HOW MANY COOKS DOES IT TAKE TO SPOIL A SOUP?: SAN JUAN COUNTY V. U.S. AND INTERVENTIONS IN R.S. 2477 LAND DISPUTES

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I. INTRODUCTION

Under an 1866 mining statute, many federal and private lands in the West have been burdened by right-of-way claims. Revised Statute 2477 (“R.S. 2477”) was passed during the Civil War era to accommodate western expansion by granting easements over unreserved public lands. When federal policy shifted from expansion to preservation, however, this provision created as many complexities and uncertainties as it did rights-of-way. After several legislative and administrative attempts to resolve these issues, jurisdiction finally fell to federal courts to decide the validity of R.S. 2477 claims. Today, thousands of outstanding claims continue unresolved due to the cost, delay and uncertainty of litigation.

The end result has been to hinder federal land managers, local governments and even private property owners in their attempts to plan for land use. These issues create particular controversy in Utah where the majority of claims exist and where competing policies of local access and federal wilderness designation come to a head. The recent case of San Juan County v. United States established that environmental advocacy groups have an interest in the outcome of a title dispute involving an R.S. 2477 right-of-way, but that the federal government adequately represents those interests so as not to require the intervention of advocacy groups as of right. While examining the issues of sovereign immunity and party intervention requirements, the San Juan County case fails to provide a test that would consider the practical demands for balance between expediency and public input in each case. Congress has prevented legislative solutions to these problems by imposing a moratorium on agency rulemaking regarding R.S. 2477. This Note contends that the current process for resolution of R.S. 2477 claims is inefficient and restrictive. Congress should allow agency rulemaking and provide guidance

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1 See infra note 5.
2 See infra note 192.
3 San Juan County v. United States, 503 F. 3d 1163, 1168 (10th Cir. 2007).
that would encourage the efficient resolution of easier claims while carefully structuring the process to determine the validity of hotly contested claims. This process should balance the needs of efficiency and public input on a case-by-case basis, although a procedural categorization of claims may also be necessary. The use of agency arbitration could be instrumental in the efficient resolution of less-controversial claims while still allowing for some public input and requiring government accountability in resolution of these claims.

II. BACKGROUND

Much of the controversies surrounding issues of land use in the Western United States find their genesis in an open-ended right-of-way grant passed by Congress in 1866. This revised statute, commonly referred to as R.S. 2477, is a land grant that gives “the right-of-way for the construction of highways over public lands, not reserved for public uses.” The meaning of the terms “construction” and “highway” lies at the center of the R.S. 2477 contention because the existence of a recognized right-of-way depends on whether a highway has been constructed. The uncertainty surrounding these terms can leave property titles clouded by the possibility of unrecorded claims, simultaneously leaving claimants with indeterminate and undocumented rights and creating confusion when trying to use or enforce them. Although no legislative history was recorded at the time the act was passed, the purpose of the act was to encourage development of unreserved public lands in the West by private parties. Evidence and recognition of this general policy is found both in comparable state statutory law and court decisions from that time period dealing with R.S. 2477.

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7 Revised Statute 2477 Rights of Way, 59 Fed. Reg. 39216, 39217 (Aug. 1, 2004) (recognizing that “R.S. 2477 has been the subject of inconsistent interpretations . . . resulting in uncertainty for all parties about the exact nature and extent of the grant.”).
8 Id. at 39218.
9 See infra notes 10-11.
10 See supra note 5, at 253 (providing rights to water acquired by appropriation were “recognized and acknowledged by the local customs, laws and decisions of courts”). See also Mining Law of 1872, 30 U.S.C. §§ 22, 26, 28 (cancellation of mining claims by federal government could result where claimant fails to comply with state procedures); Desert Land Act of 1877, 43 U.S.C. §321 (allowing citizens to reclaim desert land tracts by conducting water on them).
11 See Nicolas v. Grassle, 267 P.196, 197 (Colo. 1928) (discussing historical purpose of R.S. 2477 and congressional intent); Cent. Pac. Ry. v. Alameda County, 284 U.S. 463, 472-73 (1931) (stating that R.S. 2477 was enacted to encourage right-of-ways as “necessary aids to the development and disposition of public lands” and recognizing that their maintenance was “clearly in furtherance of the general policies of the United States”). See also Yeager v. Forbes, 78 P.3d 241, 247 (Wyo. 2003) (stating purpose of R.S.2477 and frontier road system); Southern Utah Wilderness Alliance v. Bureau of Land Management, 425 F.3d 735, 740-41 (10th Cir. 2005) (recognizing that the statute was a product of “the congressional pro-development lands policy”).
A. Congressional Action

Since R.S. 2477’s inception, various executive and congressional actions have modified and shaped how the act’s provisions have been applied. In 1938, the Department of the Interior published its first regulation of R.S. 2477 right-of-way access which made the grants “effective upon the construction or establishing of highways, in accordance with the state laws,” and that no application needed to be filed for a grant “as no action on the part of the Federal Government is necessary.” This Interior Department decision confirmed that right-of-way access was self-executing and could be established without formal procedures. The decision also showed a preference for state law interpretation of the term “construction” in relation to the right-of-way. For many years after the Interior decision, the only R.S. 2477 claims were between private land owners and would-be road users, and prior to the Federal Land Policy and Management Act (FLPMA), federal land managers had no reason to broach these issues under the pro-development policy of the federal government. However, in recent years much of the disagreement involving R.S. 2477 claims has dealt with acceptance of the grant through “sufficient public use,” and with the court’s use of state law to frame its analysis of whether that standard has been met.

In 1976, Congress formalized a movement away from the general policy of expansion and towards federal retention of public lands by enacting the Federal Land Policy Management Act (“FLPMA”). As part of this statutory repositioning, Congress specified that a “valid” R.S. 2477 right-of-way existing before the date of approval of the act would continue in effect. Any new rights-of-way must be established under the much more onerous provisions of FLPMA

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14 See Mining Law of 1872, supra note 9.
15 See Southern Utah Wilderness Alliance v. Bureau of Land Management, 425 F. 3d 735, 741 (10th Cir. 2005) [hereinafter “SUWA v. BLM”].
16 Harry R. Bader, Potential Legal Standards for Resolving the R.S. 2477 Right of Way Crisis, 11 Pace Envtl. L. Rev. 485, 492 (1994) (stating that “attempting to determine valid acceptances through sufficient public use is a difficult and intricate matter”).
17 See SUWA v. BLM, 425 F. 3d at 762 (holding that, in R.S. 2477 cases, “federal law looks to state law to flesh out details of interpretation”).
18 See supra note 4.
19 FLPMA, Pub. L. No. 94-579, §§ 509(a), 701(a), 90 Stat. 2744, 2781, 2786 (codified at 43 U.S.C. §§ 1701 (a)-(h), 1769 (2006)) (“Nothing in this Act or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this act . . . All actions by the Secretary concerned under this Act shall be subject to valid existing rights”).
which no longer grants permanent property rights\textsuperscript{20} and which may be limited or
denied on the basis of “environmental quality, national land use policies, economic
efficiency, and fair market value.”\textsuperscript{21} Aside from eliminating the self-executing R.S.
2477 right-of-way grants, the FLPMA provided a fifteen year timeline for the
designation of Wilderness Study Areas which the government would manage in
preparation for future designation as wilderness and to “prevent unnecessary or
undue degradation of the lands and their resources.”\textsuperscript{22} The Wilderness Study Area
provisions have also caused conflict between the competing interests of
establishing R.S. 2477 access for logging, grazing, mining and motorized
recreation and establishing wilderness areas which, by definition, must have at
least five thousand “roadless” acres.\textsuperscript{23} With major concerns over energy
compounding over the last few decades\textsuperscript{24} access to natural resources on BLM lands
has become a rising priority, but has met with resistance even when the proposals
are for the development of sustainable energy.\textsuperscript{25} Those who oppose these
developments argue that while the value of natural resources is relatively easy to
quantify and value, the sacrifice of non-economic resources may not be worth the
risk.\textsuperscript{26} The change in land management policy, initiated by the FLPMA, has
resulted in a “political tug-of-war” regarding the meaning of R.S. 2477.\textsuperscript{27} During
such tug-of-wars, administrative agency interpretations are often swayed to and fro
by different presidential administrations.

