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Potential Legal Standards for Resolving the R.S. 2477 Right of Way Crisis

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An obscure 1866 Federal law, Revised Statute 2477, granted rights of way for construction of highways over public lands to miners, farmers, ranchers and homesteaders to assist them in developing the West. Although the act was repealed over sixteen years ago, controversies still arise today. This article seeks to understand the R.S. 2477 grant, and proposed a workable rule of law to govern its progeny.

The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.[1]

I. Introduction

The development of America's highways and secondary road systems have, in many ways, paralleled the expansion

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1. An Act granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes § 8, 14 Stat. 253 (1866) (hereinafter Revised Statute 2477 or R.S. 2477), *repealed by* Federal Land Policy Management Act of 1976 § 706(a), Pub. L. No. 94-579, 90 Stat. 2744, 2793.

and growth of the republic over the last 200 years. An unavoidable consequence of the western migration was large scale trespass on federal lands.[2] In recognition of that fact, and in an effort to codify a system for future access, the 1866 Congress passed Revised Statute 2477 to legitimize the paths and roads made by America's frontiersman and permit the states the discretion to develop those paths and roads as they saw fit. R.S. 2477, passed as part of the mining laws of 1866,[3] was repealed in 1976. However, it still poses a significant threat to much of the nation's important land conservation legislation.

Despite its repeal, R.S. 2477 has the potential to thwart effective management of much of the country's national parklands, designated wilderness areas, and wildlife refuges.[4] Such potential protective measures as the California Desert Conservation Act[5] may be jeopardized by this statute. Despite its deceptively simple language, it invokes the imbroglio between state sovereignty and federal supremacy which has plagued American federalism since the founding of the Republic.

Though there is no legislative history on the statute's intent,[6] it is commonly understood that R.S. 2477 was an offer

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2. Central Pac. Ry. v. Alameda County, 284 U.S. 463, 469-72 (1931).

3. An Act granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes, 14 Stat. 251 (1866).

4. *See* Celia Hunter, *Guest Opinion*, FAIRBANKS DAILY NEWS-MINER, Feb. 27, 1992, at 4:

> Historic trails should be an asset, but these days, they are being turned into weapons designed to destroy wilderness . . . [across] public lands and conservation units . . . . The intent of Lt. Gov. Coghill in pushing adoption of the proposed RS 2477 route designation regulations is to spark just such a proliferation of roads of every type across the Alaska landscape.

Id. Alaska, where the assertions are most vigorous, contains 75% of America's total national park system acreage, 90% of the total area within the wildlife refuge system, and approximately 70% of all federal lands classified as wilderness.

5. Concern over impacts of R.S. 2477 right-of-ways has recently motivated Congress to instruct the U.S. Bureau of Land Management to issue a special report on the matter. Public Land News 17(24):5 (Dec. 10, 1992).

6. Leroy K. Latta, *Public Access over Alaska Public Lands as Granted by Section 8 of the Lode Mining Act of 1866*, 28 SANTA CLARA L. REV. 811, 818 (1988). *See also* Sierra Club v. Hodel, 848 F.2d 1068, 1080 (10th Cir. 1988).

from the federal government to the individual states and territories to legitimize existent miners' and homesteaders' access routes that had developed across the public domain during the expansion of the western frontier. In so doing, R.S. 2477 provided for the continued establishment of roads that would foster future resource development across the vast expanse of western lands owned by the federal government.[7]

While the motivation behind R.S. 2477 was discernible, the statute's application was inhibited by its lack of guidelines. For example, R.S. 2477 contained no criteria for determining when the federal offer had been accepted or for determining the scope of the granted easement once accepted.[8] As a consequence of this uncertainty, Congress repealed the grant 110 years later and replaced it with a more formalistic system of permits through provisions contained in the Federal Lands Policy and Management Act (hereinafter FLPMA).[9] However, Congress did provide that all accepted rights of way existing at the time of R.S. 2477's repeal would remain valid and be respected.[10]

The problem today for federal lands managers and state planners is the uncertainty regarding which rights of way were accepted prior to the repeal of R.S. 2477 and what limits were placed on those accepted. R.S. 2477 contained no clear mechanism for notifying the federal government of right of

7. United States v. Gates of the Mountains Lake Shore Homes, Inc., 732 F.2d 1411, 1413 n.3 (9th Cir. 1984); Humboldt County v. United States, 684 F.2d 1276, 1282 n.6 (9th Cir. 1982). *See contra* United States v. Dunn, 478 F.2d 443, 445 (9th Cir. 1973). The *Dunn* court, in a lengthy footnote, asserted that RS. 2477 was "not intended to grant rights, but instead to give legitimacy to existing status otherwise indefensible." *Id.* at 445 n.2. However, the court failed to address the body of state adjudications applying the provision prospectively for nearly 100 years with federal acquiescence and, indeed, reliance. *See id.* at 445-46.

8. Sierra Club v. Hodel, 848 F.2d 1068, 1080 (10th Cir. 1988); United States v. 9,947.71 Acres of Land, 220 F. Supp. 328, 335 (D. Nev. 1963); Hatch v. Black, 165 P. 518, 519 (Wyo. 1917).

9. 43 U.S.C. §§ 1769, 1764; 43 C.F.R. § 2801. *See also Sierra Club*, 848 F.2d at 1078-83. In Alaska, Alaska National Interest Lands Conservation Act §§ 1110(a)-(b), 1111, 1323. *See also* Steven P. Quarles & Thomas R. Lundquist, *The Alaska Lands Act's Innovations in the Law of Access Across Federal Lands*, 4 ALASKA L. REV. 1-35 (1987).

10. *Id.*

way acceptance. Additionally, many of the R.S. 2477 rights of way have been forgotten by the state and federal government, but never formally abandoned or terminated by either sovereign.

Clearly, resolution of this R.S. 2477 dilemma is of the utmost importance. When Congress passed most of its salient land conservation statutes, it ignored R.S. 2477's lasting impact on rights of way throughout the country. Until there is a resolution of the state-federal conflicts,[11] the ability of the federal government to promulgate and implement land management plans mandated by Congress[12] will be stymied. Second, until the issues provoked by R.S. 2477 are resolved, innumerable land titles in affected states remain unclear, and economic development in the western states will be inhibited.[13]

This article seeks to understand the R.S. 2477 grant, and propose a workable rule of law to govern its progeny.[14] Part II will set the historical context. Part III will introduce the reader to the statute and its application. Part IV will propose model rules to reconcile the conflict between state and federal interests now existing in R.S. 2477 disputes. Because Alaska is currently asserting its R.S. 2477 interests, this article shall use Alaska and its case law as a model of the present R.S. 2477 situation. Similarly, this article will also discuss cases in California, Nevada, and Idaho because of the large areas of public land situated within those states.[15]

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11. This conflict centers around state's relying on their own statutes while the federal government has been making inroads against each state's control. *See* discussion *infra* parts III.C, III.D.

