"). Thus, the State's later-created and derivative claim to K1410 is barred to the exact same extent as the County's claim to the route is time-barred.

Prior to this legislation, the State lacked any interest in County roads and associated rights-of-way alleged to exist under R.S. 2477.[13] Thus, the State was not a party to earlier R.S. 2477 litigation. See, e.g., Sierra Club v. Hodel, 848 F.2d 1068 (litigation over scope of R.S. 2477 right-of-way claimed for the "Burr Trail" in which Garfield County, but not the State of Utah was named as a defendant). While this legislation now makes "[t]he State of Utah and Kane County . . . joint owners of the R.S. 2477 rights-of-way for the roads claimed herein," ECF No. 57 at ¶ 28, because that creation of a State interest is split from and derivative to the County's interest, the State can only get what the County had. Thus, once the County's claim was time-barred, there is no need to consider the QTA's state-specific provisions of Sections 2409a(i) and (k).

2. In Any Event, the State's Claims are also Time-Barred by the Quiet Title Act's Statute of Limitations Under Sections 2409a(i) and (k)

Even if the separate QTA statute of limitations that is normally applicable to claims made by states, 28 U.S.C. §§ 2409a(i) and (k), applies to the State's bellwether claims, those claims

[13] To the extent that the State claims any other basis for its interest, it remains Plaintiffs' burden to explain when and how the State obtained any such interest. The QTA requires, as another condition of its waiver of sovereign immunity, that "[t]he complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, [and] the circumstances under which it was acquired . . . ." 28 U.S.C. § 2409a(d) (emphasis added); see also Bd. of Comm'rs of Catron Cty., N.M. v. United States, 934 F. Supp. 2d 1298, 1307-08 (D.N.M. 2013) (noting that this "particularity" requirement is another jurisdictional prerequisite as another condition on the waiver of sovereign immunity); Buchler v. United States, 384 F. Supp. 709, 711 (E.D. Cal. 1974) (dismissing quiet title claim, in part, for failure to plead with particularity the circumstances under which the claimed interest was acquired). Because the complaints here do not provide any other explanation as to when and how the State obtained any interest, the State's claims may be dismissed on this basis as well.

would similarly be time-barred by those provisions. For the same reasons discussed above, the State received notice of the United States' adverse claims discussed above in accordance with the requirements of Section 2409a(k).[14] And BLM has satisfied the "substantial activities" and/or "substantial investments" prong of Section 2409a(i) through its various management activities, including extensive wilderness study inventory, designation, environmental review, and management efforts, and various rangeland management and improvement projects. Road claims K1300 (Elephant Cove), K1410, K6200 (Paria River), K6280 (Rushbeds), K6290 (Rushbed Springs), K7020, K7300 (Last Chance/Paradise Canyon), and K8650 (Grand Bench Neck) are all (at least in part) within lands designated and managed as Wilderness Study Areas, and road claims K4200 (Kitchen Corral), K7025, K7050 (Blue Trial), K8200 (Sit Down Bench), K8600 (Little Valley), and K9000 are bounded (at least in part) by Wilderness Study Areas.[15, 16] The

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[14] Moreover, the notice provided to Kane County (discussed above), acting in its capacity as a political subdivision of the State, should also constitute notice to the State. See Utah Const. art. 11, § 1 ("The counties of the State of Utah are recognized as legal subdivisions of this State"); UTAH CODE ANN. § 72-3-103(4) ("The county governing body exercises sole jurisdiction and control of county roads within the county"). Generally, if the State has an interest in county roads in Kane County, but was in no way participating in the management of such roads, then the County was acting on the State's behalf with respect to any such State interest, and federal notice to the County, acting in its capacity as a political subdivision and agent of the State, also provided constructive notice to the State.

[15] Depending on the standard to be applied for "disputed title" and the scope of the right of way claimed by the state, it is possible that the Wilderness Study Area designations are themselves sufficient to have created a "disputed title" and thus also raise statute of limitations issues. See Garfield Cty. (1) v. United States, Case 2:11-cv-01045-CW (D. Utah May 30, 2014) (ECF No. 135) (United States' Mot. for Partial Dismissal and Memo. in Support); see also Sw. Four Wheel Drive Wheel Drive Ass'n v. BLM, 271 F. Supp. 2d 1308, 1311-12 (D.N.M. 2003), aff'd on other grounds, 363 F.3d 1069 (10th Cir. 2004); Cty. of Inyo v. U.S. Dep't of Interior, Case No. CV F-06-1502 AWI DLB, 2008 WL 4468747, at *9-11 (E.D. Cal. Sept. 29, 2008); Bd. of Comm'rs of Catron Cty., 934 F. Supp. 2d at 1306-07; cf. Kane (1), 934 F. Supp. 2d at 1362.

[16] K4500 (Willis Creek) appears to be the only bellwether road claim not involving Wilderness Study Areas. The "substantial activities" and/or "substantial investments" requirement is nonetheless met for this claim. For example, under the 1972 Road Maintenance Agreement, BLM was responsible for maintaining this road. See Def.'s Trial Ex. 1017.