\textbf{B. Executive Policies}

Under the Carter Administration, the Department of the Interior proposed
regulations that allowed any person, State or local government to establish R.S.
2477 highways within a three year time frame by submitting a map to the Bureau
of Land Management identifying their location.\textsuperscript{28} However, the final regulation

\begin{itemize}
\item\textsuperscript{20} 43 U.S.C. § 1764(b) (2006) ("Each right-of-way or permit granted, issued or renewed
pursuant to this section shall be limited to a reasonable term in light of all circumstances concerning
the project.").
\item\textsuperscript{21} Michael S. Freeman & Lusanna J. Ro, RS 2477: The Battle over Rights-of-Way on Federal
\item\textsuperscript{22} 43 U.S.C. §1782(a)-(c) (2006).
\item\textsuperscript{23} See James R. Rasband, The Rule of Capture and its Consequences, 35 ENVTL. L. 1005, 1019-
21 (2005) (asserting that the debate over R.S. 2477 is more significant with BLM lands which offer
the potential of multiple use while it is less significant in national forests where most forests were
designated as reserved before many highways could be established and any that could exist would
have difficulty proving pre-reservation existence of an R.S. 2477 route).
\item\textsuperscript{24} See Energy Design Update, Three Decades of Missed Opportunities, 28 No. 9 ENERGY
DESIGN UPDATE 16 (2008).
\item\textsuperscript{25} See Roy Fuller, Wind Energy Development on BLM Lands, 24 J. LAND RESOURCES & ENVTL.
L. 613, 619-21 (2004) (proposing wind energy as a sustainable energy solution but acknowledging
concerns over wilderness land use, aesthetics, noise, and damage to wildlife and habitats).
\item\textsuperscript{26} See generally Pete Morton, The Economic Benefits of Wilderness: Theory and Practice, 76
\item\textsuperscript{27} See Rasband supra note 23, at 1029.
\item\textsuperscript{28} 44 Fed. Reg. 58106, 58118 (Oct. 9, 1979).
\end{itemize}
shied away from the three year deadline and instead stated only that there was an “opportunity to file within 3 years.”

Toward the end of the Carter administration, Deputy Solicitor Frederick N. Ferguson issued a letter concluding that determination of R.S. 2477 right-of-way depended on federal application of the term “construction” involving actual construction instead of mere use. The Ferguson letter’s conclusions were deteriorated during the Reagan Administration by the decision in Sierra Club v. Hodel (“The Burr Trail case”). In that case, the Court held that the scope of an R.S. 2477 right-of-way was a question of state law which allowed reasonable and necessary widening of an existing road in spite of the impairment that an adjoining wilderness study area would suffer.

In response to the Burr Trail case, Interior Secretary Donald Hodel issued a new memorandum which confirmed that state law applies to the scope of R.S. 2477 highways. Although the memorandum adjusted the definition of construction to include “[t]he passage of vehicles over time” in accordance with the Burr Trail decision, it did not decide whether state or federal law applies to determine the existence of an R.S. 2477 right-of-way.

When President Clinton was elected, the ebb and flow of R.S. 2477 interpretation changed once more. As the Clinton Administration’s Department of the Interior prepared new rules to establish a federal administrative procedure for determining R.S. 2477 validity, Congress passed a temporary moratorium on further regulations. Shortly thereafter, Congress passed a permanent moratorium in the form of a rider attached to an Omnibus Act. After being prevented from promulgating any regulation concerning R.S. 2477, Clinton’s Interior Secretary Bruce Babbitt issued a new

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29 45 Fed. Reg. 44518, 44531 (July 1, 1980).
30 See Letter of Frederick N. Ferguson, Deputy Solicitor General, to James W. Moorman, Assistant Attorney General at 5-6 (Apr. 28, 1980), available at http://inyocounty.us/inyovdoi/DOIMotionToDismiss/Docs/49-10.pdf. See also Rasband, supra note 23, at 1029 (discussing Ferguson’s recognition in the letter that this interpretation could avoid conflict between R.S. 2477 and the meaning of the term “roadless” under the FLPMA).
31 Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988) (overruled on other grounds by Village of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992)).
32 Id. at 1083.
34 Id.
memorandum revoking the Hodel policy and taking an aggressive approach toward those seeking to establish an R.S. 2477 right-of-way.38

Shortly after President Bush took office in 2001, Department of the Interior Secretary Gale Norton began negotiating with the state of Utah regarding Governor Mike Leavitt’s notice of intent to file suits to quiet title to several R.S. 2477 claims. This negotiation resulted in a Memorandum of Understanding signed in April of 2003.39 The Memorandum of Understanding attempted to institute an “acknowledgement process” whereby the Bureau of Land Management would issue a recordable disclaimer of interest to resolve State claims on R.S. 2477 roads without litigation.40 The acknowledgement process excluded more controversial claims involving Wilderness Study Areas and National Wildlife or Park areas41 while attempting to resolve claims which were readily identifiable and which had documented evidence of existence prior to FLPMA.42 The acknowledgement process met with resistance and the Government Accounting Office eventually declared that it violated the legislative moratorium.43 However, the Accounting Office also found that the Interior Department has authority under provisions in FLPMA to otherwise disclaim interests in R.S. 2477 rights of way.44 By disclaiming an interest in a right-of-way, the Department basically allows the route to become public domain by simply issuing a disclaimer and foregoing any judicial determination.

38 See Rasband supra note 23, at 1032 (indicating that Secretary Babbitt issued the memorandum in preparation for R.S. 2477 disputes which were “on the horizon” after proclaiming the Grand Staircase-Escalante National Monument).
41 See Memorandum of Understanding supra note 39.
44 Id. at 21.
C. Judicial Decisions

A more recent change in R.S. 2477 management came with the 10th Circuit’s decision in *Southern Utah Wilderness Alliance v. Bureau of Land Management*.45 The case deals with attempts by several southern Utah counties to grade several routes which they claimed as R.S. 2477 rights of way, shortly after President Clinton proclaimed the Grand Staircase-Escalante area a national monument.46 The court held that the Bureau of Land Management does not have primary jurisdiction over R.S. 2477 claims and that state law is used to frame both perfection and scope of an R.S. 2477 right-of-way.47 With regard to whether an R.S. 2477 claim has been perfected, the court noted that the burden of proof could shift “where the R.S. 2477 claim has previously been adjudicated, or where there is a federal disclaimer of interest, memorandum of understanding, or other administrative recognition.”48 The essential holding of the case, however, dealt only with the scope of acknowledged rights of way and whether their improvement fell within agency authority.49 This precedent lies in contrast with the 9th Circuit approach which has overlooked state law in its decisions regarding the perfection of R.S. 2477 claims while not expressly holding that a federal standard applies.50

III. SAN JUAN COUNTY v. UNITED STATES

A. Background

The 10th Circuit decision in the *San Juan County* case was set off by frustration with regulations imposed by the National Park Service restricting travel on Salt Creek Road.51 Canyonlands National Park (“Canyonlands”) was established by Congress in 1964 in order to “preserve an area in the State of Utah possessing superlative scenic, scientific, and archaeologic features for the public enjoyment and appreciation.”52 The decision followed the frustration of Salt Creek Basin residents who were unable to drive on the roads in the area due to the restrictions imposed by the National Park Service.53