12. Pub. L. No. 96-487 § 304(g), 94 Stat. 2394-95 (1980); 16 U.S.C. §§ 1a-1 to 1a-8 (1988); 43 U.S.C. § 1712 (1988).

13. Latta, *supra* note 6, at 813.

14. Solving the legal issues surrounding R.S. 2477 will serve as illuminating precedent for other state-federal controversies in the natural resources field. Some of these include management of navigable streambeds and waterbodies.

15. The percentage of each state's total area that is under federal ownership (BLM, NPS, FWS, NFS, DOD, etc.) is as follows: Nevada—82%, Idaho—63%, Alaska—68%, California—61%. *See* GEORGE C. COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCE LAW 14 (3d ed. 1992).

II. Historical Context

The quest for understanding the R.S. 2477 grant and for developing a workable rule to govern its progeny must start with the story of the American West. America's undeveloped frontier was disappearing as settlers spread westward from the Missouri River and eastward from the Pacific coast. The Federal Government, knowing that its vast western holdings contained untold riches, and knowing equally it could not adequately administer those holdings, turned to a series of "self-help" remedies, of which R.S. 2477 is only one.

While the federal government was preoccupied with the issues of slavery and secession in the years preceding the mining laws, homesteaders and miners were left to their own devices in developing access to claims and farms. Not until after the Civil War did Congress once again turn its attention to the nation's internal economic development. Recognizing path and road developments that had already evolved in the remote territories, Congress decided to formalize and solidify these access routes, thereby validating the frontier policy of self-help development.[16]

These roads were necessary instruments in the settlement of the United States.[17] One justice, when discussing the R.S. 2477 grant romantically commented:

> one need but to raise their eyes, when traveling through the West to see the innumerable roads and trails that lead off, and on, through public domain, into the wilderness where some prospector has found a stake (or broke his heart) or a homesteader has found the valley of his dreams . . . .
>
> If the builders of such roads to property surrounded by the public domain had only a right thereto revocable at the will of the (federal) government . . . , then the rights granted for development and settlement of the public domain, whether for mining, homesteading, townsites, mill

16. *9,947.71 Acres of Land*, 220 F. Supp. at 331.

17. Central Pac. Ry. v. Alameda County, 284 U.S. 463, 473 (1931); Wilkenson v. Department of Interior, 634 F. Supp. 1265, 1275 (D. Colo. 1986).

> sites, lumbering or other uses, would have been a delusion and a cruel and empty vision . . . .[18]

The effects of this attitude are still felt today.

III. The R.S. 2477 Grant

The grant language of the R.S. 2477 right of way has consistently been construed by the federal courts as an offer to the public of a right of way across public lands not reserved for public uses.[19] This section will define public lands not reserved for public uses and will outline the current law of acceptance and scope of the accepted grant.

A. Defining Public Lands

Public lands are those owned by the federal government and subject to sale or other disposal under the general land laws, excluding those which any claims or rights of others have attached.[20] An R.S. 2477 right of way cannot be established on public lands subject to any prior valid claim in which the rights of the general public have passed. Thus, the date of entry, not the date of actual patent,[21] removes lands from the public domain for purposes of establishing public highways under the grant.

In addition to removing lands from potential R.S. 2477 designation through disposal, the federal government could unilaterally withdraw lands by placing them into reserve status, such as in national parks, monuments, wildlife refuges or forests via Congressional statute or executive order.[22] Unless the land upon which an R.S. 2477 right of way is designated

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18. *9,947,71 Acres of Land*, 220 F. Supp. at 331.

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

20. Humboldt County v. United States, 684 F.2d 1276, 1281 (9th Cir. 1982). This definition of public lands is necessarily limited to lands which were or are federally owned at the time relevant to acceptance of rights-of-way. Ball v. Stephens, 158 P.2d 207, 209 (Cal. Dist. Ct. App. 1945).

21. A land patent is defined as "[a]n instrument conveying a grant of public land; also, the land so conveyed." BLACK'S LAW DICTIONARY 879 (6th ed. 1990).

22. *Humboldt*, 684 F.2d at 1281. *See also* BUREAU OF LAND MANAGEMENT, DEPARTMENT OF INTERIOR, PUBLIC LAND ORDERS 4582, 5189, 5418.

is public land when the offer is accepted, the state cannot have acquired any right under the grant.[23]

Therefore, a state cannot acquire a R.S. 2477 right of way interest for a public road across public lands after such lands have been reserved for public uses. Conversely, a state's interest in the right of way, after acceptance, cannot be extinguished simply because the public lands through which it passes have been subsequently reserved.[24] In managing reserved lands which have been carved from the public domain, as occurred in the Alaska National Interest Lands Conservation Act,[25] the operative question becomes: "Was an R.S. 2477 right-of-way through public lands accepted prior to the reservation?"

B. Defining Acceptance

Acceptance of the R.S. 2477 grant offer is determined by state law. Acceptance can be manifested by either (1) a formal, official positive act on the part of a state (territorial) government, or (2) sufficient use on the part of the general public, without any official recognition.[26]

1. Express Acceptance

Official state action accepting the offered grant (such as through formal declaration) is a relatively simple and straight-forward matter. Some states assert that state legislation which accepts Right's of way on section lines across unsurveyed land is valid and express acceptance.[27] This position is contrary to the Supreme Court's ruling in *Cox v. Hart* that only actual survey can create a section line, and

23. *See Humboldt*, 684 F.2d 1281.

24. Colorado v. Toll, 268 U.S. 228, 231 (1925).

25. 16 U.S.C. §§ 3101-3233 (1988).

26. *See, e.g.*, Shultz v. Department of Army, 10 F.3d 649, 655 (9th Cir. 1993). Arizona does not recognize acceptance by public use; only official, formal action accepts the R.S. 2477 offer. *See* Tucson Consol. Copper Co. v. Reese, 100 P. 777, 778 (Ariz. 1909) (finding that public roads must be established by statute); Rodgers v. Ray, 457 P.2d 281, 283 (Ariz. 1969) (finding it doubtful that a public road could be established by mere use).

27. Faxon v. Lallie Civil Township, 163 N.W. 531, 533 (N.D. 1917).

this position does not stand up in court.[28] The latter position is the more prevalent.[29]

2. Acceptance Through "Sufficient Public Use"

While determining whether a grant has been expressly accepted is relatively straightforward, attempting to determine valid acceptances through sufficient public use is a difficult and intricate matter.

