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Signs, Signs, Everywhere Signs: *The Wilderness Society v. Kane County* Leaves Everyone Confused About Navigating a Right-of-Way Claim Under Revised Statute 2477

Hillary M. Hoffmann¹

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Abstract

The Tenth Circuit's recent decision in *The Wilderness Society v. Kane County* has changed the landscape of litigation arising out of Revised Statute 2477,

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a provision of the Mining Act of 1886 repealed by the Federal Land Policy and Management Act of 1976. Prior to this decision, the presumption was that the United States owned all federal public lands unless an adverse claimant proved otherwise. Moreover, any adverse claimant was required to bring an action under the Quiet Title Act to divest the federal government of title to its property. The *Kane County* decision turns both of those presumptions inside-out, provided that states and counties assert rights under R.S. 2477, regardless of whether they can be proven. This Article explores the history of R.S. 2477, its repeal by the Federal Land Policy and Management Act, and the Tenth Circuit's historical treatment of R.S. 2477 claims. It also discusses why the Tenth Circuit's holding in the *Kane County* case misconstrues the nature of an R.S. 2477 dispute, overlooks long-recognized presumptions about federal ownership of federal land, and ignores the myriad of legal issues involved in an R.S. 2477 dispute. Lastly, it makes specific suggestions about how the Tenth Circuit should address litigation surrounding the growing number of R.S. 2477 battles in years to come, to enable litigants and lower courts to more easily navigate this complex area of law.

I. Introduction

Throughout the country, there is a presumption of land ownership that is so simple, it need not even be spoken: the federal government owns federal public land unless an adverse party proves otherwise. Yet, in some western states, and most recently in southern Utah, counties and local governments have aggressively attacked this presumption, and claimed title to federal lands, without having proven any property right in a court of law. In 2011, the Tenth Circuit sanctioned this practice in *The Wilderness Society v. Kane County*, which represents a sea change in the landscape of federal public lands law.

To put the *Kane County* dispute in a national perspective, it helps to juxtapose the parties involved, and replace the land at issue with a beloved, well-known national treasure. Imagine that the City of New York decided that it owned rights-of-way across Liberty Island, so it passed an ordinance "establishing" those rights and posted signs at the base of the Statue of Liberty, "opening" those rights-of-way to motorcycles and off-road vehicles. Then imagine mufflerless dirt bikes roaring across manicured lawns in front of tourists who traveled miles to marvel at one of the most well-known and carefully preserved national monuments.² More outrageously, imagine that the City of New York took down all federal signs directing tourists around Liberty Island and dumped them into New York Harbor.

2. *Statue of Liberty*, National Park Service, U.S. Department of the Interior, <http://www.nps.gov/stli/index.htm> (noting that "thousands of people visit [Liberty Island] daily") (last visited Sept. 16, 2011).

Then imagine the bewildered National Park Service, flabbergasted by such hostile, unilateral action, replacing all of its signs and attempting to speak with the Mayor's office about the nature of the city's claims. But imagine that City of New York refused to meet in person, sent a written "notice" to the Park Service, threatening to bill the federal government for the "recovery of costs and expenses" for removing the signs if the National Park Service did not remove the offending signs immediately.³ This scene is baffling, and so difficult to picture that it seems almost comical.

Yet, a similar scenario has been unfolding across millions of acres of federal public lands,⁴ including several National Parks and National Monuments, over the past twenty years,⁵ largely under the national radar. For decades, environmental groups such as the Southern Utah Wilderness Alliance ("SUWA"), The Nature Conservancy, The Wilderness Society, the Sierra Club, and others, have battled to protect the precious natural resources on and within federal public lands from encroachment by counties and local governments, which seek to open federal public lands, including some roads⁶ and trails, to off-road vehicle users, despite the federal government's opposition.⁷ Despite the common-sense belief that it should be somewhat difficult, from a procedural and evidentiary standpoint, to divest the federal government of its property against its expressed will, both the federal government and the Environmental Groups' attempts to stop this loss of federal property often proved unsuccessful.⁸

The means counties use to divest the federal government of title to its property is an obscure provision of the Mining Act of 1866 called Revised

3. *The Wilderness Soc'y v. Kane Cnty.*, Utah, 632 F.3d 1162, 1182 (10th Cir. 2011) (*Kane County* III) (Lucero, J., dissenting) (discussing the facts surrounding the R.S. 2477 dispute at issue and how it arose).

4. Todd Wilkinson, *Roads to Nowhere*, NATIONAL PARKS MAGAZINE, Jan./Feb. 1998, at 22 (noting that, as of 1998, an estimated 160,000 miles of R.S. 2477 road claims had been "staked" in Alaska alone).

5. *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 742 (10th Cir. 2005) (*SUWA v. BLM*); Kurt Repanshek, *Secretary Salazar Hopes to Negotiate R.S. 2477 Solution with Utah Officials*, NATIONAL PARKS TRAVELER, Aug. 2, 2010, available at <http://www.nationalparkstraveler.com/2010/08/secretary-salazar-hopes-negotiate-rs2477-solution-utah-officials6344> (last visited Sept. 16, 2011).

6. Although the term "road" is bandied about frequently in the R.S. 2477 context, many of the "roads" claimed by counties have not been used in many years. Some might be only two-track trails, accessibly only with an off-road vehicle. Wilkinson, *supra* note 4, at 23.

7. See Douglas P. Farr, *Protecting Public Lands From the Public: Kane County and Revised Statute 2477*, B.Y.U. L. REV. 67, 70-71 (2010) (citing *SUWA v. BLM*, 425 F.3d at 741).

8. *Kane County* III, 632 F.3d at 1171; *San Juan County v. United States*, 503 F.3d 1163, 1203-04 (10th Cir. 2007).

Statute 2477.⁹ The battle over property rights claimed pursuant to R.S. 2477 has raged for many years, and the Tenth Circuit, despite numerous opportunities, has consistently failed to establish a framework for determining the validity of such claims; nor has it issued any guidance to the various federal agencies that must manage federal lands pursuant to statutes such as the Federal Land Policy and Management Act ("FLPMA").¹⁰

The lands at issue in *The Wilderness Society v. Kane County* have been recognized as some of "the most fragile and picturesque public lands in the United States."¹¹ In reserving this land as a national monument, President Clinton described it as a "frontier," a place where "one can see how nature shapes human endeavors in the American West, where distance and aridity have been pitted against our dreams and courage."¹²

The assault against these precious natural resources began in 2003, when Kane County posted signs "opening" R.S. 2477 rights-of-way within the Monument,¹³ despite the Bureau of Land Management's ("BLM") claim of title and in direct contradiction of the BLM's land management plans.¹⁴ The County acted assertively and aggressively in its pursuit of these claimed rights, and demanded that "BLM take down its signs 'within a timely period of sixty days' and insisted that BLM management 'instruct' its employees not to give the public 'verbal misinformation' that the claimed roads were closed to off-highway vehicle use."¹⁵ Contrary to previous decisions, in which the Tenth Circuit and other courts have held that counties and local governmental bodies bear the burden of proving title to contested R.S. 2477 rights-of-way before being able to rely on such property rights in R.S. 2477 litigation, the *Kane County* decision essentially recognized the county's title to several disputed rights-of-way without it ever having to satisfy any burden of proof before a federal agency or in a court of law.¹⁶

In the face of what is certain to be a decades-long battle over federal

9. Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253, *codified at* 43 U.S.C. § 932 (R.S. 2477), *repealed by* Federal Land Policy and Management Act of 1976 ("FLPMA"), Pub.L. No. 94-579, § 706(a), 90 Stat. 2743.

10. 43 U.S.C. § 1732 (2006).

11. *The Wilderness Soc'y v. Kane Cnty.*, Utah, 581 F.3d 1198, 1205 (10th Cir. 2009) (*Kane County II*), *rev'd*, 632 F.3d at 1171.

12. Proclamation No. 6920, 61 Fed. Reg. 50, 223-24 (Sept. 18, 1996).

13. R.S. 2477, *repealed by* FLPMA, § 706(a).

14. *The Wilderness Soc'y v. Kane Cnty.*, Utah, 632 F.3d 1162, 1166 (10th Cir. 2011) (*Kane County III*).

15. *Id.* at 118-82 (Lucero, J., dissenting) (noting that, in the County's initial letter to BLM, it "declared in no uncertain terms that BLM road signs violated 'county policy' and constituted an 'intrusion against the rights of the dominant estate.'").

16. *Id.* at 1174 (vacating district court's decision and remanding case with instructions to dismiss based on *The Wilderness Society's* lack of prudential standing to challenge Kane County's actions within the Monument).

control and management authority, the Tenth Circuit needs to recognize the gaping holes in its R.S. 2477 jurisprudence and begin to fill them with a framework that lower courts and litigants alike can act upon. Such a framework would also help the federal agencies, primarily the National Park Service and the Bureau of Land Management, determine how to treat claimed R.S. 2477 rights-of-way in their planning processes. This Article will address the need for such a framework and suggest possible jurisprudential “guideposts.” Part II will discuss the primary statutes governing R.S. 2477 disputes, placing the ancient text of R.S. 2477 in the modern context of federal land management. Part III will explore the Tenth Circuit’s historical treatment of key R.S. 2477 disputes, which established the beginnings of a framework that the court later ignored in *Kane County*. Part IV will analyze the *Kane County* litigation in depth, focusing on the Tenth Circuit’s *en banc* opinion issued in January 2011, and discuss how the majority’s opinion sets a dangerous precedent for future R.S. 2477 litigation. Part V will highlight three areas where the Tenth Circuit has declined to provide a framework that will allow federal courts to analyze and adjudicate R.S. 2477 claims more efficiently and consistently and Part V will conclude with some suggestions as to how to make that happen.