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45 *SUWA v. BLM*, 425 F.3d 735 (10th Cir. 2005).
46 *Id.* at 742. See also Rasband *supra* note 23, at 1032-34 (recounting the outraged reaction in southern Utah counties after the Monument’s proclamation as well as after the county blading (i.e. grading the earth with a plow-type grader)).
47 *SUWA v. BLM*, 425 F.3d at 746, 757, 768 (citing the *Burr Trail* Case for the “reasonable and necessary” scope originating in Utah law; BLM lacks primary jurisdiction in R.S. 2477 claims and it is an abuse of discretion for a court to defer to a BLM decision; and federal law governing R.S. 2477 may “borrow” from state law principles to determine perfection of a right-of-way).
48 *Id.* at 769 n.20.
49 *Id.* at 745 (requiring that the holder of an R.S. 2477 right-of-way consult the agency before making any improvements).
50 See Vogler v. United States, 859 F. 2d 638 (9th Cir. 1988); see also Shultz v. Dep’t of Army, 10 F. 3d 649, 655 (9th Cir. 1993) (holding that Alaska state law governs perfection and scope of R.S. 2477 rights of way), withdrawn and superseded by 96 F. 3d 1222 (9th Cir. 1996) (holding that no easement existed but not specifying whether federal or state law applied).
51 *San Juan County v. United States*, 503 F. 3d 1163, 1168 (10th Cir. 2007).
inspiration, benefit and use of the public.”\textsuperscript{52} The National Park Service retains regulatory power over national parks, including Canyonlands.\textsuperscript{53} Salt Creek Canyon lies within Canyonlands and supports the third largest riparian ecosystem within the park.\textsuperscript{54} Before the Park Service restricted access, Salt Creek Trail existed as an undeveloped jeep trail requiring a “high clearance four-wheel drive vehicle and some experience in four-wheeling” to traverse.\textsuperscript{55} The disputed road crosses Salt Creek and even travels along the creek bed at various points on its way past the Peekaboo campsite to Angel Arch.\textsuperscript{56}

Between 1980 and 1993 visitors to Canyonlands more than quadrupled.\textsuperscript{57} Vehicles periodically broke down on the trail and National Park Service assistance was required for removal.\textsuperscript{58} There were also some instances where vehicles “lost transmission, engine or crankcase fluids in Salt Creek’s water.”\textsuperscript{59} In response to this increase in patronage, the National Park Service began assessing portions of the Canyonlands National Park in order to create and implement a new Backcountry Management Plan.\textsuperscript{60} In June of 1992, the National Park Service began preparing an environmental assessment for the Backcountry Management Plan and solicited public comment.\textsuperscript{61} The Environmental Assessment considered the impact of motorized vehicle traffic on Salt Creek Road on the riparian ecosystem in Salt Creek Canyon,\textsuperscript{62} and stated that the preferred alternative would be to close the road to vehicular traffic at Peekaboo campsite allowing only pedestrian travel along the ten remaining miles to Angel Arch.\textsuperscript{63} In January of 1995, the National Park Service released the final Backcountry Management Plan which chose to limit vehicular traffic past Peekaboo campsite to ten permit vehicles and two commercial tours per

\textsuperscript{54} Canyonlands National Park – Salt Creek Canyon, 69 Fed 32871 (June 14, 2004).
\textsuperscript{56} See Canyonlands National Park – Salt Creek Canyon, supra note 54.
\textsuperscript{58} See Canyonlands National Park – Salt Creek Canyon, supra note 54.
\textsuperscript{60} Southern Wilderness Alliance v. Dabney, 7 F. Supp. 2d 1205, 1207 (D. Utah 1998); See also Canyonlands National Park – Salt Creek Canyon, supra note 54.
\textsuperscript{61} Backcountry Management Plan, Environmental Assessment; Canyonlands National Park, UT, 57 Fed. Reg. 27268 (June 18, 1992).
day instead of closing the ten-mile portion of the road completely. The Southern Utah Wilderness Alliance challenged the decision to allow limited vehicular access instead of implementing the preferred alternative stated in the earlier environmental assessment.

B. Prior Litigation

The complaint alleged that the use of motorized vehicles on Salt Creek Road would impair unique park resources which would violate the enabling act giving the National Park Service authority and commanding it to “conserve the scenery and natural and historic objects and the wild life therein . . . by such means as will leave them unimpaired for the enjoyment of future generations.” The district court granted summary judgment in favor of Southern Utah Wilderness Alliance and enjoined the Park Service from allowing motorized access in Salt Creek Canyon where it would permanently impair unique riparian resources. On appeal, the 10th Circuit reversed and remanded to determine whether motorized vehicles would cause “significant, permanent impairment” as defined by the Park Service interpretation. The court also vacated the district court’s order enjoining the Backcountry Management Plan’s allowance of motorized vehicles in Salt Creek Canyon.

The Commissioners of San Juan County viewed the reversal and vacation of injunction as a victory and, asserting an R.S. 2477 right-of-way, ordered the Park Service to remove gates and signs limiting motorized vehicle access by December. The County also warned that the gates and signs would be forcibly removed if the Park Service failed to take action. After the County had removed the gates and signs, the Wilderness Alliance moved to amend its complaint to add the County and State of Utah as defendants, arguing that:

NPS . . . has an obligation and duty to determine the validity of property claims adverse to the United States and to require

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67 SUWA v. Dabney, 7 F. Supp. 2d at 1211-12.
68 Southern Utah Wilderness Alliance v. Dabney, 222 F. 3d 819, 829-30 (10th Cir. 2000) (remanding to determine impact but also indicating that new Management Policies from the agency could elicit Chevron deference).
69 Id.
71 San Juan County v. United States, 503 F. 3d 1163, 1168 (10th Cir. 2007) [hereinafter San Juan County].
specifically that the State of Utah and San Juan County demonstrate the validity of its [sic] alleged right-of-way before making a decision or taking agency action allowing use of Salt Creek.\footnote{Id. at 1168-69 (stating that SUWA added the State in addition to the County as an alleged co-owner of Salt Creek Road).}

The Park Service defendants allowed the motion to pass uncontested, agreeing that:

\[\text{[J]oinder of the County and State “would enhance the prospects that issues pertinent to the questions of agency management of resources in Salt Creek Canyon . . . [could] be resolved in an orderly way” and “would also give the court jurisdiction to ensure that San Juan County’s and State’s actions pending final resolution of these issues do not limit the ability of the court to grant complete relief.”} \footnote{Id. at 1169.}

When the County and State jointly moved for summary judgment on the R.S. 2477 right-of-way issue, however, the Park Service and Wilderness Alliance opposed the motion\footnote{Id. (stating also that the Park Service admitted “perhaps disingenuously, that it had anticipated that such a cross-claim would be filed.”).} by asserting that summary judgment on that issue could only be granted in a suit under the Quiet Title Act.\footnote{Quiet Title Act 28 U.S.C. § 2409(a) (2006).} In the order denying partial summary judgment, the district court voiced its annoyance at this change in position:

SUWA has sued NPS for, among other things, an alleged obligation and duty to determine the validity of property claims adverse to the United States and to require specifically that the State and San Juan County demonstrate the validity of its alleged right-of-way before making a decision or taking agency action allowing use of Salt Creek Canyon as a claimed “highway” right-of-way. The State and County have asked for such a determination regarding their R.S. 2477 claims – a determination which SUWA has sued the NPS to obtain. Now, almost two years after the NPS supported SUWA’s request to name the State and the County as defendants in this action so that the R.S. 23477 issue could be resolved, the NPS and SUWA suddenly assert that the court has no jurisdiction to make such a determination. At the various status conferences that have been held in this case, no mention was ever made by the NPS or SUWA that they were expecting – or demanding – that cross-claims be filed by the State and County. Further, if a claim was necessary to resolve this issue, it is unclear
why the NPS itself has not asserted cross-claims against the State and County.76