Tenth Circuit has already noted that the act of reserving the underlying lands either constitutes a "substantial activity," or is at least an activity that contributes to a finding of "substantial activities." See San Juan (1), 754 F.3d at 795 (rejecting the State's challenge regarding "substantial activities" under Section 2409a(i), and finding "reserv[ing] the land" to be one of the "substantial activities"). Moreover, evidence at trial is expected to show other activities or investments, including substantial range management and improvement projects.

Accordingly, because the BLM both provided "notice" of its adverse claim to the State in accordance with Section 2409a(k), and has made "substantial investments" (and/or "substantial activities") in the lands underlying the claimed routes, even if this separate Quiet Title Act statute of limitations provision applied to the State's claims, those claims are also time-barred under the Quiet Title Act.

II. UTAH'S SEVEN-YEAR STATUTE OF LIMITATIONS BARS PLAINTIFFS FROM BRINGING CERTAIN CLAIMS.

As noted above, the roads associated with several of the bellwether claims appear to have "a disputed title." 28 U.S.C. § 2409a(a). However, that consequently means that statutes of limitation have begun to run. It appears that at least the state law statute of limitations, UTAH CODE ANN. § 78B-2-201, has run for all such bellwether claims.

As previously discussed, the Utah Supreme Court has interpreted the applicable state law, UTAH CODE ANN. § 78B-2-201, as a statute of limitations and not a statute of repose. Garfield Cty., 2017 UT 41. This law, thus, requires the state to "bring an action against any person for or with respect to any real property . . . based upon the state's right or title to the real property" within seven years of when its title is disputed. UTAH CODE ANN. § 78B-2-201.

Although this reformed state law does not—and could not—pre-empt the QTA's statute of limitations, it constitutes a separate state law limitation on the authority of the State to file

actions for title to real property. See Trail Mountain Coal Co., 921 P.2d at 1372 ("A plain reading of the statute reveals that it applies to actions brought by the state as a consequence of the state's claim of right to real property or issues or profits derived from real property."). State law, in defining the state's powers as a body politic, can place further limits upon the circumstances in which the state is authorized to bring suit. Order of Certification at 5. And this separate state law limitation does not distinguish between whether the claim is brought by a county or the State – making the discussion above regarding the QTA's different provisions in this regard largely academic. Thus, to the extent there has been a "disputed title," and that dispute first occurred more than seven years before the filing of this case, those claims are now time-barred.

The K6200 (Paria River), K6280 (Rushbeds), K6290 (Rushbed Springs), K7020, K7025, K7050 (Blue Trail), K7300/7300D (Last Chance / Paradise Canyon), and K8650 (Grand Bench Neck) claims all have closures or other restrictions placed on the public use of the routes by the Grand Staircase-Escalante National Monument Management Plan issued in 2000. Because this "disputed title" event was more than seven years before the filing of this case, those claims are now time-barred under Utah law. The 1997 dispute regarding K4500 (Willis Creek) means that claim is similarly time-barred.

III. PLAINTIFFS WILL FAIL TO MEET THEIR BURDEN OF PROVING A VALID R.S. 2477 RIGHT-OF-WAY.

R.S. 2477 granted a right-of-way "for the [1] construction of [2] highways over [3] public lands, not reserved for public uses." 43 U.S.C. § 932 (repealed 1976); see also SUWA, 425 F.3d at 740. In those few words, the statute lays out the elements Plaintiffs must prove to establish the validity of an R.S. 2477 claim. The burden is on Plaintiffs to prove these elements by "clear and

convincing evidence." Kane County, Utah (1), 2013 WL 1180764, at *45. Plaintiffs cannot meet their burden.

A. Plaintiffs Will Fail to Prove Certain Routes Were "Constructed" by the State, the County, or Public Use Not Otherwise Authorized or Permitted by the United States, in a Way That Would Allow the Route To Be Accepted as an R.S. 2477 Right-of-Way.

The first statutory element a plaintiff must prove to establish a valid R.S. 2477 right of way is "construction." 43 U.S.C. § 932. "Construction" may occur by mechanical means at the direction or on the behalf of the State or the County. In Utah, however, actual "mechanical construction" is not required to establish an R.S. 2477 right-of-way. Instead, "[t]he necessary extent of 'construction' [is] the construction necessary to enable the general public to use the route for its intended purposes." SUWA, 425 F.3d at 781. If a highway was not constructed by the state or county, but by many and various members of the general public, then the state or county can "accept" the public right-of-way in ways not inconsistent with federal law, such as through ten years of continuous public use. Significantly, Plaintiffs must still prove that the road was constructed in a way that would allow the road to qualify as an R.S. 2477 right-of-way. Roads constructed directly by the federal government, for example, or with other federal permission, would not have been "constructed" pursuant to R.S. 2477's grant, and thus could not be accepted as such.