Under R.S. 2477, each state must look to its statutory and common law to formulate a criteria for determining acceptance by public use.[30] The lack of available sources coupled with varying fact patterns from individually adjudicated cases has prevented the evolution of precise principles. As a result, R.S. 2477's intent of protecting validly-held, investment-backed expectations and of creating a systematic method of access and road development has been impeded. Exacerbating this legal limbo is the fact that as each state attempts to create its own rules, interstate routes are disrupted.

As eluded to earlier, different courts have varied as to what factors are important in determining sufficient public use. Some courts have focused on the length of time that the public has used the route, finding that public use of a route must exist for at least the amount of time required to estab-

28. Cox v. Hart, 260 U.S. 427, 435 (1922). It is the position of this article that section line easement designations are valid acceptances of the R.S. 2477 grant only when the actual survey has been conducted and marked the relevant section line. If this is done, the acceptance is valid as of the date of survey. The position by some Alaskan lawyers that *Fisher v. Golden Valley Electric Association*, 658 P.2d 127 (Ala. 1983), stands for the validity of section line easements relating back to time of survey is misplaced because it deals with lands owned by the state after being acquired from the federal government. Thus, the case is irrelevant to the debate of section line easements declared by states as acceptances of the grant on federal lands.

29. Wallowa County v. Wade 72 P. 793, 794 (Or. 1903).

30. *Shultz*, 10 F.3d at 656; Sierra Club v. Hodel, 848 F.2d 1068, 1079 (10th Cir. 1988). *See* Rippley, *Highway Rights-of-Way on Public Lands*, 9 TRANSP. L.J. 121 (1977). "Whether a right of way has been established is a question of state law."

lish prescriptive rights.[31] This theory, however, has been rejected by a majority of the courts.[32] This is because prescription implies an *adverse* user, while use under R.S. 2477 occurs with the government's consent and even encouragement.[33] While the length of time that the public uses the route may not be dispositive, it is often a "material ingredient" in any determination.[34]

Another factor courts have considered in determining whether there has been sufficient public use is the character of the use. Some courts, along with the Department of the Interior, have interpreted the grant as requiring that the character of use include construction of a highway to constitute sufficient public use.[35] In one jurisdiction, however, this position has been recently rejected. A Colorado district court held that mere use by the public can be sufficient.[36]

The original purpose of R.S. 2477 was to assure access to private development, facilitate communication among them, induce others to follow and create additional development, and eventually lead to permanent settlements with stable economies. R.S. 2477, however, cannot be thought of as only seeking guarantees of access to individuals and small groups:

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31. Vogler v. Anderson, 89 P. 551 (Wash. 1907); City of Butte v. Mikosowitz, 102 P. 593 (Mont. 1909).

32. Berger v. Ohlson, 9 Alaska 389, 395 (1938); *see also* Lovelace v. Hightower, 168 P.2d 864, 871, 872 (N.M. 1946); Hatch Bros. v. Black, 165 P. 518, 519 (Wyo. 1917); Quintana v. Knowles, 851 P.2d 482 (N.M. 1993); Hughes v. Veal, 114 P. 1081 (Kan. 1911); Schwertdle v. County of Placer, 41 P. 448 (Cal. 1895); Okanogan County v. Cheetham, 80 P. 262 (Wash. 1905); Murray v. City of Butte, 14 P. 656 (Mont. 1887); Doyle v. Chattanooga, 161 S.W. 997 (Tenn. 1913); Riley v. Buchanan, 76 S.W. 527 (Ky. Ct. App. 1903).

33. *Hatch Bros.*, 165 P. at 520.

34. Harding v. Jasper, 14 Cal. 642, 647-48 (Cal. 1860).

35. Rogers v. Ray, 457 P.2d 281, 283 (Ariz. 1969); Bureau of Land Management Manual, § 2801 (B)(1); *see also* Humboldt County v. United States, 684 F.2d at 1281 n.5.

36. Wilkenson v. Department of Interior, 634 F. Supp. 1265 (D. Colo. 1986). *See also* Leach v. Manhart, 77 P.2d 652 (Colo. 1938); Hamerly v. Denton, 359 P.2d 121 (Alaska 1961); Roper v. Elkhorn at Sun Valley, 605 P.2d 968 (Idaho 1980); Anderson v. Richards, 608 P.2d 1096 (Nev. 1980); *Hatch Bros.*, 165 P. 518,; Wilson v. Williams, 87 P.2d 683 (N.M. 1939).

The Interior Board of Land Appeals (IBLA) has also rejected the Department of Interior's interpretation and generally follows the state law where the right-of-way is located. *See* Latta, *supra* note 6, at 824-28.

other statutory provisions already assured those rights.[37] Congress clearly envisioned R.S. 2477 as assisting the evolution of the West as a whole. By promoting the use of individual trails across government lands by the public, Congress hoped to promote settlement of the region by means of efficient natural selection. Only those routes valuable enough and strategically located to induce public travel would be used enough to be considered accepted rights of way. Thus, public use begetting public acceptance.[38]

C. Defining the Scope of the Right of Way

Once a right of way has been accepted, considerable debate follows concerning the scope of the easement. Again, the statute is silent regarding the application of state or federal law in determining the scope of interests represented in the easement,[39] and legislative history regarding R.S. 2477 is almost non-existent.[40] In attempting to reconcile conflicting views of which privileges the right of way grants a state, at least one federal circuit has said that "[a]ny doubt as to the scope of the [easement] must be resolved in favor of the (federal) government."[41]

In *United States v. Oregon and California Railroad*,[42] the Supreme Court stated that the scope of a grant of federal land is a question of federal law. However, in some instances, "it may be determined as a matter of federal law that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances."[43]

37. *See* A.T. Biddle, *Access Rights Over Public Lands Granted by the 1866 Mining Law and Recent Regulations*, 18 ROCKY MTN. MIN. L. INST. 415 (1973).

38. State *ex rel.* Dansie v. Nolan, 191 P. 150, 153 (Mont. 1920).

39. Sierra Club v. Hodel, 848 F.2d 1068, 1080 (10th Cir. 1988).

40. *See* Latta, *supra* note 6, at 818.

41. United States v. Gates of the Mountains Lakeshore Homes, Inc., 732 F.2d 1411, 1413 (9th Cir. 1984) (citing Humboldt County v. United States, 684 F.2d 1276, 1280-81 (9th Cir. 1982). *See also* Schultz v. Department of the Army, 10 F.3d 649, 655 (9th Cir. 1993) (reaffirming *Humboldt*).

42. 164 U.S. 526 (1896).

43. United States v. Oregon, 195 U.S. 1, 28 (1935). *But see*, Marden Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454 (9th Cir. 1986). The *Marden Corp.* court, determining whether a private agreement regarding contribution rights for clean up costs barred a CERCLA § 107(a) suit to recover, found that "[c]learly

States argue that because R.S. 2477 is silent as to what law to apply, it implies that state law is to be used.