The district court then went on to dismiss the State and County from the action given that the R.S. 2477 claim was their only defense. The court called the problem a “legal quagmire” and declined to “order the State and County – against their wishes – to file suit against the United States” in order to defend themselves.77 The National Park Service issued a final rule prohibiting motorized vehicle access past the Peekaboo campsite on June 14, 2004.78 Notice of the decision reflected NPS’s assumption that no R.S. 2477 right-of-way exists, however it did not purport to limit the ability of the State or County to pursue their R.S. 2477 claim in court.79 That same day, the County filed a quiet title action against the United States, Department of the Interior and National Park Service claiming an R.S. 2477 right-of-way in Salt Creek Canyon.80

C. 10th Circuit Litigation

Southern Utah Wilderness Alliance, the Wilderness Society and Grand Canyon Trust (collectively “SUWA”) sought to intervene as a matter of right under Fed. R. Civ. P. 24(a)(2) and permissively under Fed. R. Civ. P. 24(b). The district court denied intervention on the grounds that the suit defined the case narrowly to address only whether a right-of-way existed, and its scope.81 The court offered to grant SUWA amicus curiae status, but SUWA opted to appeal.82 A divided panel of the 10th Circuit reversed the district court denial and allowed intervention as of right.83 In reaching this decision, the Court of Appeals held that SUWA had a direct, substantial, and legally protectable interest in the right-of-way required for intervention,84 that its interest could be impaired or impeded by the disposition of the case,85 and that the federal government would not adequately represent its interests in the action.86 After the divided panel allowed intervention, the county appealed requesting rehearing en banc.87

76 San Juan County, 503 F. 3d at 1169-70 (citing Aplt. Add. At 8-9 (Order, Jan. 15, 2003)).
77 Id. at 1170.
79 Canyonlands National Park supra note 54, at 32872.
80 San Juan County, 503 F. 3d at 1170.
81 Id. at 1171.
82 2004 WL 5622392 (10th Cir. 2004).
83 San Juan County v. United States, 420 F. 3d 1197, 1201 (10th Cir. 2005).
84 Id. at 1208 (distinguishing SUWA’s interest in the Salt Creek case as an interest which was not “attenuated” from the more remote interest of prospective intervenors in other cases).
85 Id. at 1210-11.
86 Id. at 1213.
87 Brief of Appellee San Juan County, Utah, San Juan County, 503 F.3d 1163 (10th Cir. 2007).
After the case was heard by the 10th Circuit en banc, a lengthy opinion was issued which decided two critical issues with a narrow majority while deciding three other issues by a clearer majority.\(^{88}\) The opinion contains four separate opinions in which various judges concur or dissent in part and differ in reasoning supporting or opposing the result.\(^{89}\) The narrow-majority issues involved (1) whether intervention by SUWA, without a claim to a property interest, is barred by sovereign immunity,\(^{90}\) and (2) whether SUWA’s interest in the litigation was or must be direct, substantial and legally protectable.\(^{91}\) Aside from dedicating significant analysis to these two main issues, the court also held that SUWA would be adequately represented by the U.S. in a quiet title action,\(^{92}\) and that denial of permissive intervention was not an abuse of discretion by the lower court.\(^{93}\) The San Juan case demonstrates how the ineffective treatment of R.S. 2477 issues has created considerable difficulty for federal courts which are now the only venue that has authority to resolve them. The inherent conflict between the general policies of landowners and environmental groups is illustrated in the 10th Circuit’s treatment of intervention in Quiet Title actions. The spectrum of decisions taken by the court serves to show that the conflict between the needs of efficiency and public input are not adequately resolved judicially. The following sections address the issues before the Court of Appeals in the order that the Hartz Opinion\(^{94}\) addresses them.

1. Does Sovereign Immunity Bar SUWA’s Intervention?

The majority considered “whether granting SUWA intervention under [Fed.R.Civ.P.24] would infringe upon sovereign immunity in litigation under the Quiet Title Act,”\(^{95}\) and then determined that the Quiet Title Act waiver is not conditioned on barring intervention of parties aligned with the United States.\(^{96}\) Ultimately, the majority held that procedural rules, including intervention, apply as

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\(^{88}\) San Juan County, 503 F.3d 1163 (10th Cir. 2007); see also Utah et al., v. United States, Slip Copy 2008 WL 4170017, at 2-3 (D.Utah, 2008) (stating that the San Juan County opinion provides precedent for two narrow issues).

\(^{89}\) San Juan County, 503 F.3d 1163, 1167-1207 (10th Cir. 2007) (opinion by Circuit Judge Hartz, joined by Circuit Judges Henry and Murphy, and joined in all but Part IV(B) by Circuit Judges Seymour, Ebel, Briscoe, and Lucero) (the “Hartz Opinion”); id. at 1207-26 (opinion by Circuit Judge Kelly, joined by Chief Judge Tacha, and Circuit Judges Porfilio, O’Brien, McConnell, and Holmes, concurring in the judgment) (the “Kelly Opinion”); id. at 1210-26 (opinion by Circuit Judge McConnell, joined by Chief Judge Tacha, and Circuit Judges Porfilio, Kelly, O’Brien and Holmes concurring in part and dissenting in part) (the “McConnell Opinion”); id. at 1226-32 (opinion by Circuit Judge Ebel, joined by Circuit Judges Seymour, Briscoe, and Lucero concurring in part and dissenting in part) (the “Ebel Opinion”); id. at 1232-34 (opinion by Circuit Judge Lucero, concurring in part and dissenting in part) (the “Lucero Opinion”).

\(^{90}\) San Juan County, 503 F.3d at 1172-87.

\(^{91}\) Id. at 1188-1203.

\(^{92}\) Id. at 1203-07.

\(^{93}\) Id. at 1207.

\(^{94}\) See San Juan County v. U.S., 503 F.3d 1163, 1207-26 (10th Cir. 2007).

\(^{95}\) San Juan County, 503 F. 3d at 1172.

\(^{96}\) Id. at 1175.
they would in civil suits even when they are employed in a quiet title claim against
the U.S. under the Quiet Title Act.97

McConnell’s dissenting opinion argued that intervention by private parties
touches on part of the substantive core of sovereign immunity and therefore does
not apply as it would in a civil suit.98 In response to the majority assertion that
intervention by SUWA would not enlarge the litigation burden already imposed by
the Quiet Title Act, McConnell identified several ways in which intervention could
affect the substantive rights of the government.99 The McConnell Opinion also
pointed to litigation strategies which SUWA could force on the government.100
McConnell advocated a simplified, closed-door approach which focused solely on
whether the title to the right-of-way had passed without consideration of any
environmental, recreational or private impacts such a determination could have on
parties without a specific property interest.