II. The Statutory Foundation: Revised Statute 2477 and the Federal Land Policy and Management Act

A. Revised Statute 2477

The origin of this modern land-grab is a provision of Section 8 of “[a]n Act granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes,” commonly referred to as the Mining Act of 1866.¹⁷ As the Tenth Circuit has noted, the language of Revised Statute 2477, or R.S. 2477, as it is now known, is “short, sweet, and enigmatic.”¹⁸ It states simply that: “the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.”¹⁹ As part of a series of legislative acts aimed at disposing of vast amounts of federal lands during an era in which the federal government legislated extensively to encourage settlement and development of public lands in the western United States,²⁰ the burden on any party seeking a right-of-way was minimal. There was no requirement to submit any proof of ownership or application,

17. R.S. 2477, *repealed by* FLPMA, § 706(a).

18. *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 761 (10th Cir. 2005) (*SUWA v. BLM*).

19. *Id.*

20. *Kane County III*, 632 F.3d at 1165 (quoting *SUWA v. BLM*, 425 F.3d at 741); see Matthew L. Squires, *Federal Regulation of R.S. 2477 Rights-of-Way*, 63 N.Y.U. ANN. SURV. AM. L. 547, 558 (2008).

and the grantee received no documentation from the federal government.

Early regulations interpreting R.S. 2477 stated: “[t]his grant becomes effective upon the construction or establishing of highways, in accordance with the State laws, over public lands not reserved for public uses. No application should be filed under this act, as no action on the part of the Federal Government is necessary.”²¹ However, the party seeking to establish title to a right of way pursuant to R.S. 2477 has always been required to demonstrate “acts . . . sufficient to manifest an intent to accept the congressional offer.”²² Such acts generally included grading or maintaining a road or right-of-way and its use by the public.²³

Also, the statute requires that any R.S. 2477 claimant show that the road or right-of-way was located on lands “not reserved for public uses.”²⁴ “Reserved” lands are those that “have been expressly withdrawn from the public domain by statute, executive order, or treaty and dedicated as a park, military post, or Native American land or for some other specific federal use.”²⁵ Lands falling within this definition were those subject to sale or disposal to individuals under general land laws. Thus, once a parcel of federal land was set aside as a national forest, national park, military reservation or for a similar use, any right-of-way contained therein would be considered reserved for public uses and no R.S. 2477 right could subsequently vest.²⁶ For the next 110 years, R.S. 2477 allowed states, counties, and municipalities to establish many of the roads crisscrossing the western United States.²⁷

B. The Federal Land Policy and Management Act

As the federal government’s interest in its property shifted from disposition to retention, and preservation, Congress enacted a series of statutes in the 1970s reflecting this changed approach, including the National Environmental Policy Act (“NEPA”);²⁸ the National Forest Management Act;²⁹ and the Federal Land Policy and Management Act.³⁰

21. Regulations Governing Rights-of-Way for Canals, Ditches, Reservoirs, Water Pipe Lines, Telephone and Telegraph Lines, Tramroads, Roads and Highways, Oil and Gas Pipe Lines, Etc., 56 Interior Dec. 533, 551 (1938).

22. *Kane County* III, 632 F.3d at 1165.

23. *Id.*

24. R.S. 2477, *repealed by* FLPMA, § 706(a).

25. *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 784 (10th Cir. 2005) (*SUWA v. BLM*).

26. *Humboldt County v. United States*, 684 F.2d 1276, 1281 (9th Cir. 1982).

27. *SUWA v. BLM*, 425 F.3d at 740.

28. 42 U.S.C. §§ 4321-4370a (2006).

29. 16 U.S.C. §§ 1600-1614 (2006).

30. 43 U.S.C. §§ 1701-1784.

These statutes represented a 180-degree shift in the federal government's approach to managing public lands.³¹ Instead of allowing and encouraging citizens to settle upon federal land and divest the federal government of its property for their own private use, these statutes required federal land management agencies to retain lands for the general public's use.³² FLPMA, in particular, required federal agencies to begin managing federal public lands using a conservation-based approach called "sustained yield," which contemplated planning around environmental values and objectives.³³

FLPMA expressly repealed R.S. 2477 in 1976, but only as to unestablished rights-of-way.³⁴ The statute provided that any "valid" R.S. 2477 rights-of-way "existing on the date of approval of [FLPMA]" would continue in effect.³⁵ Thus, FLPMA essentially "froze" R.S. 2477 rights as they were in 1976.³⁶ After that date, neither states, local governments, nor private citizens could divest the federal government of its property using R.S. 2477.

Despite this seemingly bright-line cutoff point, in the years following Congress' passage of FLPMA, it was anything but clear which rights-of-way were "valid," much less "existing."³⁷ Neither the federal government nor the states tracked the historical use of roads, trails, or routes. To this day, a determination of whether an R.S. 2477 right-of-way existed prior to 1976 requires a road-by-road analysis of historical land records and surveys, maps, federal mining and grazing surveys, and affidavits attesting to the route's use, if any of these documents even exist.³⁸ There are still no comprehensive surveys or maps indicating where unrecorded R.S. 2477 routes cross federal lands, only piecemeal surveys and lists that are difficult to access or verify.³⁹

Despite decades of litigation over R.S. 2477 roads, Congress has not spoken to the issue by amending FLPMA and providing a statutory framework to help courts resolve the discrepancies between the statutes; nor has it delegated authority to federal management agencies to

31. Farr, *supra* note 7, at 70 (citing *SUWA v. BLM*, 425 F.3d at 741).

32. 42 U.S.C. §§ 4321-4370a; 16 U.S.C. §§ 1600-1614; 43 U.S.C. §§ 1701-1784.

33. Scott W. Hardt, *Federal Land Management in the Twenty-First Century: From Wise Use to Wise Stewardship*, 18 HARV. ENVTL. L. REV. 345, 377 (1994).

34. 43 U.S.C. § 1701 (grandfathering valid rights-of-way).

35. *Id.*

36. *SUWA v. BLM*, 425 F.3d at 741 (citing *Sierra Club v. Hodel*, 848 F.2d 1068, 1081 (10th Cir. 1988)).

37. *Id.*

38. *Id.* at 741; *Kane County v. United States*, 2011 WL 2489189, at *8 (D. Utah, June 21, 2011) (*Kane County I*), *rev'd*, 632 F.3d 1162 (10th Cir. 2011).

39. See *e.g.* Utah AGRC R.S. 2477 Rural Roads Mapping Project, UTAH GIS PORTAL (Dec. 01, 2008), <http://gis.utah.gov/agrc-rs2477-rural-roads-mapping-project/rs2477-rural-roads-mapping-project> (allowing users to view *recorded* R.S. 2477 roads only).

promulgate regulations guiding their administration of R.S. 2477 claims.⁴⁰ In fact, Congress has actually prohibited the BLM from adopting regulations establishing a framework for agency adjudication of R.S. 2477 claims.⁴¹ There is also no legislative history of R.S. 2477 that might provide informal guidance to litigants.⁴²

In essence, therefore, lower courts, agencies, and interested parties have only the relevant statutes and case law to guide their actions. To the extent the statutes have left gaps, the cases have either failed to fill them, or filled them in contradictory ways, as will be discussed in Sections III and IV below.

III. Revised Statute 2477 Jurisprudence in the Tenth Circuit Prior to *The Wilderness Society v. Kane County*

A. *Sierra Club v. Hodel*

Since 1976, federal courts within the Tenth Circuit have struggled with the issue of how to analyze R.S. 2477 disputes, creating confusion for litigants and difficulty for federal and state land management processes.⁴³ One of the first significant R.S. 2477 cases to reach the Tenth Circuit was *Sierra Club v. Hodel*, in which several environmental organizations sued Secretary of the Interior Donald P. Hodel, the Bureau of Land Management, and Garfield County over Garfield County's proposal to widen portions of the Burr Trail, a recognized R.S. 2477 road connecting the town of Boulder, Utah, with one of the marinas at Lake Powell.⁴⁴ The proposal was to widen approximately twenty-eight miles of the Burr Trail from a one-lane dirt road into a two-lane gravel road, all portions of which lay within or adjacent to two federally protected Wilderness Study Areas: Steep Creek and North Escalante Canyon.⁴⁵ Concerned that widening the road and increasing the traffic capacity would adversely impact sensitive flora, fauna, and archaeological sites, the environmental groups' complaint alleged that BLM had failed to take adequate steps to protect these areas pursuant to FLPMA

40. *Kane County v. Kempthorne*, 495 F. Supp.2d 1143, 1155 (D. Utah 2007).

41. U.S. Dep't of the Interior and Related Agencies' Appropriations Act, § 108 (1997), enacted by the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (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. . . .").

42. *Sierra Club v. Hodel*, 848 F.2d 1068, 1080 (10th Cir. 1988), *rev'd*, 956 F.2d 970 (10th Cir. 1992).

43. Farr, *supra* note 7, at 70.

44. 848 F.2d at 1073.

45. *Id.*

and NEPA.⁴⁶

After a trial, the district court ruled in favor of the County and BLM, allowing the construction, but requiring the County to get a permit from BLM under FLPMA to relocate part of the road where it passed almost directly through one of the Wilderness Study Areas.⁴⁷ The district court declined to take up the issue of determining the width of the R.S. 2477 right-of-way in the Burr Trail, noting that existing Tenth Circuit precedent required the BLM to make that determination.⁴⁸ The court also ordered the agency “to conduct studies of plant life along the trail, to monitor the construction in areas with archaeological sites, and to direct alterations in the plan where necessary to preserve plant life or archaeological sites.”⁴⁹ The environmental groups then appealed.⁵⁰

The Tenth Circuit took up the issue of whether the County’s plans were included in the scope of the original right-of-way for the Burr Trail and whether, among other issues, the proposed widening would affect either of the Wilderness Study Areas.⁵¹ The former reflects one of the first times the court had to consider the merits of the County’s claim to the R.S. 2477 right-of-way in the context of a federal land management agency planning process: if in fact Garfield County possessed an R.S. 2477 right-of-way in the Burr Trail, which no party contested, the court was faced with the issue of whether and to what extent to allow the County to improve the right-of-way to allow more vehicle traffic. The latter issue, whether the proposed construction would negatively affect the Wilderness Study Areas, went beyond the mere existence and scope of the property right and implicated FLPMA because of the Burr Trail’s proximity to the Wilderness Study Areas.⁵² Thus, the court properly analyzed the issues within the context of a federal land management scheme, not as a boundary dispute between the BLM and the County.