Where competing federal and state interests are involved, most cases follow *United States v. Union Pacific Railroad*,[44] which held that federal law controls. The Court reached this conclusion when Union Pacific claimed rights to oil and gas deposits underlying their granted right of way.[45]

The leading case on the scope of the R.S. 2477 grant is *Sierra Club v. Hodel*.[46] The Tenth Circuit used a test enunciated in *Wilson v. Omaha Indian Tribe*,[47] to determine whether state or federal law should delimit the scope of the R.S. 2477 grant. Under the analysis of *Wilson v. Omaha Indian Tribe*, the choice of federal or state law depends on three factors:

> "whether there is need for a nationally uniform body of law to apply in situations comparable to this, whether application of state law would frustrate federal policy or functions, and the impact a federal rule might have on existing relationships under state law."[48]

The Tenth Circuit rejected Sierra Club's claim that the R.S. 2477 framework favored federal law over state law.[49] In addressing the first factor the court ruled that although FLPMA "admittedly embodies a congressional intent to centralize and systematize the management of public lands," the policies which support FLPMA are "simply not relevant to R.S. 2477's construction."[50] The need for uniformity should not be assessed in terms of the goals and policies of a statute

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the fact that federal law governs does not always mean that federal courts should fashion a uniform federal rule, even if the question involves the scope of a federal statutory right . . . ." *Id.* at 1457. However, even if the federal court determines that state law should be incorporated, the court may reject those state rules antithetical to federal interests. *Id.* at 1458.

44. 353 U.S. 112 (1957).
45. *Id.* at 120.
46. 848 F.2d 1068 (10th Cir. 1988).
47. 442 U.S. 653 (1979).
48. *Id.* at 672-73.
49. *Sierra Club*, 848 F.2d at 1083.
50. *Id.* at 1082.

created 110 years after R.S. 2477, but should "be assessed in terms of Congress' intent at the time of passage [of R.S. 2477]."[51]

Finding that the second *Wilson* factor also favored the states, the Tenth Circuit concluded that, because R.S. 2477 grants have been defined by state law since the statute's inception, the creation of a "new federal standard would necessitate the remeasurement and reemarcation of thousands of R.S. 2477 rights-of-way across the country. . ." which would result in "an administrative duststorm that would choke BLM's ability to manage the public lands."[52]

Under the third *Wilson* factor, the Tenth Circuit found that since the inception of R.S. 2477 grants, states have "developed [their] own state-based definition of the perfection or scope. . .either by explicitly declaring R.S.2477 to incorporate state law or by simply expounding [their] own law."[53] The court was not "aware of any state that even considered the possibility of a federal rule."[54] Thus, the court concluded that, "[a] change to a federal standard would adversely affect existing property relationships. . ." and "disturb the expectations of all parties to these property relationships."[55] The result of this ruling was that the scope of the right of way in question was determined by Utah state law, which defined the width of a R.S. 2477 as "that which is reasonable and necessary for the type of use to which the road has been put."[56]

In determining what is "reasonable and necessary" the *Sierra Club* court stated that the rights of way are subject to the principles that govern the scope of easements.[57] The

51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 1083.
56. *Id.*, (citing *Lindsay Land and Live Stock Co. v. Churnos*, 285 P. 646, 649 (Utah 1929)). Although the *Sierra Club* court applied the "reasonable and necessary" standard, implicit in its holding is that the court will apply the standard from the state in which the right of way is asserted. Thus, if the case originated in a different state, the Tenth Circuit would have applied that state's standard.
57. *Sierra Club*, 848 F.2d at 1083 (citing J. Cribbett, PRINCIPLES OF THE LAW OF PROPERTY 273-74 (1962)).

scope is not limited to that to which the road was being put when it first became an R.S. 2477 road. Every use to which the road was put before the repeal of R.S. 2477 in 1976 is "automatically vested as an incident of the easement."[58] Unless there is evidence that there was termination or surrender of the easement, the right of way as of the date of repeal, is that which is "reasonable and necessary" for the right of way's preexisting uses.[59] The initial use of the trail at issue in *Sierra Club* was for driving livestock, oil, water and mineral developments, transportation by county residents and sine 1973 tourists.[60] Therefore, the scope was determined to be "that which is reasonable and necessary to ensure safe travel for the uses above-mentioned, including improving the road to two lanes so travelers could pass each other."[61]

The *Wilson* factors comport with the Supreme Court's ruling in *Andrus v. Charlestone Stone Products.*[62] The Supreme Court stated in *Andrus* that "[t]he Government must prevail when the relevant statutory provisions, their historical context, consistent administrative and judicial decisions, and the practical problems with a contrary holding all weigh in its favor."[63] Because the Court states that there are situations when state law shall apply, it strengthens the Tenth Circuit decision which uses the *Wilson* test, because the *Wilson* test does seem to comport with the exceptions that were noted by the Supreme Court in *Andrus.*

The issue in *Andrus* concerned whether water is a "valuable mineral" within the meaning of 30 U.S.C. section 22, and hence is a locatable mineral thereunder.[64] The Supreme

58. *Id.* at 1084.
59. *Id.*
60. *Id.*
61. *Id.* Other cases which used the "reasonable and necessary" test include: *Lindsay Land & Livestock Co. v. Churnos*, 285 P. 646 (Utah 1930) (finding it "proper and necessary for the [lower] court in defining the road to determine its width, and to fix the same according to what was reasonable and necessary, under all the facts and circumstances for the uses which were made of the road"); *Montgomery v. Somers*, 90 P. 674 (Or. 1907); *Bishop v. Hawley*, 238 P. 284 (Wyo. 1925); *Whitesides v. Green*, 44 P. 1032 (Utah 1896).
62. 436 U.S. 604 (1978).
63. *Id.* at 616.
64. *Id.* at 605.

Court held that water is not a "valuable mineral" within the meaning of the statute because it was not the type of valuable mineral that the 1872 Congress intended to make the basis of a valid claim.[65] In its conclusion, the Supreme Court stated that it has long been established that, when grants to federal land are at issue, any doubts "are resolved for the Government, not against it."[66]

D. Property Clause Limitations on the Scope of an R.S. 2477 Rights of Way

The property clause ensures that the power over federal public lands is entrusted to Congress.[67] As a result, federal agencies have the ability to protect federal lands against interference with their intended uses.[68] Conduct which significantly detracts from the purposes for which the federal lands are managed may be restricted or forbidden, even when the conduct occurs on neighboring private or state property.[69] A different rule would place the management of federal land at the mercy of state law.[70] Federal resort to the property clause, though rare, has proved potent.

There is a paucity of case law regarding the use of the property clause in R.S. 2477 disputes. However, reflection on four important property clause cases may assist in the formulation of a clear, concise, and workable rule for guiding decisions when competing sovereign interests clash.