2. Does SUWA Have Any Interest in the Suit?

Next, the majority determined whether intervention as of right should be
granted, beginning its analysis by addressing SUWA’s interest in the suit.101 The
Hartz Opinion recognizes that courts have struggled to define this interest, using
terms such as “significantly protectable interest,”102 “legally protected interest,”103
and “direct, substantial, and legally protectable.”104 The solution to this problem
for the Hartz Opinion was an equitable “practical effects” test to determine
whether the practical effect of a judgment would injure SUWA’s interests without
requiring a specific or certain detriment.105 The Kelly Opinion disapproved of the
“practical effects” test introduced by the majority and maintained that the direct
test is more established and less problematic than the majority recognized.106 Judge

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97 Id. at 1186-87.
98 Id. at 1212-13.
99 Id. at 1218-20 (identifying ways intervention could affect the government, including (1)
Forcing the government to litigate issues it would prefer not to address, (2) Appealing decisions to
higher courts when the Solicitor General might view the case as “an unpropitious vehicle for
vindicating the government’s views,” and (3) Opposing settlements reached by the claimants
requiring a formal hearing to resolve).
100 Id. at 1223-26 (claiming also that distinctions between SUWA’s intervention on the side of
the government and ATV-user group interventions as co-plaintiffs would be hard to square with the
majority’s general theory of sovereign immunity waivers).
101 Id. at 1190-1203.
104 Coalition of Ariz./N.M. Countie s for Stable Econ. Growth v. Department of Interior, 100 F. 3d 837, 840 (10th Cir. 2001).
105 San Juan County, 503 F.3d at 1200 (stating that “The issue is the practical effect of a
judgment in favor of the County and the State, not the legally compelled effect”).
106 Id. at 1209, n.4 (stating that the direct test is “preferable to the vague and malleable ‘practical
effect’ test”, and that “a few case citations cherry-picked from three decades of jurisprudence hardly
casts doubt on the [direct] test’s vitality”).
Kelly also argued that the practical effect of an intervenor on the litigation warrants the direct test requirements and expressed concern that an intervenor in a quite title action has an incentive to delay final adjudication. Ultimately the majority took a more liberal approach, recognizing aesthetic and other non-property interests that are legally protectable so as to allow intervention.

3. Is SUWA adequately represented by BLM?

Finally, the majority considered whether the government could adequately represent them, thus negating intervention as of right. The Hartz Opinion held that the interest advanced in a suit for quiet title is narrowly tailored and that SUWA could have no other objective which the Park Service would not adequately represent. In spite of the government’s adverse interactions with SUWA in the past and its present objection to SUWA’s intervention, the majority viewed the opposition between the two under a “too many cooks spoil the soup” rationale, stating, “To oppose another cook in the kitchen is not to oppose the other cook’s desire for a superb meal.” The Ebel Opinion disagreed and claimed that SUWA’s objectives of limiting any easement to eliminate vehicle traffic are not identical to those of the United States. The Lucero Opinion agreed and even went so far as to assert that SUWA should be allowed to intervene to enforce its rights in the event that the U.S. changed its position during litigation or settlement negotiations. Ebel and Lucero seemed to prefer an approach to R.S. 2477 adjudication that would require the court to consider the broadest range of concerns possible, viewing the practical effects of the litigation on the same level as the more narrow issue of property ownership. The majority reaches a middle ground by admitting that SUWA has an interest in the outcome of the case under the “practical effects” approach, but maintaining that those interests are adequately represented by the Park Service in a narrow quiet title action which does not involve competing government interests.

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107 Id. at 1210, n.7 (stating that “even SUWA’s non-abusive appeals have had the ‘practical effect’ of delaying the resolution of this lawsuit for three years”).
108 Id. at 1203-07.
109 Id. at 1206.
110 Id.
111 Id. at 1228.
112 Id. at 1234; see also U.S. v. Carpenter, 526 F.3d 1237, 1240 (9th Cir. 2008) (citing San Juan County in support of its decision to vacate approval of settlement agreement where intervenors were not permitted to participate).
113 Aside from the effect that San Juan County had on the continuing debate over R.S. 2477 rights of way, the case has also impacted broader issues of standing and intervention. For a discussion of some of these issues, see Eric S. Oelrich, The Relationship Between Standing and Intervention: The Tenth Circuit Answers by “Standing” Down, 14 MO. ENVTL. L. & POL’Y REV. 209 (2006).
IV. ANALYSIS

In the R.S. 2477 arena, the decision reached by the court in San Juan County determines the scope of a federal adjudication of R.S. 2477 claims with regard to outside participation in the decision making process. Persuasive arguments support both Judge McConnell’s limited involvement approach under shelter of sovereign immunity, as well as Judge Lucero’s wide involvement approach allowing full involvement. The mere fact that the decision was passed by a narrow majority and that there were several dissenting and concurring opinions indicates that the issue involves a close call.\(^{114}\) Formal posture in R.S. 2477 disputes are complex and can change or create disparate impacts on parties depending on the nature of their interests or the outcome of the suit itself. Courts must be careful in their decisions considering the moratorium which has constrained rulemaking efforts,\(^ {115}\) and the primary jurisdiction holding in SUWA v. BLM which also constrains agency adjudication.\(^ {116}\) Federal courts have become the only avenue for settling R.S. 2477 disputes, and thus it is essential that courts craft their decisions with an eye toward potential effects.

One of the unresolved issues in the San Juan County case, which illustrates the potential impacts a single decision can have, involves fn. 6 of the Hartz Opinion and its unconvincing disavowal of the Ebel Opinion’s assertion that intervention on the side of the plaintiff would be barred by sovereign immunity while intervention on the side of the U.S. does not.\(^ {117}\) If the case is interpreted by lower courts as limiting Quiet Title Act intervenors to parties who are formally aligned with the U.S., disparate results will most likely follow. Many of the claimed R.S. 2477 routes cross through public and private land as they criss-cross Utah’s arid landscape. Some private property owners hope that R.S. 2477 rights of way do not

\(^{114}\) San Juan County, 503 F.3d at 1167-1207 (opinion by Circuit Judge Hartz, joined by Circuit Judges Henry and Murphy, and joined in all but Part IV(B) by Circuit Judges Seymour, Ebel, Briscoe, and Lucero) (the “Hartz Opinion”); id. at 1207-26 (opinion by Circuit Judge Kelly, joined by Chief Judge Tacha, and Circuit Judges Porfilio, O’Brien, McConnell, and Holmes, concurring in the judgment) (the “Kelly Opinion”); id. at 1210-26 (opinion by Circuit Judge McConnell, joined by Chief Judge Tacha, and Circuit Judges Porfilio, Kelly, O’Brien and Holmes concurring in part and dissenting in part) (the “McConnell Opinion”); id. at 1226-32 (opinion by Circuit Judge Ebel, joined by Circuit Judges Seymour, Briscoe, and Lucero concurring in part and dissenting in part) (the “Ebel Opinion”); id. at 1232-34 (opinion by Circuit Judge Lucero, concurring in part and dissenting in part) (the “Lucero Opinion”).


\(^{116}\) SUWA v. BLM, 425 F.3d 735 (10th Cir. 2005); For an argument that primary adjudication of the existence of an R.S. 2477 right-of-way should be handled by agencies, see Tova Wolking, From Blazing Trails to Building Highways: SUWA v. BLM & Ancient Easements over Federal Public Lands, 34 Ecology L.Q. 1067, 1094-96 (2007).

\(^{117}\) San Juan County v. U.S., 503 F.3d at 1183, n.6, 1223-24 (denying implication that sovereign immunity would bar intervention on the side of the plaintiff, and illustrating McConnell’s view that the majority only superficially dismisses Ebel’s distinction between plaintiff and defendant intervenors).
exist so that they can limit public access to and across their land on an adjoining or connecting right-of-way. Other private property owners hope that a right-of-way does exist so that they can have unrestricted access to their property, which may be surrounded in whole or in part by land with restricted access. If formal alignment with the United States is required to avoid sovereign immunity barring the suit, then the latter group of private property owners will get the short end of the stick even though they may be similarly situated in all other aspects. As Judge McConnell recognized, the formal alignment requirement may also complicate later analysis of the legal interest necessary to intervene. In determining whether SUWA has the sufficient legal interest required to intervene, the majority and Ebel opinions both referenced an interest relating to the property, while not an interest in the property. Judge Ebel asserted that this interest entails limiting the scope of the right-of-way should the court find one to exist. Although the court did not reach the issue in its holding, it is likely that off-road vehicle groups have a similar interest relating to the property, although they would seek to expand the scope of any R.S. 2477 rights of way instead of limiting them.