Under FLPMA, the court recognized that the BLM has a duty to manage Wilderness Study Areas much as it would manage Wilderness Areas “so as not to impair the suitability of such areas for preservation as wilderness . . . [and] by regulation or otherwise [to] take any action required to prevent unnecessary or undue degradation.”⁵³ The court also recognized the County’s uncontested R.S. 2477 right-of-way in the Burr Trail.⁵⁴ Upon

46. *Id.* at 1073-74.

47. *Id.* at 1074.

48. *Id.* at 1084.

49. *Id.* at 1074.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 1075, 1085.

54. *Id.* at 1080.

recognizing the potential conflict between these two statutes, which is guaranteed to continue occurring throughout the states in the Tenth Circuit, and beyond, the Tenth Circuit had a golden opportunity to establish a framework for resolving these issues and clarify which party bears the burden of proof on each issue; however, it did not. Instead, to answer the question of whether the County had a vested right to expand the scope of its right-of-way, the court examined the original text of R.S. 2477, determining that any right the County held to expand the Burr Trail would be determined by R.S. 2477 alone.⁵⁵ The court then analyzed the text of R.S. 2477, found that the width of an R.S. 2477 right-of-way is properly measured under state law, and ultimately declined to opine as to the exact scope of Garfield County's right-of-way in the Burr Trail.⁵⁶

When it finally addressed whether allowing the project would violate FLPMA, the court found a "latent" ambiguity in the statute because FLPMA's nondegradation provisions inherently conflicted with the Savings Provision in 43 U.S.C. sections 1701(a) and (h) (restricting the BLM from managing federal lands in a way that impacts vested rights).⁵⁷ The court then afforded deference to the agency's interpretation of the interplay between these two sections pursuant to one of its previous decisions, *Rocky Mountain Oil and Gas Association v. Watt*,⁵⁸ rather than attempting to resolve the inherent conflict itself through the canons of statutory interpretation.⁵⁹ The BLM's interpretation was that FLPMA exempts "valid existing rights" from the nonimpairment and nondegradation standards.⁶⁰ Thus, even though Garfield County had applied for a permit, pursuant to FLPMA, to move certain sections of the road adjacent to the Wilderness Study Areas further away from their boundaries, the court held that the County had a right to build the road in its original proposed location (adjacent to the Wilderness Study Areas).⁶¹ The court then remanded the case to the district court to determine whether, in fact, the proposed construction would degrade or impair the Wilderness Study Areas under FLPMA, with little to no instruction on how to arrive at such a determination.⁶²

55. *Id.* at 1079-80.

56. *Id.* at 1084.

57. *Id.* at 1085.

58. 696 F.2d 734, 749 (10th Cir. 1982) (citing *Udall v. Tallman*, 380 U.S. 1, 16 (1965)).

59. *Sierra Club v. Hodel*, 848 F.2d 1068, 1078 (10th Cir. 1988).

60. *Id.* at 1088.

61. *Id.*

62. *Id.* The court also examined whether the proposed road construction met NEPA's "major federal action" threshold, held that it did, and remanded the NEPA issue to the district court, with instructions for the district court to remand that issue to the agency. *Id.* at 1096.

On the FLPMA issue, at least, the case went full circle, from agency to district court to appellate court and back to district court, leaving more questions unanswered than resolved. On remand the BLM conducted the required Environmental Assessment pursuant to NEPA, as required by the Tenth Circuit, and issued a Finding of No Significant Impact, allowing the project to proceed.⁶³ The Sierra Club appealed that decision to the Interior Board of Land Appeals and later to the Tenth Circuit, which affirmed, in part based on the “law of the case” doctrine and its earlier holding that BLM could not “prevent improvements to Garfield County’s R.S. 2477 right-of-way [citation omitted] provided the improvements are ‘reasonable and necessary to ensure safe travel.’”⁶⁴ In short, however, the Tenth Circuit’s *Hodel* decision represented the court’s first opportunity to take up the issue of how R.S. 2477 and FLPMA should be interpreted; an opportunity the court declined to accept.

B. SUWA v. BLM

As tensions grew between federal land managers and local governments over the federal government’s management of public lands in southern Utah, county and state officials became more aggressive in their assertion of R.S. 2477 rights-of-way. In September 1996, President Clinton (perhaps unwittingly) exacerbated the tensions by establishing the Grand Staircase-Escalante National Monument, pursuant to his authority under the American Antiquities Act,⁶⁵ reserving almost two million acres of land and placing them under BLM management.⁶⁶ Sixty-eight percent of the Monument’s acreage lies in Kane County, and thirty-two percent lies within Garfield County.⁶⁷ Since the establishment of the Monument, Kane County, in particular, has engaged in a decades-long campaign to undermine the federal government’s management of the Monument’s aesthetic, environmental, and archaeological resources.⁶⁸ In the Grand Staircase-Escalante National Monument alone, there have been at least three legal actions wherein Kane County claimed R.S. 2477 rights-of-way in the past ten

63. *Sierra Club v. Lujan*, 949 F.2d 362, 366 (10th Cir. 1991).

64. *Id.* at 369 (quoting *Hodel*, 848 F.2d at 1090)).

65. 16 U.S.C. § 431 (2006).

66. *Utah Ass’n of Counties v. Bush*, 316 F. Supp. 2d 1172, 1184 (10th Cir. 2004).

67. *Defs.’ Opp’n to Pls.’ Mot. to Consolidate*, ¶ 5 (filed Feb. 8, 2006) in *Kane County I*, 2011 WL 2489189.

68. *See S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 742 (10th Cir. 2005) (*SUWA v. BLM*); *Utah Ass’n of Counties v. Bush*, 455 F.3d 1094, 1097-98 (10th Cir. 2006).

years.⁶⁹

In 2005, the Tenth Circuit issued another landmark decision arising out of the dispute over federal ownership and management of lands within the Grand Staircase-Escalante National Monument: *SUWA v. BLM*.⁷⁰ At that point, R.S. 2477 had become “one of the more contentious land use issues in the West,” according to Tenth Circuit Judge Michael McConnell, who authored the majority opinion.⁷¹ From the outset, the court recognized the difficulty of resolving the scope of an R.S. 2477 right-of-way claim, given that there was no administrative component to establishing a claim and no requirement to record the claim once it had been established.⁷² Moreover, the court recognized the lack of legislative history, statutory text clarifying the procedures Congress intended, agency regulations, or informal commentary guiding courts and litigants alike.⁷³ Thus, the issue of how to determine the existence of an R.S. 2477 right-of-way, the scope of any existing right-of-way, and to what extent FLPMA and other modern statutes require federal agencies to plan around such rights-of-way by 2005 had become a jurisprudential “flash point.”⁷⁴

Shortly after the Monument was designated, road crews from three of the southernmost counties in Utah — Kane, Garfield, and San Juan — entered the Monument and began grading several dirt trails.⁷⁵ The counties did not notify BLM in advance of their plans or attempt to gain BLM’s permission to enter and begin road construction activities in the Monument.⁷⁶ According to the court, “six of the routes lie within wilderness study areas,” “nine are within the [Monument],” and “six others traverse a mesa overlooking the entrance corridor to the Needles District of Canyonlands National Park.”⁷⁷

SUWA filed informal protests with the BLM about the County’s activities, but the BLM did nothing to stop them.⁷⁸ SUWA then filed an action in federal court against the BLM and the counties, “alleging that the Counties had engaged in unlawful road construction activities and that the

69. *SUWA v. BLM*, 425 F.3d at 742; *Kane Cnty. v. Kempthorne*, 495 F. Supp. 2d 1143, 1147 (D. Utah 2007); *The Wilderness Soc’y v. Kane Cnty.*, Utah, 632 F.3d 1162, 1165 (10th Cir. 2011) (*Kane County III*).

70. 425 F.3d at 742.

71. *Id.* at 740.

72. *Id.* at 741 (acknowledging the lack of any requirement of entry, application, license, patent or deed under R.S. 2477).

73. *Id.*

74. *Id.* at 742.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

BLM had violated its duties” under FLPMA, the American Antiquities Act, and the National Environmental Policy Act, by failing to act.⁷⁹ The district court referred the issue of whether the counties possessed R.S. 2477 rights-of-way in the sixteen claimed routes back to the BLM and stayed the pending federal action until the agency could make the determination.⁸⁰ The BLM conducted a thorough, informal adjudication of the claimed routes and found that the counties lacked any rights in fifteen of the sixteen claimed routes, and found that Kane County had exceeded the scope of any right-of-way it held in the remaining route, the Skutumpah Road.⁸¹ The district court then treated further briefs in the federal action as appeals of the agency adjudication and affirmed all of the BLM’s determinations.⁸²

The counties appealed, arguing that the district court’s decision to affirm the administrative findings regarding the counties’ lack of any rights-of-way in the sixteen claimed R.S. 2477 routes was in error, and that the corresponding declaratory judgment that the counties had trespassed on federal land was similarly erroneous.⁸³ The Tenth Circuit addressed these issues in reverse order; first, it analyzed the trespass claims and then the issue of whether the counties, in fact, had R.S. 2477 rights in any of the sixteen claimed routes.⁸⁴ With respect to the claims of trespass against the counties, the court began by analyzing the BLM regulations governing the issue of a party claiming a right-of-way across federal public lands.⁸⁵ The trespass regulations, in particular, provided that any use claimed by such a party “that is beyond the scope and specific limitations of such an authorization or that causes unnecessary or undue degradation is prohibited and shall constitute a trespass.”⁸⁶

Analyzing this regulation, the district court held that, as long as the counties stay within their rights-of-way, they did not require BLM’s authorization to conduct routine maintenance on roads within the Monument.⁸⁷ Rejecting that approach, the Tenth Circuit held that “the holder of an R.S. 2477 right-of-way across federal land must consult with the appropriate federal land management agency before it undertakes any improvements to an R.S. 2477 right of way beyond routine maintenance.”⁸⁸ For undisputed R.S. 2477 routes, it was clear after *SUWA v. BLM* that

79. *Id.* (citing 43 U.S.C. § 1732; 16 U.S.C. § 431; 42 U.S.C. § 4321).