The first significant restriction upon private conduct occurring on lands outside federal territory took place in Virginia.[71] There, pursuant to the Migratory Bird Treaty Act,[72] the Back Bay Waterfowl Refuge was authorized by the De-

65. *Id.* at 614.

66. *Id.* at 617 (citing *United States v. Union Pacific R. Co.*, 353 U.S. 112, 116 (1957)).

67. Kleppe v. New Mexico, 426 U.S. 529, 539-41 (1976).

68. Minnesota v. Block, 660 F.2d 1240, 1249 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

69. *Id.*

70. Ventura County v. Gulf Oil Corp., 601 F.2d 1080, 1083-84 (9th Cir. 1980); Camfield v. United States, 167 U.S. 518, 526 (1897).

71. Bailey v. Holland, 126 F.2d 317 (4th Cir. 1942).

72. 16 U.S.C. §§ 701-711 (1988).

partment of Interior. The purpose of the refuge was to offer the sanctuary as a feeding and resting area for the Atlantic Flyway's beleaguered denizens. Protection, offered by the refuge was designed to restore waterfowl populations whose numbers had plummeted during a century of mismanagement before the efforts of Leopold and others had transformed wildlife managers into professional scientists.

The remarkable, though not yet completely understood migratory urges which brought the birds to Back Bay, also brought them low over vantage points owned by a private hunting club. Just outside the refuge boundary, clubmembers shot the waterfowl with alacrity. The disproportionate success enjoyed by these hunters, due to their strategic positions, threatened to undermine the entire purpose for the refuge. Consequently, the federal government promulgated regulations that banned all waterfowl hunting on 5,000 acres of surrounding state and private land, including the land owned by the hunting club. Fearing economic ruin, the owner filed suit, seeking to invalidate the regulations' reach beyond federal land.

Holding in favor of the federal government, the court ruled that even though the United States claimed no title to the lands subject to the new regulation, the ban was obviously necessary to effectuate the conservation program envisioned, and therefore the regulations were not confined to the lands under federal ownership.[73] In order to achieve the federal purpose, the government had the power to prohibit all hunting within the immediate vicinity of the refuge.[74]

A similar case, forty years later, made more explicit use of the property and supremacy clauses.[75] In Minnesota's north country is a labyrinth of lakes and streams that create one of America's premier canoeing areas. Congress, recognizing the need to preserve the area's recreational potential, reserved much of the federal land for a wilderness area and a national park. In addition, regulations were promulgated

73. *Bailey*, 126 F.2d at 322.
74. *Id.* at 324.
75. United States v. Brown, 552 F.2d 817 (8th Cir. 1977).

that prohibit hunting on waters inside the Voyegeurs National Park.

A duck hunter, in full compliance with state law, began hunting from a boat on Rainey Lake, a navigable water body completely surrounded by the national park. The hunter was in full compliance with all relevant state and federal hunting laws for the harvesting of waterfowl on a state lake. Because the lake was navigable, the hunter argued that it remained within state, and not federal territory. The case began when national park rangers, consistent with park regulations, arrested the hunter.

The court agreed with the hunter that the lake remained within state territory. The state, according to the court, had never relinquished its sovereignty over the lake to the federal government when the national park was created. However, the court ruled in favor of the National Park Service regulations that prohibit hunting on the lake because the ban was a constitutional exercise of congressional power under the property clause.[76] The court decided that "when regulation is for the protection of federal property, the property clause is broad enough to reach beyond territorial limits."[77] Because the federal regulations were deemed "necessary" to protect wildlife and visitors in the national park, the court reasoned that to allow hunting would significantly interfere with intended purposes for which the park was established.[78]

A third property clause case, *Minnesota v. Block*,[79] also upheld the validity of federal regulations restricting private activity on lands within state jurisdiction and outside federal territory. Again, this case arose from issues in northern Minnesota's watery wilderness. In 1978, Congress altered the management of the 1,000,000 acre Boundary Waters Wilderness Canoe area in the Superior National Forest by severely restricting the use of motorized boats and snow machines in order to preserve the sense of wilderness. The ban extended

76. *Id.* at 822.
77. *Id.*
78. *Id.*
79. Minnesota v. Block, 660 F.2d 1240 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

beyond the territorial limits of the designated wilderness area and applied to 120,000 acres of neighboring state and private lands. The state of Minnesota and private land owners, fearing the effect of the regulation upon the important local tourist economy filed suit.

In its opinion, the court once again found that under the authority of the property clause, Congressional power extends to the regulation of conduct both on and off federal lands if that conduct threatens the purposes for which the government is managing its lands.[80] The court upheld the regulation as needful, concluding that motorized vehicles could significantly interfere with the wilderness values of the area.[81]

The first case that clearly demonstrated the property clause's impact on Rights of Way 2477 was *United States v. Vogler*.[82] Joe Vogler, a Fairbanks miner and Alaskan Independence Party founder, drove his D-8 Caterpillar tractor along the Bielenberg Trail into Yukon-Charley Rivers National Preserve in the remote east-central region of Alaska. Vogler chose to drive his machinery into the preserve during the summer, without applying for a permit, instead of using the trail in winter, its traditional season of use. Park Service policy was to reject summer use of the trail because of the extreme environmental damage caused by the heavy vehicles to the tundra and spruce bog. Routinely, however, the Park Service granted winter permits when snow and the frozen ground minimized ecological harm.

Based upon their protective regulations, Park rangers forcibly stopped Mr. Vogler as he entered the preserve. Vogler asserted in court that the state, not the federal government had sole authority to regulate use and scope of valid R.S. 2477 easements.

Rejecting Vogler's arguments, the court ruled that even if the Bielenberg Trail was an accepted right of way (which the court ultimately declined to decide), it was within the power

80. *Id.* at 1248-49.
81. *Id.*
82. 859 F.2d 638 (9th Cir. 1988).

of the Park Service, under the property clause, to control the easement. Relying on *Wilkenson v. Department of Interior*,[83] the court held:

> Even if we assume that the trail is an established right-of-way, we do not accept Vogler's argument that the government is totally without authority to regulate the manner of its use . . . [T]he property clause gives Congress the power over public lands . . . The regulations here are necessary to conserve the natural beauty of the preserve.[84]

The property clause, however, should not be interpreted as vitiating all state interests in the management of R.S. 2477 rights of way.[85] For even the tremendous authority granted to the federal government under the powerful commerce clause is not without limitation.[86] Significant state interests may permit state authority and activity, under the state police powers, even when state conduct may effect interstate commerce, a field traditionally held to be exclusively federal.[87]

IV. Analysis

A. Proposed Rule for Acceptance

Though the statute was silent as to whether federal law or state law governs determinations of acceptance, custom has dictated that state law governs.[88] During the past decade, however, there have been sporadic federal initiatives asserting that federal regulation alone should determine

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83. 634 F. Supp. 1265, 1279 (D. Colo. 1986).