Ultimately, the decision to include or exclude intervenors has as much to do with policy decisions on how much public involvement should be allowed in quiet title actions against the government as it does with sovereign immunity or Rule 24 requirements. On one hand, the increase in efficiency which comes from limiting parties would allow both private property owners and federal land managers to plan their investments and regulations without the restrictions and delay of the more protracted litigation which inevitably results from intervention. Moreover, an approach that favors giving federal courts primary jurisdiction in limited party disputes may benefit peripheral parties where agencies are susceptible to shifting executive priorities or industry influence. However, this approach may also produce ill-informed results which fail to consider the impact a single decision might have on the valid interests of different groups. Environmental groups who

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120 See San Juan County, 503 F. 3d at 1210, 1223-24 (stating that off-road vehicle users are “waiting in the wings to intervene on the same legal theory that supports SUWA’s intervention,” and that “the argument that sovereign immunity necessarily allows intervention by entities that seek only to intervene on the United States’ behalf is unwarranted”).

121 Id. at 1200-01.

122 Id. at 1228.

123 See Richard B. Stewart, The Reformation of American Administrative Law, 88 HARV. L. REV. 1669, 1684-87 (1975) (suggesting that regulators can become too friendly with industry from benign repeat interactions with the targets of their regulation, or from limited agency resources).

124 See San Juan County, 503 F.3d 1163, 1234 (recognizing that if the government decides to “change its position at a critical point in the litigation or settlement negotiations, SUWA will be left as a mere protestor forced to fight the rearguard action by renewing its motion to intervene” and
have expended much time and energy to protect areas burdened by unfounded right-of-way claims could be limited to amicus participation which the court is free to ignore.\textsuperscript{125} Additionally, limiting party participation could facilitate so-called “sweetheart deals” in settling disputes which could circumvent the purpose of the FLPMA.\textsuperscript{126} Under the current approach, many right-of-way disputes which could otherwise be determined relatively easily are forced to undergo costly and time-consuming litigation. Many of the less controversial rights of way may live on in limbo where the limited resources of the allowed parties weigh against a court determination. Uncertainty and unnecessary delay in land planning are burdens which plague all of the interested parties whether they are included or excluded by this rule.

On the other hand, there is something to be said for the “too many cooks spoil the soup” rationale employed by the San Juan County court. As Judge Kelly asserts, the intervention of additional parties has the practical effect of complicating and delaying litigation even when those parties desire a speedy result.\textsuperscript{127} Part of these delays stem from intervention of advocacy groups and creating strange bedfellows out of formally aligned parties.\textsuperscript{128} Advocates against or in favor of a right-of-way might desire expedited or extended proceedings depending on the status of the right-of-way during the litigation. Where title to the property interest is the only issue in an R.S. 2477 dispute, these difficulties can arguably be avoided by narrowing the scope of the suit to include only those with a direct, substantial and legally protectable interest in the property.\textsuperscript{129} By allowing federal courts primary jurisdiction in a final, narrow-party forum, limited agency resources can be allocated more efficiently than they would be if they were to

SUWA would then have to “confront all of the further procedural difficulties compounded by the unavoidable delay, as well as the huge burden of persuading the court to ‘do it all over again.’”).

\textsuperscript{125} Id. at 1210 (stating that “The principal difference between party and amicus status is that only parties ordinarily have the right to raise new issues, oppose settlements, appeal and file petitions for certiorari. While amici have the right to make arguments, only parties can avail themselves of judicial power to compel action by other parties, either inside or outside the litigation.”).

\textsuperscript{126} See Blumm, supra note 42. However, with the recent change in U.S. presidency, the tides of administrative policy may have shifted again such that “sweetheart deals” would be less likely.

\textsuperscript{127} See San Juan County, 503 F.3d at 1200 (demonstrating that the practical effect of allowing even non-abusive intervenors is prolonged litigation).

\textsuperscript{128} In San Juan County, SUWA initially filed suit against the NPS for failing to regulate off road vehicle access. This initiated the suit, however both parties agreed afterward that the State and County were necessary co-defendants and both admitted that they had expected an R.S. 2477 cross-motion. NPS and SUWA then opposed the cross-motion by the State and County on jurisdictional grounds, effecting their dismissal. Finally, after the state and county had initiated a quiet title suit against the United States, both parties opposed SUWA’s motion to intervene. The competing motivations of each party in this litigious run-around resulted in awkward and often fickle alliances with co-parties. See supra Part III.

\textsuperscript{129} See San Juan County, 503 F. 3d at 1210.
determine hotly contested rights of way on the agency level in addition to extended participation as parties in federal court review.\textsuperscript{130} The reality of the situation is that the amount of public participation that a particular R.S. 2477 claim warrants cannot be determined based solely on judicial interpretation of sovereign immunity or Rule 24 constraints. Unfortunately, Congress has failed to allow for a policy decision by imposing a permanent moratorium on rules or regulations which would affect an R.S. 2477 right-of-way.\textsuperscript{131} The current stalemate has induced several attempts by the Interior Department to resolve latent R.S. 2477 claims without running afoul of the moratorium,\textsuperscript{132} but these attempts are necessarily inadequate in effectively resolving R.S. 2477 claims.\textsuperscript{133} Therefore, any non-judicial solution to these problems must address the need for congressional action in removing the moratorium and providing guidance for agencies to create a viable and effective procedure. In providing that guidance, Congress should weigh the need for expediency against the need for public participation, and provide a solution that will satisfy each.

V. ARBITRATION: LESS COOKS FOR SIMPLE SOUPS

A. Arbitration generally

Over the past few decades, a consensus has emerged that traditional litigation is an inefficient way to resolve disputes. Litigation is costly, drawn-out, adversarial, and fails to produce long-term solutions to problems.\textsuperscript{134} The inefficiency of litigation in resolving disputes is exemplified in the San Juan


\textsuperscript{131} See FLPMA, Pub. L. No. 104-208, 110 Stat. 3009-200 (stating that “No final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to Revised Statute 2477 . . . shall take effect unless expressly authorized by an Act of Congress.”).


\textsuperscript{133} See Wolking, supra note 116, at 1096-1107 (examining tools such as Road Maintenance Agreements, Nonbinding Administrative Determinations, Recordable Disclaimers of Interest, etc. and ultimately concluding that these tools “will provide only incoherent resolution of a fraction of outstanding R.S. 2477 claims.”).

\textsuperscript{134} S. REP. NO. 104-245 (1996).
In order to encourage more innovative solutions for resolving disputes in agency programs, the Administrative Conference of the United States and the Federal Mediation and Conciliation Service began in the early 1980s to brainstorm what later became the Administrative Dispute Resolution Act ("ADRA").

The ADRA was initially signed into law on November 15, 1990 by President George W. Bush. Alternative Dispute Resolution ("ADR") is characterized by the use of substitute procedures such as mediation, arbitration, ombudsmen, mini-trials or other combinations to resolve a controversy. Arbitration has found considerable success in civil practice and saves valuable time and resources while still allowing each side to participate in a trial-type proceeding. The use of ADR procedures helps lower costs and reduces delays for all parties while encouraging more innovative compromises and settlements that would benefit both parties. In response to increases in formal agency hearings and litigation challenges to agency actions which threatened to overburden those processes, a few agencies began to engage in ADR practices. After the ADRA was passed, the use of ADR procedures was officially encouraged for use in agency processes wherever possible. The 1990 Act even required agencies to designate an official to act as a dispute resolution specialist whose job it would be to review programs or circumstances with ADR potential, to train others on ADR use, and to review grants and contracts for inclusion of ADR provisions.