80. *Id.* at 743.

81. *Id.*

82. *Id.* at 744.

83. *Id.* at 744-45.

84. *Id.* at 745.

85. *Id.* at 745 (citing 43 C.F.R. § 2801.3(a) (2004) (deleted April 22, 2005)).

86. *Id.* at 745 (citing 43 C.F.R. § 2801.3(a)).

87. *Id.*

88. *Id.*

counties could not drive bulldozers and road graders onto BLM land to conduct “routine maintenance” of these routes without BLM authorization. As the court noted:

Unless it knows in advance when right-of-way holders propose to change the width, alignment, configuration, surfacing, or type of roads across federal land, the BLM cannot effectively discharge its responsibilities to determine whether the proposed changes are reasonable and necessary, whether they would impair or degrade the surrounding lands, and whether modifications in the plans should be proposed.⁸⁹

At this point, it would seem that all the Tenth Circuit needed to do was remand the action to the district court, with instructions to remand it to the agency to determine whether to authorize the counties’ construction activities along the lines of the framework the Tenth Circuit established in its decision.⁹⁰ This framework involved two steps: (1) notice by the R.S. 2477 claimant to the federal agency charged with managing the relevant public lands over which the R.S. 2477 right-of-way crosses of the proposed road improvements or construction activities; and (2) an agency determination of “whether the proposed improvement is reasonable and necessary in light of the traditional uses of the rights-of-way as of October 21, 1976,” any potential effects of the activities, and where required, agency “alternatives that serve to protect the lands.”⁹¹ The problem with this framework, however, is that it only applied to nonroutine maintenance and construction activities. If the counties unilaterally determined that their proposed activities were “routine maintenance,” within the scope of the R.S. 2477 grant as of 1976, there would be no need to notify the appropriate federal land management agency, much less seek its approval.⁹² If the activities constituted “construction,” on the other hand, which included acts such as “grading or blading a road for the first time,” realigning the road, or improving the surface, agency notice was required.⁹³ In short, the court noted, “[b]ulldoze first, talk later’ is not a recipe for constructive intergovernmental relations or intelligent land management.”⁹⁴

With respect to the district court’s decision to remand the initial determination of the validity of the R.S. 2477 rights-of-way to the BLM, the Tenth Circuit reversed, holding that BLM did not have primary jurisdiction over R.S. 2477 claims; thus finding that the district court’s referral was an

89. *Id.* at 747.

90. *Id.* at 748.

91. *Id.*

92. *Id.*

93. *Id.* at 745-46.

94. *Id.* at 749.

abuse of discretion.⁹⁵ After examining the text of the statute and reviewing the agency's historical interpretation of it, the court determined that nothing in this history gave the BLM primary jurisdiction to determine the validity of an R.S. 2477 claim.⁹⁶ It seemed, however, that the court was implicitly acknowledging BLM's authority to make some type of determination of a route's validity, stating that "nothing in our decision today impugns the BLM's authority to make nonbinding, administrative determinations, or the introduction and use of BLM findings as evidence in litigation."⁹⁷

Moreover, and to add further confusion, the Tenth Circuit held that nothing in its *SUWA v. BLM* decision precluded the agency from making an initial determination of the validity of an R.S. 2477 right-of-way "for its own land-use planning purposes."⁹⁸ This really goes to the heart of the matter in an R.S. 2477 dispute. The federal agencies are charged with managing the federal public lands for a multitude of uses, and must engage in periodic planning processes pursuant to their statutory mandates, as well as address concrete issues that arise when conflicts flare between competing uses. After *SUWA v. BLM*, the agencies were limited to making "administrative determinations" of the validity of R.S. 2477 rights-of-way, for the purposes of planning only.⁹⁹ Yet, the agencies have no primary jurisdiction to make a determination as to the validity, which would carry the force of law.¹⁰⁰ The message, then, was that a county simply had to "check in" with an agency about any potential road improvement or road construction, but the agency's opinion on whether those activities could proceed or not could be taken with a proverbial grain of salt.

To attempt to guide the district court on remand, the Tenth Circuit discussed the burdens of proof in an R.S. 2477 dispute, which was somewhat instructive.¹⁰¹ First, the court stated that "the party seeking to enforce rights-of-way against the federal government bears the burden of proof."¹⁰² The court explained that "this allocation of the burden of proof to the R.S. 2477 is consonant with federal law and federal interests."¹⁰³ It is also consistent with "the established rule that land grants are construed favorably to the Government" and the principle that, "if there are doubts they are resolved for the Government, not against it."¹⁰⁴ Thus, after 2005, the rule in the Tenth

95. *Id.* at 757-58.

96. *Id.*

97. *Id.* at 758.

98. *Id.*

99. *Id.*

100. *Id.* at 757.

101. *Id.* at 768.

102. *Id.*

103. *Id.* at 769.

104. *Id.*

Circuit was that a party seeking to assert an R.S. 2477 claim to a disputed route was required first to prove that it held valid title to that right of way in a court of law.¹⁰⁵

Second, the court established the “public use standard” for determining when and if an R.S. 2477 right-of-way had vested.¹⁰⁶ The public use standard had two components: “the landowner’s objectively manifested intent to dedicate property to the public use as a right of way, and acceptance by the public.”¹⁰⁷ The easier of the two requirements to determine is dedication, which the court held could manifest “by express statement or [be] presumed from conduct, usually by allowing the public ‘the uninterrupted use and enjoyment of their privilege’ over a specified period of time.”¹⁰⁸ The latter component, acceptance, has been the most difficult to determine,¹⁰⁹ but the court held that under Utah common law, acceptance is manifested by “continuous public use for a period of ten years.”¹¹⁰ In different states, the common law might dictate a different result.

In short, although the *SUWA v. BLM* decision was lengthy, it gave little guidance to lower courts and litigants alike. The Tenth Circuit established some useful definitions (of “reserved” lands, what constitutes a “highway,” and how “construction” and “public use” are measured)¹¹¹ and reiterated the burden of proof. It left most major issues unaddressed, however, such as a framework within which litigants or lower courts could assess R.S. 2477 disputes, combining the mandates of FLPMA with the text of R.S. 2477.¹¹² It established primary jurisdiction to determine R.S. 2477 rights in the district court, but gave the courts little guidance on how they should determine those rights.

C. *Utah v. United States*

In a 2008 decision, the United States District Court for the District of

105. *Id.* at 755, 757, 757 n. 12, 758, 769; *Kane County v. Kempthorne*, 495 F. Supp.2d 1143, 1151, 1155 (D. Utah 2007); *The Wilderness Soc’y v. Kane Cnty.*, Utah, 560 F. Supp. 2d 1147, 1151 (D. Utah 2008) (*Kane County I*).

106. *SUWA v. BLM*, 435 F.3d at 769-70.

107. *Id.* at 769 (citing ISAAC GRANT THOMPSON, A PRACTICAL TREATISE ON THE LAW OF HIGHWAYS 48-52 (1868) (dedication); *id.* at 54-57 (acceptance); JOSEPH K. ANGELL & THOMAS DURFEE, A TREATISE ON THE LAW OF HIGHWAYS 146-65 (2d ed. 1868) (dedication); *id.* at 174-83 (acceptance); RICHARD POWELL, THE LAW OF REAL PROPERTY VOL. 6 § 84.01 (2005) (hereinafter Powell); *see* *The President, Recorder and Trustees of Cincinnati v. White’s Lessee*, 31 U.S. (6 Pet.) 431, 438-40, 8 L.Ed. 452 (1832)).

108. *SUWA v. BLM*, 435 F.3d at 769.

109. *Id.*

110. *Id.* at 771.

111. *Id.* at 776, 782, 784.

112. *Id.* at 788.

Utah considered an action brought by the State of Utah and Juab County, wherein the plaintiffs sought to quiet title to several claimed R.S. 2477 roads on BLM lands in western Utah.¹¹³ Several environmental groups sought to intervene as defendants, including the Southern Utah Wilderness Alliance, The Wilderness Society and the Sierra Club, to protect their members' interest in management of certain public lands, "managed by law to protect their roadless, wild nature, and all of which traverse or abut lands proposed for wilderness protection."¹¹⁴ As stated in their briefing in support of the motion to intervene, the environmental groups sought to protect their members' interest in the federal government's management of the disputed area because "[t]he goal of the State's case is clear: to open routes to motor vehicles that have been partially closed as a result of the establishment of the Deep Creek Mountains and Scott's Basin wilderness study areas (Wilderness Study Areas) and Bureau of Land Management (BLM) land use planning decisions."¹¹⁵ Thus, they argued, "[i]f the State prevails, the resumption of motor vehicle use on these routes is likely and would cause substantial ecological damage. ... In order to protect [their] long-standing and oft-recognized interests in wildlands protection, [the intervenors] seek] the right to intervene on behalf of Federal Defendants."¹¹⁶

In its analysis of the environmental groups' arguments supporting intervention, the court considered both the subject of the property interest (an R.S. 2477 route) and the potential impact of the decision on that property interest (management for wilderness protection by the federal government or management for off-road vehicle use by the State and County).¹¹⁷ Considering the entire legal landscape, which includes the various environmental statutes requiring the BLM to manage the federal government's property for particular uses and with a view toward conservation, the court aptly stated that "the issue is not just who holds title to the easement; it is also the scope of the easement. A ruling on the merits favoring plaintiffs may result in opening closed portions of the rights-of-way to vehicle travel, would change the land management ability of the federal agency as to those routes, and may reduce the chance that the federal land would retain its wilderness characteristics."¹¹⁸ Finding that SUWA also proved its interest would not be adequately represented by the BLM, the

113. Utah v. United States, 2008 WL 4170017, at *1 (D. Utah, Sept. 3, 2008) (unreported).

114. *Id.* (quoting SUWA's Mem. Supp. Mot. Intervene, at 1).