In SUWA, the Tenth Circuit held a "two track" road could be constructed by use—by the passage of vehicles over time—and could then be "accepted" as an R.S. 2477 right-of-way. 425 F.3d at 758. The Tenth Circuit explained "federal law governs the interpretation of R.S. 2477, but that in determining what is required for acceptance of a right of way under the statute, federal law 'borrows' from long-established principles of state law, to the extent that state law provides convenient and appropriate principles for effectuating congressional intent." Id. at 768 (emphasis

added). Thus, the Tenth Circuit borrowed an acceptance requirement from Utah state law: "Acceptance of an R.S. 2477 right of way in Utah thus requires continuous public use for a period of ten years." Id. at 771. Notably, the Tenth Circuit borrowed from a Utah state law that allowed for adverse possession of private roads. See id. R.S. 2477, however, granted only a right to "construct" highways, and FLPMA only "preserved" valid rights-of-way then in existence as of October 21, 1976. Neither statute transferred to the States title to federally constructed roads through federal lands, nor do they undermine the prohibition of a party asserting title to federal property through a claim of adverse possession. R.S. 2477 cannot be read to allow the State to adversely possess federal roads simply because they pass through federal lands and were used by the public for ten continuous years. It is essential that Plaintiffs be required to prove construction, in other words, initial establishment of the claimed route by such public use over ten continuous years, not just such use beginning at some time after the route was initially established in a different manner, in order to keep the burden of proof on the correct party.

Parties claiming R.S. 2477 rights bear the burden of proof. SUWA, 425 F.3d at 768-69 ("The established rule is that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government." (internal quotations and marks omitted)). And the standard "is not satisfied merely by evidence that vehicles may have passed over the land at some point in the past." Id. at 781 (internal quotation marks omitted). If Plaintiffs are not required to prove construction, then this burden would be flipped: the United States would bear the burden of proving it did not convey title. This violates well-established law.

B. Plaintiffs Will Fail to Prove Certain Routes Were "Highways" Sufficient to Establish an R.S. 2477 Right-of-Way.

The second statutory element a plaintiff must prove to establish a valid R.S. 2477 right-of-way is that the claimed route is a "highway." 43 U.S.C. § 932. Under Tenth Circuit precedent "The limiting phrase 'for the construction of highways' should be read as congruent with the common-law understanding of 'public thoroughfare.'" San Juan (1), 754 F.3d at 799 & n.13 (citing SUWA, 425 F.3d at 783-84). "To demonstrate the existence of a public thoroughfare, a claimant must show: '(i) passing or travel, (ii) by the public, and (iii) without permission.'" Id. at 797 (citing Jennings Inv. v. Dixie Riding Club, Inc., 2009 UT App 119, ¶ 11, 208 P.3d 1077, 1081 (Utah Ct. App. 2009); Heber City, 942 P.2d at 311). "While the frequency of use need not be 'great,' it must be sufficient to call the road a 'public thoroughfare'." Id. at 798 (citations omitted).

The "without permission" element of a public thoroughfare establishing an R.S. 2477 highway is especially relevant here. In San Juan (1), the Tenth Circuit addressed an R.S. 2477 claim for a road that cattle ranchers used "to move cattle between winter and summer grazing." San Juan (1), 754 F.3d at 800. The Tenth Circuit affirmed the district court's determination that these uses would not qualify as "public uses," noting that "the Utah courts have consistently held '[u]se under private right is not sufficient' to demonstrate public use." Id. (quoting Heber City, 942 P.2d at 311 (quoting Morris v. Blunt, 49 Utah 243, 161 P. 1127, 1131 (1916)) and citing Utah Cty. v. Butler, 2008 UT 12, ¶ 19, 179 P.3d 775, 782; Jennings Inv., 2009 UT App 119, ¶ 17). The United States expects Plaintiffs will rely heavily on proffered evidence of private and otherwise permitted use to attempt to establish their claims.

The public had permission other than R.S. 2477 to use the public lands for many purposes, such as ranching, mineral exploration, mining, hunting, wood gathering, post cutting,

or Christmas tree cutting. But these permissive uses of public lands cannot establish an R.S. 2477 "highway." Travel "over public lands" to reach an identifiable destination would qualify a route as a "highway," but merely traveling within those public lands to use those public lands (for example, to graze livestock, collect wood, picnic, or simply to "go out for a drive"), would not qualify a route as a "highway."

It appears that Plaintiffs' evidence only shows uses of certain routes for ranching, hunting, wood gathering, post cutting, Christmas tree cutting, mineral exploration, mining, and perhaps other permissive uses of these public lands. Although San Juan (1) addressed only cattle ranching, its holding and reasoning preclude reliance on these types of uses of the public lands to establish an R.S. 2477 right-of-way. The other Utah cases cited by the Tenth Circuit are in accord. See id. at 798 (citing Harding v. Bohman, 26 Utah 2d 439, 491 P.2d 233, 234 (1971) (use by sheep herders with permission and occasional use by deer hunters is insufficient)).

Other than perhaps use of the K6200 claim around the late 1800s, it does not appear that any of the bellwether route claims serve (or served) as "highways."