However, arbitration is not appropriate in every situation and the ADRA recognizes this by establishing guidelines to help determine when techniques such as arbitration will help agencies perform their statutory functions in a more effective and efficient manner. Subchapter 4 of the ADRA lists six factors agencies should rely on to determine whether ADR techniques such as arbitration should be used. One concern listed was that the confidential nature of arbitration would eliminate the establishment of controlling precedents and that even disclosed arbitration awards would not be accepted as having precedential value. Arbitration is also discouraged in cases where there is a need to establish an important government policy with additional procedures. Additional factors used to determine the appropriateness of arbitration include the desirability of consistent results, the effect of the decisions on persons or organizations not parties to the

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135 See infra part III.
138 During arbitration, an informal evidentiary hearing is held after which a neutral third-party has authority to decide disputed issues.
142 Id. at (b)(1).
143 Id. at (b)(2).
144 Id. at (b)(3).
arbitration, the need for a full public record, and the need for the agency to maintain jurisdiction over the proceeding. An agency decision about whether these factors preclude ADR techniques is not subject to judicial review except that a court may direct a rehearing by the arbitrators.

The courts historically disfavored arbitration until Congress passed the Federal Arbitration Act of 1925. Afterward, arbitration quickly became a widely accepted alternative to litigation in the private sector. However, the U.S. Comptroller General had traditionally taken the position that federal agencies were prohibited from using a private arbitrator to decide disputes against the government without explicit statutory authority. The ADRA, however, repealed the General Accounting Office’s prohibition on agency use of arbitration. The Justice Department (“DOJ”) initially raised constitutional concerns about the Federal Government’s use of arbitration, consensual or otherwise, during testimony concerning the ADRA. The DOJ voiced concern about delegation of government decision-making authority to private arbitrators even though the U.S. Supreme Court had apparently accepted the use of arbitration by the Federal Government.

Some commentators believe that this initial opposition to the use of arbitration was based on an erroneous reading of the “theory of the unitary executive.” Under the Constitution, the president must “take Care that the Laws be faithfully executed” and, the argument suggests, that delegation of executive functions to persons not accountable to the president would violate this clause. However, the delegation doctrine does not prevent the president from appointing heads of state with the power to contract out different government functions. In fact, a number of federal statutes which predate the ADRA had allowed for the government’s use

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145 Id. at (b)(4).
146 Id. at (b)(5).
147 Id. at (b)(6).
of private decision-makers in binding arbitrations.\textsuperscript{155} In the context of adjudication particularly, the importance of independent decision free from agency control or influence is reflected in the history of administrative law reform.\textsuperscript{156} For example, Administrative Law Judges ("ALJs") have acted as neutral adjudicators of administrative disputes as early as 1978.\textsuperscript{157} In many respects, private arbitration is not so different from adjudications performed by ALJs. Both act as neutral decision-makers to decide agency adjudications on a contractual basis. Nevertheless, after the DOJ raised this constitutional concern, an arbitration "escape clause" was included to pacify any constitutional concerns which allowed agencies to vacate arbitral awards within thirty days of issuance.\textsuperscript{158} Unfortunately, this provision effectively eliminated any interest in arbitration for non-agency litigants where a favorable arbitration award could easily be vacated by the agency. Under this provision, not a single dispute was submitted to arbitration except under the Federal Deposit Insurance Corporation ("FDIC") who developed a process for a mutual agreement between parties to not vacate an arbitral award before beginning arbitration proceedings.\textsuperscript{159}

On September 7, 1995 the DOJ reversed its position on the constitutionality of an agency’s use of binding arbitration.\textsuperscript{160} As a result, the "escape clause" provision of the ADRA was removed to allow for binding arbitration in administrative matters.\textsuperscript{161} To ameliorate any lingering constitutional doubts, and consistent with comparable private arbitration, parties to public arbitration must specify a maximum potential award that the arbitrator may make\textsuperscript{162} and may otherwise limit the possible outcomes of the arbitration by written agreement.\textsuperscript{163} This process could give agencies the power to litigate only the issue of a right-of-way’s

\begin{itemize}
\item \textsuperscript{158} See 5 U.S.C. § 580(b)-(c) (2006) (formerly §590(b)).
\item \textsuperscript{159} Marshall J. Breger, The Administrative Dispute Resolution Act of 1996 and the Private Practitioner, in FEDERAL ADMINISTRATIVE DISPUTE RESOLUTION DESKBOOK 1, 9 n.56 (Marshall J. Breger, Gerald S. Schatz & Deborah Schick Laufer eds., 2001).
\end{itemize}
existence or scope, tailoring individual adjudications to maximize their efficiency while maintaining agency discretion. Finally, agencies are required to issue guidance policies about when agency employees are authorized to use arbitration, assuring further executive control. The 1996 Amendment to the ADRA represent congressional acknowledgement that arbitration is as important as more formal dispute resolution procedures.

Aside from resolving the chilling effect of the “escape clause,” the 1996 Amendments also provided enhanced confidentiality protections and streamlined the process for selecting neutrals. These measures remove other disincentives of agency arbitration which had previously discouraged non-agency litigants. Before the 1996 Amendments, the confidentiality of agency arbitrations was undermined by the lack of exemption from the Freedom of Information Act (“FOIA”), and although the matter was never tested in court, potential ADR participants feared that neutrals acting as federal employees would be required to divulge notes submitted by the parties. In the world of R.S. 2477 disputes, however, the desire for confidentiality may be somewhat less than in other circumstances, allowing for disclosure despite FOIA exemption. The sections of the ADRA dealing with the procurement of neutrals provide many options to agencies. Agencies may use in-house employees in intra-agency dispute resolution, employees of other agencies as neutrals, contractors of private sector non-agency neutrals and use the services of other federal agencies and state and federal governments. However, agency discretion in neutral procurement is limited by the parties’ entitlement to participate in the selection of an arbitrator. Greater agency freedom in choosing the dispute resolution procedure was designed to encourage them to utilize arbitration. Further, allowing participation by non-agency parties in selection of the arbitrator also encouraged the use of arbitration for dispute resolution. As of August 2000, “over 29 agencies and agency components have published proposed or final ADR policies or implemented pilot ADR programs.” While some agency plans merely designate an ADR specialist and state a preference for ADR, others include guidance about which types of disputes are appropriate for the use of ADR techniques. The most developed agency plan is administered by the Department of Labor (“DOL”). The DOL began by initiating a pilot program

167 Although the actual extent of this chilling effect cannot be measured since it was never tried in court, many commentators suggest that the absence of FOIA exemptions curtailed the use of ADR, see, e.g., Mark H. Grunewald, Freedom of Information and Confidentiality Under the Administrative Dispute Resolution Act, 9 ADMIN. L.J. AM. U. 985 (1996).
169 Id.
171 See Breger, supra note 159, at 10, n.67.
for identifying the types of disputes appropriate for ADR resolution and was met with great success.\textsuperscript{174} The pilot program was subsequently expanded to encourage further resolutions through mediation and arbitration.\textsuperscript{175} Currently, the use of voluntary arbitration is used in six categories of cases: discrimination cases under section 11(c) of the OSH Act, environmental whistleblower cases, Family and Medical Leave Act cases, Fair Labor Standards Act cases, compliance review cases under Executive Order 11,246, and complaint investigation cases arising under the Vietnam Era Veteran’s Readjustment Assistance Act of 1974.\textsuperscript{176} The extended plan also provides for arrangements with a nation-wide contractor to administer a roster of neutrals.