115. *Id.*

116. *Id.*

117. *Id.* at *4.

118. *Id.* (citing Decl. of Suzanne Jones ¶ 15 (attached as Ex. 2 to SUWA's Mem. Supp.)).

court granted the organization's motion to intervene.¹¹⁹ This decision, although limited in scope to the motion to intervene, at least recognized that R.S. 2477 decisions must take the entire statutory landscape into consideration because they implicate issues and rights beyond mere ownership of property.

IV. The Kane County Litigation

The *Kane County* litigation involves four major reserved parcels of federal lands within the boundaries of Kane County: the Grand Staircase-Escalante National Monument, the Paria-Vermillion Cliffs Wilderness, Moquith Mountain Wilderness Study Area, and Glen Canyon National Recreation Area.¹²⁰ All of these are federal reserves managed by either the BLM or the National Park Service, pursuant to various statutes and federal regulations, and they total approximately 1.6 million acres.¹²¹ Kane County now claims title to R.S. 2477 routes in each of these four areas, and, as will be discussed below, aggressively and openly flouted the federal government's authority over them, engaging in a systemic replacement of federal management signs with Kane County signs, purporting to "open" all R.S. 2477 routes to vehicle traffic.¹²²

A. The Management Framework: FLPMA, the Wilderness Act, the National Park Service Organic Act, Agency Regulations, and Management Plans

First, the BLM manages the Monument pursuant to FLPMA¹²³ and its November 1999 Grand Staircase-Escalante National Monument Management Plan [hereinafter "Monument Plan"], which became effective in February 2000.¹²⁴ Understanding the agency's management philosophy with respect to road closures in the Monument requires both the text of the Monument Plan and a map, known as "Map 2."¹²⁵ Map 2 denotes all roads that are open to vehicle traffic within the Monument and provides that all roads not marked on Map 2 are closed, "subject to valid existing rights."¹²⁶

119. *Id.* at *5.

120. *The Wilderness Soc'y v. Kane Cnty.*, Utah, 560 F. Supp.2d 1147, 1153 (D. Utah 2008) (*Kane County I*).

121. *Id.*; *The Wilderness Soc'y v. Kane Cnty.*, Utah, 581 F.3d 1198, 1205 (10th Cir. 2009) (*Kane County II*), *rev'd*, 632 F.3d 1162 (10th Cir. 2011).

122. *Id.*

123. 43 U.S.C. § 1732.

124. See 65 Fed.Reg. 10819-10821 (Feb. 29, 2000); see also 43 U.S.C. § 1732(a) ("The Secretary [of Interior] shall manage the public lands ... in accordance with the land use plans developed by him under section 1712 of this title[.]").

125. *Kane County II*, 581 F.3d at 1223.

126. *Id.*

More specifically, the Monument Plan states that “[s]ome government entities may have a valid existing right to an access route under Revised Statutes (R.S.) 2477.”¹²⁷ While the Plan acknowledges that all of the R.S. 2477 claims were not necessarily known by the agency at the time it implemented the Plan, it states that if any claims were subsequently made, “the validity of those claims would have to be determined.”¹²⁸ If the claims were determined to be valid, the Monument Plan states that it would “respect those as valid existing rights.”¹²⁹ If not, the Plan provides that “the transportation system described in the Approved Plan will be the one administered in the Monument.”¹³⁰

The BLM also manages the Paria-Vermillion Cliffs Wilderness, which Congress reserved as a wilderness area in 1984,¹³¹ and Moquith Mountain Wilderness Study Area pursuant to the Wilderness Act and FLPMA section 603(a).¹³² Section 603(a) requires the agency to manage all Wilderness Study Areas “so as not to impair the suitability of such areas for preservation as wilderness” and to, “by regulation or otherwise[,] take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection.”¹³³ Finally, the National Park Service manages the Glen Canyon National Recreation Area pursuant to a delegation of authority from Congress in the National Park Service Organic Act.¹³⁴ As the district court noted, each of these areas is either “totally closed to off-highway vehicle use or is only open to such use in limited areas” designated by the BLM or the NPS.¹³⁵

B. Factual Background: Tensions Over Federal Control of Public Lands in Kane County.

In March of 2003, Kane County officials sent a letter to the Monument Manager warning that the County intended to assert its ownership of claimed rights-of-way pursuant to R.S. 2477.¹³⁶ In the letter, Kane County Commissioners stated that

The monument road number signs are a clear manifestation and

127. *Id.* (quoting Monument Plan, p. 46 n.1).

128. *Id.* (quoting Monument Plan, p. 46, n.1) (emphasis in original).

129. *Id.* (quoting Monument Plan, p. 46, n.1).

130. *Id.* (quoting Monument Plan, p. 46, n.1) (emphasis in original).

131. Arizona Wilderness Act of 1984, Pub.L. 98-406, 98 Stat. 1485 (Aug. 28, 1984).

132. 43 U.S.C. § 1782; see 45 Fed.Reg. 75602-75603 (Nov. 14, 1980) (final wilderness inventory decision designating the Moquith Mountain WSA).

133. 43 U.S.C. § 1782(c).

134. 16 U.S.C. §§ 460Dd-Dd-9.

135. *The Wilderness Soc’y v. Kane Cnty.*, Utah, 560 F. Supp.2d 1147, 1153 (D. Utah 2008) (*Kane County I*).

136. *Id.* at 1154.

implementation of the restrictions ostensibly implemented with the approval of the monument plan on November 15, 1999. The federal numbering system, therefore, conveys the impression of federal ownership and control of county asserted roads and closes travel on roads not numbered by the BLM. The federal road numbers also conflict with the current county road numbering system that has been in place for several years. The ATV/motorcycle restrictive signs are inconsistent with county policy regarding vehicle travel on county roads and conveys a legal ability of the BLM to place restrictions on those roads.¹³⁷

Later that summer, Kane County employees removed thirty-one BLM road closure signs from within the Monument and deposited them at the BLM's Monument Manager's office in Kanab, along with a "Notice" demanding that BLM remove signs restricting travel on "Kane County roads" within the Monument.¹³⁸ The County's Notice asserted that the BLM signs were "obstructing public access upon county roads in violation of state law" and that the BLM's road closures failed "to respect the rights of the dominant estate regarding rights-of-way granted to the State of Utah and to Kane County under Revised Statute 2477."¹³⁹

In 2005, Kane County posted 268 signs on hundreds of closed routes, "including 103 inside the Grand Staircase-Escalante National Monument."¹⁴⁰ Sixty-three of these signs "open[ed] routes to off-highway vehicle travel otherwise restricted by the federal land management plan," using decals indicating to off-highway vehicle ("OHV") users that the routes were open for such use.¹⁴¹ Later, the County removed all but thirty-nine of the signs.¹⁴²

Concurrently, Kane County adopted an ordinance, opening all roads within County borders to OHV use, including roads on federal land.¹⁴³ The Ordinance declared that Kane County "claims the right and ownership of all Class B and Class D roads" within the "County Road System."¹⁴⁴ Under state law Class B roads are "public highways"¹⁴⁵ suitable for two-wheel drive vehicles and Class D roads are "any road, way, or other land surface route that has been or is established by use or constructed" and maintained for

137. *Id.* at 1154-55 (citing March 10, 2003 Letter from Kane County Commissioners to BLM's Manager of the Monument at 1-2).

138. *Id.* at 1155.

139. *Id.*

140. *The Wilderness Soc'y v. Kane Cnty., Utah*, 632 F.3d 1162, 1182 (10th Cir. 2011) (*Kane County III*) (Lucero, J., dissenting).

141. *Id.*; *Kane County I*, 560 F. Supp.2d at 1156.

142. *Id.*

143. Kane County Ordinance No. 2005-03 (Aug. 22, 2005).

144. *Id.*

145. Utah Code § 72-3-103 (1953).

four-wheeled vehicles.”¹⁴⁶ Furthermore, it declared that all of the Class B and Class D roads are “open, unless designated [as] closed to off-highway vehicle (OHV) use.”¹⁴⁷

The Ordinance also provided that currently registered OHVs could be operated on the County Road System as posted by sign or designated by map or description as open to off-highway vehicle use by the County.¹⁴⁸ The Ordinance defines “OHVs” as motorcycles, snowmobiles, and all-terrain vehicles (“ATVs”).¹⁴⁹ Kane County Commissioner Habbeshaw testified that the Ordinance “opened all Kane County Transportation System Roads to ATV travel,” and that those routes opened to OHV use included “[a]ll Class B and Class D roads.”¹⁵⁰ Many of these “Kane County Transportation System Roads” were on lands managed by the federal government.

C. The District Court’s Decision: *Kane County I*

The Wilderness Society and the Southern Utah Wilderness Alliance (the Environmental Groups) filed a complaint in federal court in response to the County’s actions, asserting that Kane County had violated the Supremacy Clause of the United States Constitution and its actions, including the Ordinance discussed above, and the sign removal and replacement campaign, were preempted by federal law.¹⁵¹ The Environmental Groups sought a declaration that the County’s actions were unconstitutional and sought an injunction preventing the County from engaging in further similar conduct, until the County had proven that it held any property rights in the alleged rights-of-way.¹⁵² The County filed a motion to dismiss the Environmental Groups’ complaint, claiming that its actions were proper because it held fee simple title to R.S. 2477 rights-of-way in the disputed routes.¹⁵³ From the outset, the County defended the Environmental Groups’ complaint as if it asserted a claim under the Quiet Title Act, which it did not.¹⁵⁴ Despite the County’s attempts to manipulate the litigation into a property dispute under the Quiet Title Act, the district court remained steadfast in its analysis of the Environmental Groups’ claims under the Supremacy Clause.¹⁵⁵

146. *Id.* § 72-3-105(1).