C. Plaintiffs Will Fail to Prove Certain Routes Were Constructed Over Federal Public Lands "Not Otherwise Reserved for Public Purposes."

1. Plaintiffs cannot prove lands underlying certain claimed routes were "not otherwise reserved for public purposes" during the relevant time periods

"R.S. 2477 rights of way may be established only over public lands that are 'not reserved for public uses.'" SUWA, 425 F.3d at 784. "[E]xcluded from the grant were any lands that Congress or its designees chose to reserve for a particular purpose. No matter how enterprising, someone could not acquire a right-of-way under R.S. 2477 across lands 'reserved for public uses' such as a national monument or a national park." Id. Under Tenth Circuit precedent, land is "reserved for public uses" if it has been (1) withdrawn from the operation of public lands laws and (2) dedicated to a specific public use. Id. At least four road claims traverse lands that meet

this test: K8600, K8200, K8650, and K9000. The lands underlying all of K8600 and parts of the remaining three claims were withdrawn in 1954 as part of the Colorado River Storage Project, and withdrawn in 1972 with the creation of the Glen Canyon National Recreation Area.

The 1954 Colorado River Storage Project Withdrawal withdrew approximately 1,178,300 acres from the operation of the public land laws.[17] See Colorado River Storage Project, Arizona-Utah, First Form Reclamation Withdrawal, 19 Fed. Reg. 3,799, 3,799-801 (June 22, 1954). The text provides:

> Pursuant to the authority delegated by Departmental order No. 2515 of April 7, 1949, I hereby withdraw the following described lands from public entry, under the first form of withdrawal: as provided by section 3 of the Act of June 17, 1902 (32 Stat. 388): (land description omitted).

Id. The referenced Act of June 17, 1902 sets up two forms of withdrawals, which are referred to as first and second form reclamation withdrawals. Under a first form reclamation withdrawal, "the Secretary may withdraw from public entry such lands as are required for the actual occupation of the reclamation service. This is for such purposes as reservoirs, canals, pumping works, etc." United States v. Hanson, 167 F. 881, 885-86 (9th Cir. 1909). Under the second form, the Act allows "withdrawal of any other public lands 'believed to be susceptible of irrigation from said works.' Such lands are to be withdrawn from entry 'except under the homestead laws.'" Id. at 886.

It is well settled that a first form withdrawal "is an absolute withdrawal from any kind of entry." U.S. ex rel. Harden v. Fall, 276 F. 622, 623 (D.C. Cir. 1921); see also Hanson, 167 F. at

[17] The "public land laws" authorize private individuals to enter onto public land and obtain title by complying with various requirements. Such laws include the Homestead Act, the Desert Land Act, and the Mining Law of 1872. SUWA, 425 F.3d at 786. The primary purpose of a withdrawal is to remove the identified land from the operation of those laws and prevent private individuals from obtaining new rights to the land because the Federal government wants to use the land or wants to preserve the status quo while it decides what to do with the land. See id. at 784-85.

886 ("[W]e find from the fact that the exception is inserted in the second case and omitted from the first convincing proof of the intention of Congress that there was to be no exception of lands to be withdrawn under the first clause. . . . There was the best of reasons for omitting it from the first clause, for it was the intention to reserve thereunder only such lands as were needed for the actual occupation of the reclamation service, such as for reservoirs, dams, canals, and pumping works."); Hitchcock, *Arid Land–Mineral Locations–Timber and Stone Applications–Withdrawal Under Act of June 17, 1902*, 32 Int. Dec. 387, 387-88 (1903) (withdrawals by the Secretary of the Interior under the Reclamation Act of 1902 are legislative withdrawals that withdraw "from other disposition all lands within the designated limits to which a right has not yet vested.").

The 1954 Colorado River Storage Project Withdrawal dedicated the subject lands to a particular public use: the construction and operation of the Glen Canyon Dam and reservoir. See 19 Fed. Reg. 3,799, 3,799-801; 32 Stat. 388.

The Department of the Interior and the courts have consistently held that irrigation works constitute a "public use." In Johnson, *Executive Withdrawals of November 26, 1934 and February 5, 1935, Without Application to Lands Withdrawn Under the Reclamation Laws*, 55 Int. Dec. 247 (1935), the Department of the Interior rejected a homestead entry application because the lands had been withdrawn under section 3 of the 1902 Reclamation Act. *Id*. It stated "[t]he Department and the courts have held that lands withdrawn pursuant to the Reclamation law are [reserved] . . . that the withdrawal of lands . . . is legislative in its effect and the use of such withdrawn lands in connection with a Federal reclamation project is a public use." Id. 248. (emphasis added) (internal citations omitted).[18]

[18] See also Clyde v. Cummings, 101 P. 106, 108 (Utah 1909) (rejecting challenge to first form withdrawal under 1902 Reclamation Act and concluding the withdrawal "severe[d] the land reserved from the mass of public domain and appropriate[d] it to a public use."); Leslie A.