84. *Vogler*, 859 F.2d at 641-42.

85. The Supreme Court does, however, use the Property Clause as an implement of great power. *See* Kleppe v. New Mexico, 426 U.S. 529, 539 (1976).

86. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 310 (1981) (Rehnquist, J., concurring).

87. Maine v. Taylor, 477 U.S. 131 (1986).

88. Sierra Club v. Hodel, 848 F.2d 1068, 1078 (10th Cir. 1988); Wilkenson v. Department of Interior, 634 F. Supp. 1265, 1272 (D. Colo. 1986); United States v. 9,947.71 Acres of Land, 220 F. Supp. 328, 335 (D. Nev. 1963); Girves v. Kenai Peninsula Borough, 536 P.2d 1221, 1226 (Alaska 1975); Ball v. Stephens, 158 P.2d at 209; Kirk v. Schultz, 119 P.2d 266, 268 (Idaho 1941).

whether acceptance has occurred.[89] The federal attempts to unilaterally control acceptance criteria should not prevail.

State law should continue to be the sole source for controlling acceptance by formal official action, and federal courts should amalgamate the laws of the various states into a single uniform rule (which remains dedicated to the maintenance of state sovereignty over the police power interests over health, safety and welfare), for construing acceptance criteria by public use. In advocating the paramount role of state law in the acceptance process, though, it must be acknowledged that a state cannot "bootstrap" rights with legislation passed after R.S. 2477's repeal in 1976.[90] Thus, one must look only to the standard of state law, as it existed between 1866 and 1976, during which time public lands remained eligible for right of way grants.

The argument in favor of deference to state authority in matters of grant acceptance is institutional in nature. Unless some new problem unquestionably demonstrates that the concept of state authority is no longer viable, the century old rule of law should not be surrendered. To do otherwise would wreak havoc to the foundations of federalism. If the federal government possessed the ability to eliminate state jurisdiction over such vital state interests as transportation, without balancing the utility of the decision, the validity of the notion of states as sovereign entities is no more than an illusion. And if that be the case, then federalism is dead. The federal government has not yet established that existing mechanisms in the law for substantively balancing state and federal interests are so unworkable in R.S. 2477 determinations that state authority should be removed entirely from the field of grant acceptance. Indeed, the opposite has been true.

89. *See* Letter from Frederick I. Ferguson, Deputy Solicitor, Office of the Solicitor, United States Department of the Interior, to James W. Moorman, Assistant Attorney General, Land and Natural Resources Division, Department of Justice (Apr. 28, 1980) (on file with the *Pace Environmental Law Review*) [hereinafter Solicitor Ferguson Letter]. *See also* Latta, *supra* note 6.

90. *Sierra Club*, 848 F.2d at 1083.

In addition to recent federal court decisions upholding the role of state law in acceptances,[91] the federal agency most responsible for interpreting and implementing the grant, the U.S. Bureau of Land Management (BLM), has also relied exclusively upon state law. BLM has recognized for decades that grants become effective upon the construction or establishment of highways in accordance with state law.[92] Additionally, congressional silence throughout the 110 year period between enactment and repeal of R.S. 2477 must be perceived as legislative approval of the statute's implementation, at least up until the date of repeal.[93] Furthermore, for over a century territories and states have organized their social and economic development in reliance on the idea that their state law — not federal — determines the acceptance of potentially valuable R.S. 2477 right of ways.

When Congress deliberately writes broad and vaguely worded statutes as general policy pronouncements, it relies upon the federal courts to "fine tune" and "fill in the blanks" so that the statute may be appropriately applied to specific circumstances.[94] Because the complete body of federal statutes is not internally consistent when viewed in aggregate, the federal courts must balance among any number of competing public policies as they interpret legislation.[95] Relying upon common law principles, the canons of statutory construction and the history of prior compromises in statutory case law, the federal judiciary fashions a "common law of statutes" from the legal analysis.[96]

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91. *See* note 27 *supra*.

92. 43 C.F.R. § 244.55 (1939); 43 C.F.R. § 244.58 (1963); 43 C.F.R. § 2822.2 (1974).

93. *See* Central Pac. Ry. v. Alameda County, 284 U.S. 463 (1931); *see also* Morton v. Ruiz, 415 U.S. 199 (1974); United States v. Midwest Oil Co., 236 U.S. 459, 472-73 (1915). "In the face of congressional silence, the interpretation of the implementing agency will carry great weight. . . . [W]hen an agency has followed a notorious, consistent, and long standing interpretation, it may be presumed that Congress' silence denotes acquiescence." *Sierra Club*, 848 F.2d at 1080.

94. ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW: NATURE, LAW, AND SOCIETY 259, 283, 299 (1992).

95. *Id.* at 283.

96. *Id.* at 259.

The public highway law of 1866 is no longer serving the interest it sought to promote. Therefore, with special deference to state court decisions already in existence, it is time for the federal judiciary to articulate a uniform rule governing public use acceptance.

What then, is the definition of public use? Public use must be defined as the function of three factors: 1) the purpose for which the public puts the route to use; 2) the types of public user; and 3) the nature of the route itself.

These three factors, closely related, must be considered in aggregate to determine if use by the public is sufficient to constitute acceptance. Each factor has its own threshold, and no one factor alone is sufficient to indicate acceptance. The following description of these factors is intended to identify a rational test for acceptance determinations, thereby bringing order and predictability to the R.S. 2477 assertion process.

1. The Purpose for Which the Public Puts the Route to Use

There are four possible uses of a route under the first criterion. These are: (a) Commercial Uses, (b) Destinational Uses, (c) Developmental Uses, and (d) Governmental Uses.

(a) Commercial Uses are those in which a particular route regularly serves as a conduit in the stream of transporting goods. Examples include routes for hauling freight from public docks into town,[97] and routes used for the transport of livestock to and from grazing territory.[98]

(b) Destinational Uses occur when a route is used to connect two or more distinct locations. Examples include routes which are the primary means between towns[99] or which link two transportation arteries,[100] or which once served as stage lines.[101] Random travel for hunting, trap-

97. Dillingham Commercial Co. v. City of Dillingham, 705 P.2d 410, 414 (Alaska 1985); Berger v. Ohlson, 9 Alaska 389, 392 (1938).

98. Montgomery v. Somers, 90 P. 674, 675 (Or. 1907).

99. Schwerdtle v. Placer County, 41 P. 448 (Cal. 1895).

100. *Dillingham Commercial*, 705 P.2d at 414.