**B. Arbitration May be the Answer for R.S. 2477 Claims**

The Department of the Interior is no stranger to ADR techniques and credited ADR with a 43 percent reduction in formal case filings between 1992 and 1993.\textsuperscript{177} Agencies who used arbitration generally found that disputes were resolved and awards administered much faster than traditional methods while achieving settlements as good as or better than those resulting from litigation.\textsuperscript{178} The general consensus has been that the use of arbitration by administrative agencies is effective where the agency is burdened with numerous disputes and where the precedential value of individual cases is low. This bodes well for the viability of arbitration in R.S. 2477 land disputes and demonstrates the likelihood that the federal, state and county governments would agree to conserve resources by using arbitration to settle less important disputes. However, the agenda of state and federal governments should not be the only consideration when deciding whether arbitration would be appropriate. If private interest groups and citizens are shut out of that determination altogether then the process ignores the intervention concerns raised in the San Juan case. With proper consideration of these interests, however, voluntary binding arbitration could improve the current stalemate.

Today there may be as many as 10,000 R.S. 2477 claims in Utah alone which remain unresolved and which hinder wilderness designation as well as private property planning and use.\textsuperscript{179} With such a broad spectrum of potential rights of way, there are undoubtedly many claims which lie at the ends of the spectrum and are either clearly valid or are clearly not valid. These outlying claims could be

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\textsuperscript{174} See generally MARILYNN L. SCHUYLER, A COST ANALYSIS OF THE DEPARTMENT OF LABOR’S PHILADELPHIA ADR PROJECT (Department of Labor 1993).

\textsuperscript{175} See Expanded Use of Alternative Dispute Resolution Programs Administered by the Department of Labor, 62 Fed. Reg. 6690 (1997).

\textsuperscript{176} Breger, supra note 159, at 11.


\textsuperscript{178} See Breger, supra note 159, at 11.

\textsuperscript{179} See Rasband supra note 23, at 1010 (citing Stephen H.M. Bloch & Heidi J. McIntosh, A View From the Front Lines: The Fate of Utah’s Redrock Wilderness Under the George W. Bush Administration, 33 Golden Gate U.L. Rev. 473, 489 (2003)).
easily resolved through a simple application process, allowing those seeking to establish a right-of-way (or those seeking to establish a roadless area) to petition for an agency designation. Agencies are not the only organizations with limited resources, and as long as the petition process required some amount of information gathering resources as well as a significant filing fee, it is likely that these outlying petitions would go unchallenged. At the same time, more tenuous claims could still be rebutted by producing a petition with conflicting evidence.

This process could significantly narrow the scope of contested R.S. 2477 claims without requiring an agency mapping or survey determination resulting in delays and expense. Also, the danger of sweetheart settlements and closed door negotiations would be limited where the scope of claims is defined by interested parties on the record. If, by some chance, an uncontested petition grants land which the federal government wishes not to disclaim, the power of eminent domain would allow the government to recoup the right-of-way. Similarly, if a petition for a roadless area designation passes despite the existence of a clear R.S. 2477 right-of-way, the federal government could still elect to remedy the situation by issuing a recordable disclaimer of interest. Even before coming to the option of arbitration-type proceedings, many R.S. 2477 disputes could be resolved by forcing interested parties to allocate their time and resources to those claims which are most important to the community.

Once a claim is disputed, a more efficient resolution process should include the possibility of ADR. The adjudication process could use voluntary arbitration with the agreement of all parties or use a more formal adjudication process involving trial-type proceedings where the parties cannot agree to that alternative. In this preliminary decision, opportunity to consider the opinions of non-parties would be necessary, however, once an arbitration proceeding is selected, the arbitrators, administrative law judge, or other adjudicatory body should have discretion in limiting the number of parties to achieve a swift and efficient result. The decision to use arbitration can be appealed judicially under the APA, increasing administrative accountability, while an agency’s discretion in whether to allow arbitration helps to avoid delegation problems. Where a timely result is more important to the parties, voluntary arbitration would allow reasonable limits to intervention, discovery and judicial review. Where the main concern revolves around the result of the adjudication and the ensuing public policy or precedent, the opportunity for judicial review would be more accessible and even preclude the use of arbitration. In this way, even those claims which do not fall at the ends of the spectrum can be categorized according to their varied circumstances and resolved without unnecessary delay. Case by case administration of R.S. 2477

180 Subject, of course, to the limitations of the Takings Clause in U.S. Const. amend. V, § 8.
182 See Administrative Procedure Act, 5 U.S.C. §706(2)(A) (2006) (establishing a procedure to challenge agency decisions which are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).
183 See Breger, supra note 159, at 11.
claims would be much more manageable after these fringe disputes are taken care of, especially if arbitration-type proceedings could be used for outlying right-of-way disputes.

Concerns regarding legal precedent are less important in the R.S. 2477 context where the legal framework has been substantially developed by the federal court and can be applied to individual cases by arbitrators. Additionally, implementation of arbitration proceedings does not preclude the publication of arbitration awards in the Federal Register. The use of arbitration in R.S. 2477 does not signal the need for confidentiality where the primary parties are normally state and federal governments as it may in employment cases where one of the parties may be a private company or an individual. To further increase the public transparency through agency arbitration, it may be desirable to require publication of arbitration awards even when their precedential value is limited.

As mentioned above, some R.S. 2477 disputes are more time sensitive than policy driven and use of arbitration proceedings would be most effective where the parties are mainly interested in resolving title disputes to a right-of-way which does not prohibit wilderness designation. Additionally, where parties agree to arbitration after the dispute is present, there is no concern that arbitration is used by means of adhesion to force a particular result. By using a tiered approach, agencies can (1) resolve title disputes which are uncontested by a simple petition process, (2) allow for the parties to agree to binding arbitration while balancing the need for public input and the need for efficient resolution, and (3) allow for more formal adjudications and judicial review of disputes which are more hotly contested.

VI. CONCLUSION

The result of the R.S. 2477 dispute has been to require protracted litigation. Extended litigation has led to uncertainty in private property use and delay in federal and state land planning. The decision in San Juan County, while limiting party intervention as of right, does not provide adequate guidance for deciding when additional public participation is required. With some claims, no formal adjudication would be necessary while other cases should not be decided without adequate participation by public interest groups. The use of arbitration could simplify this process and allow for a more individualized balancing of these factors. Additionally, concerns of closed door negotiations could be eliminated by reporting arbitral awards while maintaining a speedy resolution by traditional arbitration limits on discovery and intervention.

The current approach of case-by-case litigation and party restriction is not practical in assessing thousands of claims which are clouded by a variety of interests. In federal court proceedings, parties face the difficulty of digging through century-old records to establish or refute the validity of a right-of-way. In many cases, evidence may be incomplete or non-existent where rights of way were
originally granted without any formal process. Even when some evidence may be shown, the expense, delay and uncertain outcomes of litigation often outweigh the need to resolve a particular claim. As a result of the prevailing uncertainty, federal land managers are unable to establish management plans for wilderness areas, property titles of private owners are clouded by potential claims, and State and County governments are unable to plan for road use, natural resource development, and emergency travel routes. All involved parties would benefit from congressional guidance and a comprehensive arbitration process evaluating both the cost of delay and the need for public input.

Congress should remove the moratorium on agency rulemaking and provide guidance that will balance the concerns of public access and preservation. Agency rulemaking could help eliminate frivolous claims which are peripheral to the more contested claims. Not only would this approach be less costly and less time-consuming for each party, it would also allow agencies to allocate their limited resources more efficiently. Allowing for the parties to agree to an arbitration-type proceeding would further separate those claims which demand more process from those which can be quickly resolved while not eliminating the public accountability of the agency. Those claims which are more controversial should be allowed a more formal review with potential for later judicial review to eliminate any capricious agency decisions. Unless the current impasse can be overcome by congressional action, land use in the West will continue to be plagued by uncertainty and halted progress.

184 See Administrative Procedure Act, 5 U.S.C. §706(2)(A) (2006) (establishing a procedure to challenge agency decisions which are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).