The construction of the dam and reservoir are also specific purposes inconsistent with the existence or vesting of an R.S. 2477 right-of-way on the withdrawn lands. Unlike the public water reserve in Kane County (1), which did not dedicate land to a specific public purpose, 772 F.3d at 1222, a first form reclamation withdrawal is done to reserve land "for construction purposes," Fall, 276 F. at 624. It "withdraw[s] from public entry such lands as are required for the actual occupation of the reclamation service." Hanson, 167 F. at 885 (emphasis added). More specifically, the land encompassed by such a withdrawal is to be physically occupied by "reservoirs, dams, canals, and pumping works," id. at 886, a use in direct conflict with rights-of-way for highways. See Verde Water & Power Co. v. Salt River Valley Water Users' Ass'n, 197 P. 227, 229–30, 239 (Ariz. 1921) (holding that company did not have a vested water right when a reclamation withdrawal occurred and could not acquire the right under R.S. 2339 after a first form reclamation withdrawal was made because "[n]o valid claim to the lands embraced in the order could be initiated by the plaintiff in the presence of such withdrawal").

The Colorado River Storage Project Withdrawal therefore precludes plaintiffs from constructing or accepting an R.S. 2477 route over the subject lands after 1954. So too with land dedicated to the Glen Canyon National Recreation Area in 1972. See 86 Stat. 1311; SUWA, 425 F.3d 784 (listing "parks" as a specific public purpose sufficient to prevent the vesting of an R.S. 2477 right-of-way).

Reinovsky, 41 Int. Dec. 627 (1913) (rejecting an application to make homestead entry on lands withdrawn under the 1902 Reclamation Act stating "withdrawals so made have been uniformly held to be in effect legislative withdrawals and the use of the lands thereunder in connection with the reclamation act to be a public use.").

2. R.S. 2477 rights can arise only over federal public lands; Plaintiffs cannot claim an R.S. 2477 right-of-way over lands that were not federal

R.S. 2477 operated only as a dedication of a right-of-way over federal public lands. SUWA, 425 F.3d at 740-41; United States v. Balliet, 133 F. Supp. 2d 1120, 1129 (W.D. Ark. 2001) ("Revised Statute 2477 has no applicability to the land from 1882 when it became privately owned until 1977 when the United States purchased the land."). Accordingly, neither Kane County, the State of Utah, nor the public could construct an R.S. 2477 right-of-way over lands while the state or a private entity owned those lands. The evidence will show that at least nine of the fifteen routes at issue in this case traverse lands that, at certain times, were not federal public lands.

The Court recognized this rule in Kane (1). There, the Court concluded that Kane County had not presented evidence showing two roads existed at the time certain State of Utah School and Institutional Trust Lands Administration ("SITLA") Parcels passed into state ownership. Kane Cty., Utah v. United States, No. 2:08-CV-00315, 2011 WL 2489819, at *7 (D. Utah June 21, 2011). It ruled, "Kane County must therefore show other evidence that these roads became a public way either during the time the land was in federal ownership or by some means other than R.S. 2477." Id.

Kane (1) addressed only SITLA parcels the State continued to own in 1993, at which time the state passed a law that the Court interpreted to "specif[y] that if a road existed across federal land when the SITLA Parcel passed into state ownership, then the grant was accepted by the State." Id. at *5. The Court reasoned that, because "the State owned the SITLA Parcels at the time of the 1993 legislation, this declaration imposed no burden against any property owner other than the State itself." Id. This legal rule would apply to certain portions of K4200 (Kitchen Corral), K4500 (Willis Creek), K6200 (Paria River), K6280 (Rushbeds), K6290 (Rushbed

Springs), K7300/7300D (Last Chance/Paradise Canyon), K8650 (Grand Bench Neck), K9000 (Hole in the Rock).

If title returned to the United States before 1993, however, the situation in Kane (1) is "distinguishable" because the law would not be "an action by the State recognizing a right across the State's own property." Id. Instead, the law would be an attempt to impose a burden on a property owner other than the State itself—"*post hoc* legislation that attempted to re-write history to the disadvantage of the federal government." Id. Where the State returned title to the United States before enacting the 1993 law, therefore, Plaintiffs must prove they accepted an R.S. 2477 right-of-way before the State received title to the land, or after the State returned title to the United States. This legal rule applies to certain portions of K1300 (Elephant Cove), K4500 (Willis Creek), K6200 (Paria River), and K7300 (Last Chance/Paradise Canyon).

IV. EVEN IF PLAINTIFFS PROVE CONSTRUCTION OF CERTAIN HIGHWAYS OVER LANDS NOT OTHERWISE RESERVED FOR PUBLIC PURPOSES, PLAINTIFFS MAY STILL FAIL TO PROVE THE STATE OR COUNTY ACCEPTED AN R.S. 2477 RIGHT-OF-WAY THROUGH TEN YEARS OF CONTINUOUS PUBLIC USE.