147. Kane County Ordinance No. 2005-03 (Aug. 22, 2005).

148. *Id.*

149. *Id.*

150. *The Wilderness Soc’y v. Kane Cnty., Utah*, 632 F.3d 1162, 1182 (10th Cir. 2011) (*Kane County III*) (citing Appendix 1715-16).

151. *The Wilderness Soc’y v. Kane Cnty., Utah*, 560 F. Supp.2d 1147, 1149 (D. Utah 2008) (*Kane County I*).

152. *Id.*

153. *Id.* at 1150.

154. *Id.*

155. *Id.* at 1150-51.

Before analyzing the merits of the summary judgment arguments, the district court noted that, in any dispute involving R.S. 2477 claims, or any dispute involving claimed federal ownership of any land, the presumption is “that ownership and management authority lies [sic] with the federal government and that any adverse claimant, like the County here perhaps, is not entitled to win title or exercise unilateral management authority until it successfully has carried its burden of proof in a court of law.”¹⁵⁶

The district court then proceeded to analyze the merits of the Environmental Groups’ Supremacy Clause and preemption claims.¹⁵⁷ First, the court listed the various federal statutory and regulatory authorities guiding the BLM and NPS’s management actions: the Presidential Proclamation creating the Monument;¹⁵⁸ FLPMA;¹⁵⁹ regulations promulgated pursuant to FLPMA governing management of off-road vehicle use on public lands;¹⁶⁰ the Monument Management Plan, which the BLM adopted through formal notice and comment rulemaking and which the agency uses as the primary guideline for managing various public uses in the Monument;¹⁶¹ the Wilderness Act of 1964¹⁶² and the Arizona Wilderness Act of 1984, both of which *prohibit* the use of permanent and temporary roads within wilderness areas;¹⁶³ the National Park Service Organic Act (creating the Park Service and giving it authority to manage all lands reserved as national parks);¹⁶⁴ an Executive Order (requiring the Secretary of the Interior to develop administrative rules designating areas for use of off-highway vehicles and areas where such use is prohibited)¹⁶⁵ and regulations promulgated pursuant to the Executive Order.¹⁶⁶ The court then determined that the County’s ordinance directly conflicted with these federal laws, and held that the Ordinance was an unconstitutional violation of the Supremacy Clause.¹⁶⁷

The court also ordered Kane County to remove the thirty-nine signs that remained on federal lands managed by NPS and the BLM enjoined Kane County from “adopt[ing] ordinances, post[ing] signs, or otherwise

156. *Id.* (citing *The Wilderness Soc’y v. Kane Cnty.*, Utah, 470 F.Supp. 2d 1300, 1306 (D. Utah 2006)).

157. *Id.* at 1161.

158. Establishment of the Grand Staircase-Escalante National Monument, 61 Fed. Reg. 50223 (Sept. 18, 1996).

159. 43 U.S.C. § 1732.

160. 43 C.F.R. § 8341.1(c) (1980).

161. See 61 Fed. Reg. 50223, 50225.

162. 16 U.S.C. §§ 1131-36 (1964).

163. Arizona Wilderness Act of 1984, Pub. L. 98-406, 98 Stat. 1485 (1984).

164. 16 U.S.C. § 1-18f-3.

165. Use of Off-Road Vehicles on the Public Lands, Exec. Order No. 11644, 37 Fed. Reg. 2877 (Feb. 8, 1972).

166. 36 C.F.R. § 4.10(a) (1987).

167. *The Wilderness Soc’y v. Kane Cnty.*, Utah, 560 F. Supp.2d 1147, 1163 (D. Utah 2008) (*Kane County I*) (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990)).

purport[ing] to manage or open to vehicle use any route or area closed to such use by governing federal land management plan or federal law.”¹⁶⁸ The injunction also prohibited Kane County from taking any “other action to invite or encourage vehicle use on any route or area closed to such use by governing federal land management plan or federal law” until it proved “in a court of law” that it possessed valid R.S. 2477 rights in any of the contested routes.¹⁶⁹

In short, before the district court, the Environmental Groups alleged and pled their case under the Supremacy Clause violation, and they did not seek, nor did the County request, an adjudication of property rights.¹⁷⁰ The Environmental Groups did not, nor could not, have filed an action to quiet title in the federal government to the claimed R.S. 2477 routes. However, based on precedent such as *SUWA v. BLM*, the Environmental Groups had standing to bring an action alleging that the County had overstepped its authority, to put it mildly. The district court reviewed the action as it was pled, and as noted later by Judge Lucero, in his lengthy dissenting opinion to the Tenth Circuit’s *en banc* panel decision “[t]he district court clearly entered a final judgment without determining the validity of any property rights.”¹⁷¹

D. The Tenth Circuit’s First Decision: Kane County II

On appeal, the Tenth Circuit phrased the issue before it as whether “a county [may] exercise management authority over federal lands in a manner that conflicts with the federal management regime without proving that it possesses valid R.S. 2477 rights of way.”¹⁷² The County’s primary argument was that the Environmental Groups lacked standing to bring a Supremacy Clause challenge to their actions.¹⁷³

To have Article III standing, the Environmental Groups were required to prove that their members suffered an injury or injuries that were caused by the County’s actions, which a federal court had jurisdiction to redress.¹⁷⁴

168. *Id.* at 1166.

169. *Id.*

170. *Id.* at 1149.

171. *The Wilderness Soc’y v. Kane Cnty.*, 632 F.3d 1162, 1183 (10th Cir. 2011) (*Kane County III*) (Lucero, J., dissenting).

172. *The Wilderness Soc’y v. Kane Cnty.*, 581 F.3d 1198, 1205 (10th Cir. 2009) (*Kane County II*), *rev’d*, 632 F.3d 1162.

173. *Id.* at 1209. The County also argued that the action was mooted by its repeal of the offending Ordinance, yet the district court and the Tenth Circuit remained concerned that the County had not demonstrated that it would not reenact the Ordinance upon the conclusion of the litigation. Moreover, dozens of the County signs, opening the claimed R.S. 2477 routes to public use, remained in place. *Id.* at 1215.

174. *Id.* at 1209-10.

The majority opinion discussed the Environmental Group's members' injury at length, analyzing them against the United States Supreme Court's decisions in *Summers v. Earth Island Institute* and *Sierra Club v. Morton*.¹⁷⁵ Based on the standards established in those cases, the majority stated that "[i]n the environmental context, a plaintiff who has repeatedly visited a particular site, has imminent plans to do so again, and whose interests are harmed by a defendant's conduct has suffered injury in fact."¹⁷⁶ The majority held that SUWA's members, who submitted affidavits attesting to their use of the areas in question for multiple purposes, had demonstrated injury sufficient for the purposes of Article III standing.¹⁷⁷

The heart of the affiants' claims related to management authority. Under federal management authority, the alleged R.S. 2477 routes in question would remain closed, limiting off-road vehicle access to those areas the affiants visited.¹⁷⁸ Thus, when analyzing causation and redressability, the court focused on the impact of federal versus local management authority on the Environmental Groups' members.¹⁷⁹ If the County was allowed to continue its "management" activities, the alleged R.S. 2477 routes would be opened, and off-road vehicle use would be allowed, and even encouraged.¹⁸⁰ As SUWA member Jill Ozarski stated in her declaration, she "seek[s] out and prefer[s] to use those federal public land[s] that are more wild; in other words, those lands that are not burdened by [OHV] use."¹⁸¹ The County's signage initiative and Ordinance would, therefore, cause her to stop recreating in the areas that would be open to off-road vehicle use.¹⁸² The Tenth Circuit held that these assertions satisfied the latter two elements of the standing test, causation and redressability, and found that the Environmental Groups had Article III standing to assert their Supremacy Clause claims in a federal court.¹⁸³

The County also argued that the Environmental Groups lacked prudential standing because "(1) they are asserting the legal rights of the United States; (2) their claims raise generalized grievances; and (3) their claims fall outside the zone of interest protected by the Supremacy Clause."¹⁸⁴ The majority quickly disposed of each of these arguments. First,

175. *Id.* at 1210; 555 U.S. 488, 129 S. Ct. 1142, 1149-50 (2009); 405 U.S. 727, 734-36 (1972).

176. *Kane County II*, 581 F.3d at 1210.

177. *Id.* (the affiants declared that they used and enjoyed the resources on public lands in Kane County for "health, recreational, scientific, spiritual, educational, aesthetic, and other interests.").

178. *Id.* at 1210-11.

179. *Id.* at 1220-21.

180. *Id.* at 1210-11.

181. *Id.* at 1210 (quoting Decl. of Jill N. Ozarski) (alteration in original).

182. *Id.* at 1211.

183. *Id.* at 1212-13.

184. *Id.* at 1216.

the court noted that the Environmental Groups' complaint was not stating an injury to interests of the federal government, but injuries to its members, who submitted testimony confirming that they used the lands in question for recreation and other purposes.¹⁸⁵ Second, the court held that the members' declarations established particular, specific injuries that were not shared by the general public.¹⁸⁶ Finally, with respect to the "zone of interest" test, the court began its analysis by questioning whether this doctrine even applies to Supremacy Clause challenges.¹⁸⁷ If so, the court reasoned, "The Supremacy Clause is at least arguably designed to protect individuals harmed by the application of preempted enactments," such as the County's Ordinance, and the zone of interests test does not require a plaintiff to definitively prove that his or her interest lies within the "zone" protected by the legislative act, or, in this case, Constitutional amendment.¹⁸⁸

Turning to the merits of the Environmental Groups' Supremacy Clause challenge, the court began by stating that the burden of proof, in *any* case where a party challenges the federal government's claim of title, is on the challenging party.¹⁸⁹ This allocation, recognized by the Tenth Circuit in *SUWA v. BLM*,¹⁹⁰ was not only "consonant with federal law and federal interests," as well as state law,¹⁹¹ but it also recognized the long-established principle that "land 'grants must be construed favorably to the government.'"¹⁹²

As it had before the district court, the County asserted that it had valid R.S. 2477 rights in the disputed rights, and attempted to use this claim of title as a defense to the Environmental Groups' Supremacy Clause challenge.¹⁹³ The problem with this argument, as the district court and the Tenth Circuit recognized, was that the County had not counterclaimed under the Quiet Title Act, or brought an independent action seeking to quiet title.¹⁹⁴ Thus, the County had never proven that it held title to the alleged R.S. 2477 routes in a court of law.¹⁹⁵

Although, as the Tenth Circuit recognized, in a preemption action, the

185. *Id.* at 1217.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 1220 (citing *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 768 (10th Cir. 2005) (*SUWA v. BLM*)).