101. *Schwerdtle*, 41 P. at 448.

ping, and sightseeing does not constitute a destinational use.[102]

(c) Developmental uses occur when a variety of different entrepreneurs use the same route to access a common region for development. Area examples include oil fields, mineral districts, and ranchlands.[103]

(d) Governmental uses occur when the government, state or federal, regularly use a route to provide a public service, such as for delivering the mail.[104]

2. The Types of Public User

The second factor, the type of public using the route, is closely related to the first factor. However, this criterion looks at the number and variety of users over time.[105] The point of this criterion is to demonstrate that the route is not used primarily by only one or several individuals. Thus, this factor distinguishes truly public roads from those that are essentially "private" in character.[106]

3. The Nature of the Route

The final factor to be considered in the "public acceptance" test is the nature of the route itself. This test looks to factors which indicate attributes which would lead one to view the route as a public highway. Factors include whether the route is well-defined,[107] whether it is clearly confined to a

102. Hamerly v. Denton, 359 P.2d 121, 124-25 (Alaska 1961).

103. Ball v. Stephens, 158 P.2d 207, 210-11 (Cal. 1945); Montgomery v. Somers, 90 P. 674, 676 (Or. 1907).

104. *Schwerdtle*, 41 P. at 448.

105. Lindsay Land and Livestock Co. v. Churnos, 285 P. 646 (Utah 1929). For other examples of number and variety, see Ball v. Stephens, 158 P.2d 207 (Cal. Dist. Ct. App. 1945); *Schwerdtle*, 41 P. at 448; *Dillingham Commercial*, 705 P.2d at 410.

106. This criterion runs counter to much of the case law. See opposing views in Rogge v. United States, 10 Alaska 130, 152 (1941); Leach v. Manhart, 77 P.2d 652, 653 (Colo. 1938); Wilkenson v. Department of Interior, 634 F. Supp. 1265, 1272 (D. Colo. 1986).

107. Clark v. Taylor, 9 Alaska 298, 313 (1938); *Ball*, 158 P.2d at 210; *Leach*, 77 P.2d at 653; *Montgomery*, 90 P. at 677.

recognizable route,[108] and whether there is evidence of constructed improvements and maintenance on the part of private individuals or government.[109]

If an asserted route meets the rigors of these three criteria, then it should be considered a valid R.S. 2477 right of way accepted through public use.

For over a century, territories and states have organized their social and economic development in reliance on the idea that their state law -not federal- determines the acceptance of potentially valuable R.S. 2477 rights of way. There is not a strong argument contrary to this long held belief. The extent to which an accepted right of way may be developed and used by the state is an entirely separate legal issue from the law of acceptance. Mechanisms for fashioning new balancing tests already exist within the Constitution's property and supremacy clauses for resolving conflicts concerning right of way scope after it has been accepted. Therefore, there is no reason to change the source of authority addressing acceptances sufficient to violate the expectations that have vested over a century of consistent implementation.

B. Proposed Rule for Scope

This article asserts that it would be far easier to recognize the easement as possessing all the attributes of a normal modern day highway right of way as statutorily driven in each state than to try to measure the scope of the right of way as a reflection of the use to which the route has traditionally been put.[110] To do otherwise would involve a difficult factual inquiry coupled with an almost impossible task of extrapolating yesterday's frontier conception of highways to today's societal needs and technological realities.

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108. *Clark*, 9 Alaska at 312; Hatch Bros. v. Black, 165 P. 518, 519 (Wyo. 1917).

109. Okanagon County v. Cheetham, 80 P. 262 (Wash. 1905); Kirk v. Schultz, 119 P.2d 266 (Idaho 1941). *See also Hatch Bros.*, 165 P. at 520; State *ex rel.* Dansie v. Nolan, 191 P. 150, 152 (Mont. 1920); *Schwerdtle*, 41 P. at 448; *Leach*, 77 P.2d at 653.

110. *See* Sierra Club v. Hodel, 848 F.2d 1068, 1081 (10th Cir. 1988). *See also* 43 U.S.C. § 1769(a) (1988).

Conflicts arising between the exercise of a state's full easement rights and the federal government's right to protect and use its lands, across which the right of way passes, should be resolved under a balancing calculus construed from the U.S. Constitution's Property Clause.[111] This is an entirely different issue than determining the existence of a valid easement under R.S. 2477.

Scope of right of way use becomes an issue when a state or any other governmental unit or private individual attempts to use an R.S. 2477 easement in a fashion perceived as incompatible with the use for which the surrounding federal lands have been dedicated or for which the easement was originally used.[112] For obvious reasons, the problem is most pronounced when the federal land, through which the route passes, has been reserved from public domain status into national parks or some other conservation system unit, after the route has been accepted as an R.S. 2477 easement. Potential conflicts may arise when a state wishes to pave the route or straighten it; or when private parties use is at such a time or in a manner that is disruptive to federal lands management goals. When such conflicts erupt, the U.S. Constitution's property clause may serve as an appropriate guide. The task, then, is one of fashioning an appropriate legal rule that will strike the proper balance between legitimate state interests in its easement and federal authority under the property clause in R.S. 2477 use disputes.

1. Establish Presumptions

The first step is to establish presumptions. A logical starting point would be to begin with the presumption that federal regulatory restrictions on R.S. 2477 easements running across federal lands are valid exercises of federal au-

111. U.S. CONST. art. IV, § 3, cl. 2.

112. Scope has been defined as:

> The 'scope' of a right of way refers to the bundle of property rights possessed by the holder of the right of way. This bundle is defined as the physical boundaries of the right-of-way as well as the uses to which it has been put.

Sierra Club, 848 F.2d at 1083-84.

thority. This presumption is based upon the rationale that it is assumed the regulation was drafted upon a genuine concern for the protection of federal lands, and not some invidious attempt to weaken state sovereignty. The statutory requirements for administrative procedure must be assumed to be sufficient to weed out arbitrary or thinly veiled efforts to assault states in the rule making process.

This presumption, however, must be rebuttable. Thus, if a federal regulation thwarts the use of an easement in a manner perceived as deleterious to state interests while furthering only a minor federal benefit, then the regulation must submit to the state's objection.

A state should be able to prevail over federal restrictions on R.S. 2477 easement use if it can satisfy five separate conditions. These conditions are as follows:

1. The state interest justifying the type of easement use must be compelling, it cannot simply advance the "public good."
2. The state interest must be one of a peculiarly unique and local character.
3. There can be no viable alternative reasonably available to the state other than the type of use sought.
4. Any impact to the federal interests on surrounding federal lands through which the easement passes must be merely incidental, not intentional.
5. Use of the easement, though inconsistent with the federal purposes for which the surrounding federal lands are managed, does not *significantly* impair those federal purposes. This standard, while protecting state interests, is still consistent with "supremacy clause" analysis which preempts state conduct if the action interferes with the accomplishment of federal purposes. Under traditional supremacy tests, federal interests take precedence over state concerns if the state's concerns prompt actions frustrating to federal goals.[113] However, in limited circumstances state conduct will be allowed. The standard proffered here is intended to clarify those circumstances.