As noted above, in SUWA, the Tenth Circuit borrowed from Utah state law an additional acceptance requirement: "Acceptance of an R.S. 2477 right-of-way in Utah thus requires continuous public use for a period of ten years." 425 F.3d at 771. This acceptance requirement appears to be in addition to the requirement for "construction," discussed above. Or in the case of construction by use, this acceptance requirement may simply help define the level of use required to establish such construction.

A. Plaintiffs Will Fail To Prove Continuous Use of Certain Claimed Routes as Public Thoroughfares for a Period of Ten Years.

"Under Utah law, the 'continuous public use as a public thoroughfare for a period of ten years' standard has three components: (1) continuous use; (2) a public thoroughfare; and (3) a

ten-year-minimum period of use." San Juan (1), 754 F.3d at 797 (citing Butler, 2008 UT 12, ¶ 10). "The ten-year minimum is self-explanatory and the Utah courts have elaborated on the other two components of this standard." Id. "'Continuous' in this context means 'without interruption.'" Id. (citing Wasatch Cty. v. Okelberry, 2008 UT 10, ¶ 14, 179 P.3d 768, 774. "It includes any frequency of uninterrupted use, so long as the use occurs 'as often as the public finds it convenient or necessary.'" Id. (citing Wasatch Cty., 2008 UT 10, ¶ 14); but see id. (citing Heber City Corp., 942 P.2d at 312 (applying "convenient or necessary" as an inquiry to the purposes of use rather than the frequency of use)). "The 'public thoroughfare' element refers to 'a place or way through which there is passing or travel' by the public." Id. (citing Heber City Corp., 942 P.2d at 311; Jennings Inv., 2009 UT App 119 at ¶ 11). "To demonstrate the existence of a public thoroughfare, a claimant must show: '(i) passing or travel, (ii) by the public, and (iii) without permission'." Id. Jennings Inv., 2009 UT App 119 at ¶ 11; Heber City, 942 P.2d at 311). "Although frequency (or intensity) of use is not an explicit component of the 'public thoroughfare' analysis, it has always been pertinent to establishing sufficient 'passing or travel' 'by the public.'" Id. at 798 (citing SUWA, 425 F.3d at 771; Lindsay Land & Livestock, Co. v. Churnos, 75 Utah 384, 285 P. 646, 648 (1929)). "While the frequency of use need not be 'great,' it must be sufficient to call the road a 'public thoroughfare.'" Id. (citations omitted).

It is Plaintiffs' burden to prove "continuous public use for a period of ten years." As discussed above, only certain uses may qualify to meet this standard.

B. Plaintiffs Will Fail to Prove the County Accepted an R.S. 2477 Right-of-Way for One or More Claimed Routes by Determining the Route Was a Public Highway and Preparing, in Duplicate, Plats and a Specific Description of the Claimed Route.

Utah law also provides at least one additional acceptance requirement.[19] Under Utah law, "[i]t shall be the duty of the board of county commissioners in each county immediately to determine all public highways existing in its county, and to prepare in duplicate, plats and specific descriptions of the same and of such other highways as such board may from time to time locate upon public lands, ..." Utah Statutes Title 25, Chapter 1, § 1122 (1898); see also § 1134(2) (1898) (requiring the board of county commissioners to "[c]ause to be surveyed, viewed, laid out, recorded, opened, maintained, and worked, such public highways as are necessary for public convenience"); § 1135 (1898) (requiring the county clerk to "keep a book in which must be recorded all the orders of the board of county commissioners relative to each road district, including . . . ; a description of each road district, the name of its supervisors, roads, highways,

[19] The United States notes that the Tenth Circuit, in San Juan (1), has stated that "[n]either R.S. 2477 nor Utah law requires any 'administrative formalities' or 'formal act of public acceptance' of the right-of-way. SUWA, 425 F.3d at 741; see Lindsay Land & Livestock Co., 285 P. at 648." San Juan (1), 754 F.3d at 791. But a closer examination of those cases reveals that this misstates Utah law. In SUWA, the Tenth Circuit merely stated that, "[a]s the Supreme Court of Utah noted 75 years ago, R.S. 2477 'was a standing offer of a free right of way over the public domain,' and the grant may be accepted 'without formal action by public authorities.' Lindsay Land & Livestock Co., 285 P. at 648, (quoting Streeter v. Stalnaker, 61 Neb. 205, 85 N.W. 47, 48 (1901))." SUWA, 425 F.3d at 741 (emphasis added). Lindsay Land & Livestock Co., in turn, cites only to non-Utah cases for the proposition that "[i]t has been held by numerous courts that the grant may be accepted by public use without formal action by public authorities[.]" Lindsay Land & Livestock Co., 285 P. at 648 (emphasis added). In its quotation from Streeter, the Utah Supreme Court states that R.S. 2477 "was a standing offer of a free right of way over the public domain, and as soon as it was accepted in an appropriate manner by the agents of the public, or the public itself, a highway was established." Lindsay Land & Livestock Co., 285 P. at 648 (quoting Streeter, 85 N.W. at 48) (emphasis added). In other words, these cases merely establish that a state need not require any administrative formalities for acceptance of a grant under R.S. 2477 for construction of a highway. But states may impose such requirements. Cf. Order of Certification, ECF No. 211 at 5 (noting that "Utah elected to impose a limitation on itself regarding when it may assert a right to real property"). As discussed herein, Utah has imposed at least one additional acceptance requirement.