190. 425 F.3d at 768.

191. *Id.* at 769; *see* *Leo M. Bertagnole, Inc. v. Pine Meadow Ranches*, 639 P.2d 211, 213 (Utah 1981) (noting that, under Utah law, the party claiming a right-of-way bears the burden of proving it exists).

192. *The Wilderness Soc'y v. Kane Cnty.*, 581 F.3d 1198, 1205 (10th Cir. 2009) (*Kane County II*), *rev'd*, 632 F.3d 1162.

193. *Id.* at 1220-21.

194. *Id.*

195. *Id.*

party asserting that a governmental action is preempted bears the initial burden of establishing a conflict between federal and local laws.¹⁹⁶ Once that burden is met, the burden then shifts to the defending party to demonstrate that its actions fall within a “safe harbor” provision of federal law.¹⁹⁷ The court held that the Environmental Groups had met their initial burden of demonstrating a conflict between the various federal statutes and regulations governing BLM and the National Park Service’s management of the federal lands at issue in *Kane County*, and thus, the burden then shifted to the County to prove that its actions were authorized by federal law.¹⁹⁸ This, the County could not do, because its actions of replacing the federal road signs with its own signs, adding additional signs, and passing an Ordinance flouting the federal government’s management authority on federal public lands, were based on nothing more than an assertion of property rights. The County had never proven that it held title to the R.S. 2477 routes in question and without doing so, it could not establish a defense to the preemption claims.¹⁹⁹ Also, without proving that it held title to the routes, the County could not unilaterally exercise management authority over them.²⁰⁰ The Tenth Circuit ultimately affirmed the district court’s decision.²⁰¹

Although this reasoning appears somewhat circular, it makes sense to create a bright-line rule that states and counties may not take management actions or engage in construction activities on claimed R.S. 2477 rights-of-way prior to establishing valid title to them in a federal court. Otherwise, if the past is prologue, local officials will continue to take action contrary to federal agencies’ management plans, perhaps without consulting the agencies, and these actions may irreversibly damage fragile ecosystems, rendering them ineligible for heightened protection as wilderness.

E. The Tenth Circuit’s *En Banc* Decision: *Kane County III*

Unsatisfied with the original panel’s decision, the County petitioned for a rehearing *en banc*, which the court granted.²⁰² The full panel requested that the parties brief the issues of whether the Environmental Groups had

196. *Id.* at 1221 (quoting *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1262 (10th Cir. 2004)).

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *The Wilderness Soc’y v. Kane Cnty.*, 632 F.3d 1162, 1164 (10th Cir. 2011) (*Kane County III*).

Article III standing or prudential standing; whether the Supremacy Clause²⁰³ provides the Environmental Groups with a private right of action; whether the Counties can assert R.S. 2477 rights-of-way in a way that conflicts with the federal management plan in the Monument without first filing a Quiet Title action; whether the Counties could assert R.S. 2477 rights-of-way as a defense without joining the recognized title-holder (the United States) as a party to the action; and whether the action was moot due to Kane County's decision to remove its road signs and rescind its Ordinance.²⁰⁴

Disappointingly, the court stopped after the first issue and did not address any of the others. With respect to the prudential standing doctrine, the majority aptly noted that "the question of prudential standing is often resolved by the nature and source of the claim."²⁰⁵ Then, the majority stated that the Environmental Groups "rest [their] claims on the federal government's property rights,"²⁰⁶ essentially recasting this litigation as a property dispute between two landowners, rather than a constitutional challenge brought by interested citizens seeking to challenge a local government's attempts to undermine the federal government's implementation of its laws and regulations. By twisting the Environmental Groups' claims into property rights, the majority was able to arrive at the conclusion that they lacked standing to assert the property rights of the federal government, under the prudential standing doctrine.²⁰⁷

Prudential standing, as the *en banc* majority noted, "embodies 'judicially self-imposed limits on the exercise of federal jurisdiction.'"²⁰⁸ It also prohibits a litigant from "raising another person's legal rights."²⁰⁹ Yet, the determination of whether, in fact, a litigant is attempting to assert the claims of another depends entirely how "the claim" or "the right" is defined.²¹⁰ If the Environmental Groups' claim was that the County was trespassing, for example, prudential standing would bar them from asserting it because the federal government would be the proper plaintiff. If the Environmental Groups brought the claim based on their members' use of the federal lands, and the impact that the County's actions had on that use, as was the case here, then the Environmental Groups would, in fact, be *the only* parties that could bring those claims.

203. U.S. CONST. art. VI, cl. 2 (stating that federal law is "the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

204. *Kane County III*, 632 F.3d at 1183 (Lucero, J., dissenting).

205. *Id.* at 1169.

206. *Id.* at 1170.

207. *Id.* at 1187 (Lucero, J., dissenting).

208. *Id.* at 1168 (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2010)).

209. *Allen v. Wright*, 468 U.S. 737, 751 (2009).

210. *Kane County III*, 632 F.3d at 1169.

Concluding that the Environmental Groups rested their claim “on the federal government’s property rights,” the *en banc* panel stated that they “obviously” sought to enforce the federal government’s property rights because their “claims turn on the superiority of the federal government’s property claim.”²¹¹ Thus, the *en banc* panel vacated the district court’s decision and remanded the case to the district court with instructions to dismiss it.²¹²

The dissent, written by the same judge who had authored the majority panel decision two years earlier, forcefully criticized the *en banc* majority’s about-face on R.S. 2477 and its recasting of the Environmental Groups’ claims.²¹³ As noted by the dissent, the *en banc* majority’s decision reversed the burden of proof formerly established by the Tenth Circuit in R.S. 2477 cases and Supremacy Clause challenges.²¹⁴ Rather than requiring the County to prove that it held R.S. 2477 rights in the alleged roads, the decision assumed that to be true and required the Environmental Groups to overcome that presumption. The majority’s decision also completely ignored the merits of the five issues that the court had asked the parties to brief, despite the Supreme Court’s strong preference for deciding cases on the merits and despite the obvious need for guidance on R.S. 2477 issues for litigants.

Moreover, the County did not counterclaim under the Quiet Title Act, which is the “exclusive means” by which the United States’ title to federal lands may be challenged.²¹⁵ According to the Supreme Court, “[o]nce the ‘United States claims an interest’ in land, there is one way — and only one way — to disturb federal possession: by bringing a QTA suit.”²¹⁶ Otherwise, litigants can “easily avoid Congress’ ‘carefully crafted provisions of the QTA deemed necessary for the protection of the national public interest.’”²¹⁷ Furthermore, the dissent noted that “Despite the majority’s aspirations to the contrary, there is no R.S. 2477 exception to the *Block* rule, as the Seventh and District of Columbia Circuits have recognized.”²¹⁸ The *Kane County*

211. *Id.* at 1171.

212. *Id.* at 1170, 1174.

213. *Id.* at 1181 (Lucero, J., dissenting).

214. *Id.* at 1190.

215. *Id.* at 1186 (quoting *Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 280 (1983)).

216. *Id.* at 1184-85 (Lucero, J., dissenting) (quoting *Block*, 461 U.S. at 286).

217. *Id.* at 1185 (Lucero, J., dissenting) (quoting *Block*, 461 U.S. at 284) (citing *Sw. Four Wheel Drive Ass’n v. Bureau Land Mgmt.*, 363 F.3d 1069, 1071 (10th Cir. 2004); *Sw. Four Wheel Drive Ass’n v. Bureau Land Mgmt.*, 271 F.Supp.2d 1308, 1310 (D.N.M. 2003)).

218. *Id.* (citing *Shawnee Trail Conservancy v. U.S. Dep’t of Agric.*, 222 F.3d 383, 385-86 (7th Cir.2000) (holding that “because the plaintiffs did not bring their claim under the QTA,” the court “could not consider the issue of title to the land.”)).

decision thus created a circuit split,²¹⁹ in addition to setting the precedent that a county can now “seek a legal determination of disputed title without being subject to the [QTA] limitations placed on such challenges.”²²⁰

V. Gaps in the Tenth Circuit’s R.S. 2477 Jurisprudence After *Kane County III*

As the dissenting opinion accurately noted, *Kane County III* “is a pivotal case which, unless reversed or modified, will have long-term deleterious effects on the use and management of federal public lands.”²²¹ This is true for three primary reasons. First, the Tenth Circuit’s *en banc* holding fails to recognize the complexity of the legal landscape involved in an R.S. 2477 adjudication. These are not mere property disputes between adjoining landowners in an urban subdivision, subject only to common law doctrines of trespass and easements. Instead, these disputes often invoke upwards of three federal statutes, federal regulations, land management plans, state common law, and they involve not only the “landowners,” but parties that have deep-rooted, personal interests in how the contested land is managed.

Second, the Tenth Circuit’s *en banc* decision to invoke the easily manipulated doctrine of prudential standing to dismiss the litigants, rather than creating a legal framework for resolving future disputes ignores strong Supreme Court precedent for deciding cases on their merits. Moreover, the Tenth Circuit’s unwillingness to create a consistent body of jurisprudence surrounding the issue of RS 2477 claims in *Hodel*, *SUWA v. BLM*, and especially, in *Kane County III*, has muddled an already very murky body of law.²²² *Kane County III* represented an opportunity to establish a framework within which to resolve R.S. 2477 disputes, streamlining negotiations between the parties and easing the burden on federal district courts that

219. See *Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225, 228-29 (D.C. App. 2009); *Shawnee Trail*, 222 F.3d at 386-88.