contracts, and all other matters pertaining thereto"). These same provisions were substantively continued with only stylistic modifications, the latter two apparently until 1963, and the first one to the present day. See §§ 2808, 2820, & 2821 (1917 Compiled Laws); UTAH CODE ANN. §§ 19-5-16(3), 36-1-9 (1943); UTAH CODE ANN. §§ 17-5-16(3), 27-1-9 (1953); UTAH CODE ANN. § 27-12-26 (1976); UTAH CODE ANN. § 72-3-107 (2010). Thus, state law requires certain mapping to accept any public highway. With respect to Class D roads, this requirement was made even more explicit after FLPMA. See § 72-3-105 (1978) (continued, with amendments, to present). Plaintiffs' 1410 claim, however, was not mapped after 1976. Thus, even assuming Plaintiffs could prove the construction of this claim, they have failed to meet the acceptance requirements imposed by state law.

V. PLAINTIFFS WILL FAIL TO PROVE CERTAIN RIGHTS-OF-WAY WERE EXISTING IN 1976, OR OTHERWISE HAD NOT LAPSED.

"R.S. 2477 rights of way were an integral part of the congressional pro-development lands policy" under which Congress "promoted the development of the unreserved public lands and their passage into private productive hands. SUWA, 425 F.3d at 740–41. Consistent with this purpose, a road must be used in order to maintain a state or county's right-of-way. Where a road is abandoned, the right-of-way must lapse. See Hodel, 848 F.2d at 1084 ("[A]ll uses before October 21, 1976, not terminated or surrendered, are part of an R.S. 2477 right-of-way." (emphasis added)). Interpreting R.S. 2477's grant as unconditionally perpetual would critically undermine Congress's purpose by hindering development and preventing the passage of land into private productive hands. Further, adopting a State law that requires a formal process to abandon an R.S. 2477 grant would expand the rights of the grantee and limit the rights of the United States, the grantor. Such an interpretation is inconsistent with the plain language of R.S.

2477; it did not provide a formal process, and the purpose of the statute was to provide for productive use of the land.

The parties agree the R.S. 2477 statute "required no administrative formalities [to establish a right-of-way]: 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." SUWA, 425 F.3d at 741. Similarly, the parties agree that the R.S. 2477 statute did not provide for, let alone require, a formal abandonment process. Although Utah law requires a formal process of abandonment for right-of-way easements, any suggestion that abandonment of an otherwise valid R.S. 2477 right-of-way could only occur through that formal process would impose constraints on the servient estate holder, the United States. Unlike State law requirements adopted for acceptance, which constrain how the grantee accepts the right-of-way offer, such state laws cannot constrain the rights of the United States, especially in a way that is inconsistent with Congress' intent. San Juan (1), 754 F.3d at 798; see also Leo Sheep Co. v. United States, 440 U.S. 668, 682 (1979) (holding that for grants of federal lands any doubts are "resolved in favor of the federal government and not against it" and "public grants are construed strictly against the grantees"). An interpretation that requires formal abandonment without any support or direction by Congress appears contrary to Congress' intent in enacting R.S. 2477, as well as other similar statutes during the period of western expansion, to put land to beneficial use.

Utah law also recognizes that maintaining easements for highways in perpetuity can prevent the productive use of the subject land, which is contrary to the public interest. See Mason v. State, 656 P.2d 465, 469 (Utah 1982) ("The property owner's right to preserve the status quo on access to and over abutting highways must be qualified by the public interest in relocating public highways for greater advantage at minimum possible cost and in facilitating the return of

land to productive purposes."). In such instances, some landowners could be surprised by the state claiming rights-of-way through their land based on long-unused roads, others who know of a historic but no longer used road through land may choose not to develop that land at all.[20] Thus, it appears any law purporting to always require formality to abandon an R.S. 2477 right-of-way is inconsistent with federal law, and should not be "borrowed" in this context.

Moreover, Utah law recognizes that State and local authorities can lose title to roadways without formal abandonment proceedings where the initial grant of a public right-of-way is conditional. In Falula Farms, Inc. v. Ludlow, 866 P.2d 569, 573 (Utah Ct. App. 1993), the Utah Court of Appeals found a county lost its title to a road "when it vacated part of the roadway by moving it twenty-two feet to the west." *Id.* The court found that the county had a defeasible fee interest in the roadway because the court interpreted the relevant grant as conditioning the county's rights on the perpetual use of the road. *Id.* Congress similarly granted only a "right of way for the construction of highways over public lands." R.S. 2477, 43 U.S.C. § 932. When the "highways" cease, whether through a formal process or simply by long non-use of the road, so too must the federal right-of-way cease.