220. *Kane County III*, 632 F.3d at 1186 (quoting *Shawnee Trail*, 222 F.3d at 388); see also *Barbouletos*, 568 F.3d 225 (D.C. Cir. 2009) (holding that parties asserting R.S. 2477 claims must proceed under the Quiet Title Act).

221. *Kane County III*, 632 F.3d at 1180 (Lucero, J., dissenting).

222. In a concurring opinion, three of the members of the *en banc* panel posed as open questions at least two issues related to R.S. 2477 claims that the court had previously addressed and resolved in prior decisions. See e.g. *Kane County III*, 632 F.3d at 1178 (Gorsuch, J., concurring) (noting that all of the questions were “intriguing” but declining to posit any answers to them). For example, they asked: “Does an R.S. 2477 right of way holder have to prove its existing rights before exercising those rights in a federally regulated monument or park?” *Id.* This question was squarely addressed and answered in the affirmative by the decision in *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 768-69 (10th Cir. 2005) (*SUWA v. BLM*) (holding that those seeking to establish R.S. 2477 rights-of-way in a national monument bear the burden of proof of the claim).

must adjudicate these complex claims. Several questions that the court could have answered in the process were (1) the proper allocation of burdens of proof in R.S. 2477 actions, (2) whether a party seeking to assert an R.S. 2477 claim must bring a quiet title claim in federal court if the federal government contests title, (3) whether there is any presumption that the federal government has title, and therefore, management authority, over all as-yet unclaimed R.S. 2477 routes, and (4) if so, whether such a presumption may be rebutted. Instead, the court did not, and “the resulting anarchy and chaos in the national parks, national monuments, and federal public lands lying within this circuit is profound.”²²³

Moreover, despite the majority’s reluctance to address the merits of the R.S. 2477 debate in *Kane County*, appellate courts have a responsibility to consider how lower courts and administrative bodies—to the extent they rely on federal appellate decisions as persuasive authority—will interpret their holdings. Appellate courts, for better or worse, guide lower courts in their application of legal principles to future cases or controversies and they do these lower courts a disservice by circumventing the merits of a contentious issue like R.S. 2477 in favor of dismissing the case for lack of subject matter jurisdiction. The United States Supreme Court has strongly discouraged federal appellate courts from this course of action for precisely the reasons that the *Kane County* decision illustrate: (1) dismissing a case for lack of subject matter jurisdiction, while not technically resolving a dispute “on the merits,” has the effect of deciding the case on the merits because, as in this instance, Kane County can now proceed with its attempts to open rights-of-way over which the federal government claims title because the sole party in the best position to litigate the federal government’s position has now been thrown out of court²²⁴ and (2) the lack of a thorough roadmap as to how to resolve future RS 2477 claims will mean that, in the inevitable tide of R.S. 2477 litigation to come, lower courts will issue inconsistent decisions and parties will have no guidelines on how to establish, assert, or challenge R.S. 2477 rights.

Third, the Tenth Circuit’s *Kane County* decision represents yet another opportunity to clarify the burdens of proof and production in R.S. 2477 disputes, yet the court sidestepped the merits altogether and dismissed the appeal because it held that the environmental plaintiffs did not have prudential standing. By turning a blind eye to the County’s trespassory actions and allowing it to proceed as if an R.S. 2477 right of way existed absent a quiet title action, the court has created a paradigm under which counties may possibly divest the federal government of property rights

223. *Kane County* III, 632 F.3d at 1181 (Lucero, J., dissenting).

224. *Id.* (Lucero, J., dissenting) (noting that “Tomorrow, Kane County can proceed with its signage program.”).

without bringing an action under the Quiet Title Act,²²⁵ so long as the federal government is not joined as a party to the litigation. The Tenth Circuit has also created a circuit split on the appropriate presumptions in an R.S. 2477 case.²²⁶

Consistency requires adherence to the generally accepted principle that the Quiet Title Act is “the exclusive means by which adverse claimants [may] challenge the United States’ title to real property.”²²⁷ If an exception is required for R.S. 2477 claims by virtue of the uniqueness of these property rights and how they arise, the court should adhere to the foundational holdings it has thus far established. Either way, it should provide definitive guidance to litigants and interested parties alike in each of the above-mentioned areas.

VI. Conclusion

As federal agencies regulate the vast areas of public lands under federal ownership more closely, restricting access to a smaller number of roads and trails to minimize the human footprint, further clashes between local and state governments and federal agencies will undoubtedly continue to arise. When the next R.S. 2477 case reaches the Tenth Circuit, the court should address the issues raised above – the burdens of proof, the nature of an R.S. 2477 claim or defense, and how R.S. 2477 factors into agency management decisions under statutes like FLPMA – and address challenges on the merits of the parties’ pleadings. This way, at the very least, litigants and lower courts could proceed to adjudicate the respective property rights accordingly.

Moreover, the *Kane County* decision has created a circuit split on the issue of whether an R.S. 2477 claimant is required to bring an action under the Quiet Title Act before actively claiming title to a right-of-way that is disputed by the federal government.²²⁸ In its next R.S. 2477 case, the court should force states and counties to file a quiet title suit or participate in the relevant agency planning process if either of those two methods fail. Absent either of these two choices, states and counties should not be able to rely on, or otherwise, assert R.S. 2477 rights in a court of law.

Finally, because the Tenth Circuit has not established clear guidelines

225. *Id.* at 1195.

226. *Id.*; *Shawnee Trail Conservancy v. U.S. Dep’t of Agric.*, 222 F.3d 383, 385-86 (7th Cir.2000).

227. *Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 286 (1983).

228. *Kane County III*, 632 F.3d at 1181 (Lucero, J., dissenting) (citing *Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225, 228-29 (D.C. Cir. 2009) (holding that an R.S. 2477 claim “must proceed under the Quiet Title Act.”); *Shawnee Trail Conservancy v. U.S. Dep’t of Agric.*, 222 F.3d 383, 386-88 (7th Cir. 2000)).

on how agencies should consider R.S. 2477 rights-of-way in their planning processes, there is confusion within the district courts about the extent to which district courts may consider evidence of R.S. 2477 claims in actions challenging agency planning processes or other decisions, and to what extent the agency may act or decline to act based on these claims.²²⁹ Agencies, as well as the public, must have some guidance from the court about how R.S. 2477 claims play a role in the agency land management planning process. As of yet, this has proven thorny for lower courts to navigate²³⁰ and *Kane County III* does nothing to facilitate that process.

In short, the Tenth Circuit has its work cut out for it when the next R.S. 2477 case reaches it. Given that “there are thousands of miles of claimed R.S. 2477 rights of way across federal lands in the western United States,”²³¹ this issue will likely come before the court many times in the near future. R.S. 2477 will also continue to cause litigation across the western half of the country, where unclaimed R.S. 2477 routes no doubt traverse many of our nation’s national parks, BLM lands, Wilderness Study Areas, National Monuments, and other reserves.²³² As long ago as 1993, “the National Park Service estimated that 68 of the 376 park units nationwide, encompassing 17 million acres, could be affected by R.S. 2477.”²³³ If left to their own devices, states and counties will continue to grade and improve these “roads,” which will “undoubtedly derogate most [park] unit values and seriously impact the ability of NPS to manage the units for the purposes for which they were established.”²³⁴

Instead of clarifying an already murky body of law, the *Kane County III* decision adds further confusion within the circuit and amongst the neighboring circuits containing R.S. 2477-eligible lands. The resulting burden on federal district courts is tremendous because they must continue to adjudicate disputed R.S. 2477 rights-of-way in a relative jurisprudential

229. E.g. *S. Utah Wilderness Alliance v. Nat’l Park Serv.*, 387 F. Supp.2d 1178, 1198 (D. Utah 2005) (*SUWA v. Nat’l Park Serv.*).

230. *SUWA v. Nat’l Park Serv.*, 387 F. Supp.2d at 1198.

231. *The Wilderness Soc’y v. Kane Cnty.*, Utah, 581 F.3d 1198, 1205 (10th Cir. 2009) (*Kane County II*).

232. Probasco, Christian, *County in Utah Wins Title to R.S. 2477 Roads*, NEW WEST COMMUNITY BLOG (Jan. 13, 2011), http://www.newwest.net/topic/article/county_in_utah_wins_title_to_rs_2477_roads/C566/L564/; See, e.g., *United States v. Nye County*, 920 F. Supp. 1108, 1109-10, 1111 (D. Nev. 1996) (regarding Nye County Commissioner’s bulldozing a road into Toiyabe National Forest); Mike Gorrell, *Feds Sue to Halt Road Work in Wild Utah Areas*, *Feds Sue to Halt County Road Graders*, SALT LAKE TRIB., Oct. 19, 1996, at A1; Vincent J. Schodolski, *Range Wars: Nevada Struggle Emblematic of Battle to Put Public Land Strictly in Counties’ Hands*, S.F. EXAM’R, May 21, 1995, at A6; Ed Vogel, *Nye’s Carver Leads Fight for Land Use*, LAS VEGAS REV. J., May 7, 1995, at 1.A; Jim Woolf, *Road-Grading Dispute Reaches Uintah County*, SALT LAKE TRIB., June 2, 1999, at C3.

233. Wilkinson, *supra* note 4, at 23.

234. *Id.*

vacuum, navigating the statutes, regulations, and Tenth Circuit precedent with no clear framework from the Tenth Circuit. It is hard to imagine an appellate court side-stepping the merits of this issue if the battle were taking place on Liberty Island National Monument, but hopefully the Tenth Circuit will see the need to provide some guidance before the nation loses some equally valuable and historic places.

* * *