Additionally—or in the alternative—there can be no dispute that prior to 1911 "[a] road not worked or used for a period of five years cease[d] to be a highway" pursuant to Utah statute and consistent with the language and intent of R.S. 2477. §2070 (1888 Compiled Laws); see also § 1116 (1898 Rev. Stat.) ("All highways once established must continue to be highways until abandoned by order of the board of county commissioners of the county in which they are

[20] If the Court rules the statutes described in Part IV, supra, provide necessary formalities to accept R.S. 2477 rights of way under Utah law, then the possibility of surprise would—at least constructively—be reduced. Nonetheless, perpetual rights in roads not used or maintained would still be inconsistent with the grant of a right-of-way for the construction of highways over public lands provided in R.S. 2477.

situated, by operation of law, or by judgment of a court of competent jurisdiction; provided, that a road not used or worked for a period of five years ceases to be a highway."); §2802 (1917 Comp. Laws) (removing "by operation of law" language, and five years of non use language). Accordingly, if Plaintiffs attempt to prove the existence of an R.S. 2477 right-of-way based on pre-1906 use by pioneers or settlers, Plaintiffs must prove that the route never ceased to be used for a period of five or more years prior to 1911, or that the route was independently constructed and accepted as an R.S. 2477 right-of-way after 1911.

The United States expects this to be relevant to Plaintiffs' R.S. 2477 claims to K6200 (Paria River), K9000 (Hole in the Rock), and unused sections of other claims.

VI. PLAINTIFFS WILL FAIL TO PROVE THE SCOPE THEY REQUEST.

The Tenth Circuit recently summarized R.S. 2477 cases as proceeding in three steps:

> First, the court must make the binary determination of whether a right-of-way exists at all. Second, the court must determine the pre-1976 uses of the right-of-way. And third, the court must decide whether, based on the pre-1976 use, the right-of-way should be widened to meet the exigencies of increased travel.

Kane Cty., Utah v. United States, 928 F.3d 877, 884 (10th Cir. 2019) (citing Hodel, 848 F.2d at 1083). Again, a plaintiff "must prove its R.S. 2477 claims by clear and convincing evidence." Kane County, Utah (1), 2013 WL 1180764, at *45.

A. The Scope of Any Right-of-Way Is Limited to the Character, Width, and Uses of the Right-of-Way on October 21, 1976.

"A right of way is not tantamount to fee simple ownership of a defined parcel of territory. Rather, it is an entitlement to use certain land in a particular way." SUWA, 425 F.3d at 747 (rejecting County's argument "that as long as their activities are conducted within the physical boundaries of a right-of-way, their activities cannot constitute a trespass"). "[T]he scope of an R.S. 2477 right of way is limited by the established usage of the route as of the date of repeal of the statute." Id. at 746; see also Hodel, 848 F.2d at 1083 ("FLPMA preserved only preexisting

rights-of-way as they existed on the date of passage, October 21, 1976. Thus, Garfield County's rights, as they existed under Utah law on that date, are the maximum rights it can exercise today."). For those rights-of-way the court determines to be valid, Plaintiffs must show "what width is reasonable and necessary in light of the pre-1976 uses of the road." Kane (1), 772 F.3d at 1223 (citing Hodel, 848 F.2d at 1084). In spite of the acknowledged burden, Plaintiffs ignore the relevant considerations for determining the scope of an R.S. 2477 right-of-way and merely state that they are entitled to a blanket 66-foot right-of-way for each of the claimed routes. Such an unsupported pronouncement is insufficient to meet Plaintiffs' burden with regards to scope.

B. Where the Width of Certain Routes Have Expanded Since October 21, 1976, Plaintiffs Cannot Prove That Expansion Was Both Reasonable and Necessary to Meet the Exigencies of Increased Travel in Light of Pre-1976 Uses.

Although rights-of-way are "frozen" as of October 21, 1976, "[t]he 'scope' of a right-of-way is a question of state law, and under Utah law a right-of-way may be expanded beyond the beaten path where 'reasonable and necessary' to safely accommodate the pre-1976 use." Kane Cty., 928 F.3d at 884 (citing Hodel, 848 F.2d at 1080). "In other words, an R.S. 2477 right-of-way in Utah may be widened 'as necessary to meet the exigencies of increased travel, at least to the extent of a two-lane road.'" Id. (quoting Hodel, 848 F.2d at 1083). Thus, "even upon deciding the R.S. 2477 title issue on the rights-of-way, the district court still [must] decide under Utah law whether Kane County and the State of Utah were entitled to widen the scope of the rights-of-way beyond the beaten path existing before October 21, 1976, when R.S. 2477 was repealed." Id. at 894.

Plaintiffs have not proffered any evidence to prove that the expansion of their route claims since 1976 was reasonable and necessary "to safely accommodate the pre-1976 use[s]."

Indeed, increases in use and road width after 1976 appear to be the result of uses that did not occur before 1976.

RESPECTFULLY SUBMITTED this 15th day of January, 2020.

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