113. Hines v. Davidowitz, 312 U.S. 52 (1941).

First, the state interest being promoted by the right of way development must be compelling. Within the meaning of "compelling" the concepts of health and safety stand foremost. If a right of way is being improved because use or an expected use of the current route is inherently dangerous, then a state's assertion of a compelling interest will be more persuasive.[114] Protection of a particularly fragile or critically valuable ecosystem may also be compelling.[115] Development of a right of way for ensuring essential police and fire protection, otherwise unavailable, can be a compelling purpose. Public trust doctrine obligations, in addition to police and fire protection, are fundamental state responsibilities, incapable of being abrogated, and therefore constitute compelling interests.[116] Economic development interests seldom, if ever, rise to the level of being considered compelling.[117]

Second, the state interest asserted must be, due to a variety of local circumstances, characterized as unique; it cannot stem from generic problems which generally afflict most states to one degree or another. Thus, in a variety of different types of cases, courts have found such localized oddities as ocean currents and navigational hazards, seismic activity, weather peculiarities, remoteness, particularly rugged topography, and other similar contexts to justify special deference to asserted state interests.[118] This requirement is necessary to prevent states from impeding federal objectives in order to unfairly compete with other states under the guise of special hardship. Therefore, the elements which contribute to a unique, local character for a problem should be interpreted conservatively, requiring a firm link between the claim asserted and specific, detailed justifications.

Third, the development or improvement of an R.S. 2477 right of way, if inconsistent with the surrounding federal lands management, must be necessary for the ability of the state to achieve its compelling objectives. Mere efficacy is in-

114. *Sierra Club*, 848 F.2d 1068.
115. Maine v. Taylor, 477 U.S. at 148-51.
116. Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892).
117. *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 437 (2d ed. 1988).
118. *See generally* PLATER ET AL., *supra* note 94, at 477-536.

sufficient to justify such action. It must be demonstrated that there is no other viable alternative available which will achieve the desired results. This criterion for the standard advocated here is essential if the federal government is to protect itself from ulterior motives other than the stated reasons for the right of way improvement. For example, before an R.S. 2477 route will be permitted to be used in a manner inconsistent with the management goals for surrounding federal lands, there can be no avenue for access available under the comprehensive array of other regulatory statutes. This criterion may prove one the most difficult obstacles for a state to negotiate around due to the mechanisms for access found within the Federal Lands Policy and Management Act[119] and the Alaska National Interest Lands Conservation Act.[120] In most situations, resorting to R.S. 2477 would be unnecessary because of the permit procedures that already exist and currently address most state needs.

Fourth, the impacts to federal purposes must be incidental and unavoidable. There can be no evidence in the record of the state employing R.S. 2477 with the express purpose of frustrating federal plans. One example in which a court would take especially careful scrutiny is where a route is sought for development prior to anticipated federal initiatives to place public domain into more restrictive management classifications. A state cannot be allowed to cloak attempts to vitiate federal land conservation programs under a veil of fictional interests.

Fifth, the unavoidable impacts to federal purposes, if negative, cannot be significant. "Significant" in this context is defined as making it impossible for the federal purposes to be achieved. Simply making the federal tasks more difficult, or adding to administrative costs, is not significant. Similarly, frustrating a preferred management choice when other effective means in realizing a federal purpose are also available, does not constitute a significant impact. In addition, "federal purposes" must not be frivolous nor arbitrary. In-

119. 43 U.S.C. §§ 1761-1771 (1988).
120. 16 U.S.C. §§ 3170, 3171, 3210 (1988).

stead, the federal purpose defended must be one that is central to the management plan when viewed in its entirety.

Finally, current case law supports this five point standard that strikes a balance between state and federal interests under the property clause. Though the property clause has received little attention compared its commerce clause sibling, several generalizations can be relied upon.

What the courts have consistently made clear is that the federal government controls property as both a sovereign and as a proprietor.[121] The issue, then, is not one of questioning the existence of federal power, but rather of clarifying its scope and application. There are three types of land to which the property clause may be applied: (a) lands in which the federal government is the owner in fee simple and is the sole holder of property interests,[122] (b) lands in which the federal government retains fee title, but the lands are encumbered by interests held by a state sovereign,[123] and (c) lands to which the federal government holds no title, but upon which conduct (whether state or private) may frustrate management goals on neighboring federal land.[124]

As to the first instance, courts have consistently ruled that federal power to regulate and control is complete. The *Kleppe* Court held that "[the] Property Clause, in broad terms, gives Congress the power to determine what are needful rules respecting the federal lands . . . [and] the power over the public lands thus entrusted is without limitations."[125] Thus, it can reasonably be assumed that the federal government is free to use such property as it sees fit, and regulate it in any fashion which rationally relates to the goals sought, so long as no other statutes or Constitutional restrictions are violated.

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121. *See* Eugene R. Gaetke, *Refuting the 'Classic' Property Clause Theory*, 63 N.C. L. REV. 617 (1985); Dale D. Goble, *The Myth of the Classic Property Clause Doctrine*, 63 DENV. U. L. REV. 495 (1986).

122. *See* Kleppe v. New Mexico, 426 U.S. 529, 538-39 (1976).

123. *See* United States v. Volger, 859 F.2d 638, 640-42 (9th Cir. 1988).

124. Minnesota v. Block, 660 F.2d 1240, 1249-51 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

125. Kleppe v. New Mexico, 426 U.S. 529, 539 (1976).

In the latter two situations, the court is not nearly so precise and definitive. A series of recent cases, however, does illuminate some governing principles for extraterritorial application of the property clause.[126] Cases involving exercises of federal regulatory power over conduct on state and private lands should be upheld only when the conduct sought to be restricted would significantly frustrate federal purposes on federal lands.[127]

Such a standard would not be inconsistent with current case law. The courts in *Vogler*, *Brown*, and *Alexander* all cited the significance of threats in justifying the extra-territorial application of the property clause. Vogler's caterpillar march across sensitive lands in summer would cause damage so severe, the court feared it would "require 100 years to return to their original condition."[128] Because the duck hunting would occur in such close proximity to adjacent lands, there was significant danger of injury to park users, according to the *Brown* court.[129] In *Alexander* the court relied on Congressional findings that snow machine and motorboat use "seriously marred" the character of the designated wilderness.[130] "Significance" in all three cases can be interpreted in the fashion set forth here. It would be impossible to preserve the natural ecosystem of the Charlie River Wilderness if innumerable scars persisting over 100 years were allowed to be formed; it would be impossible to manage an area for its pristine character and solitude[131] with the persistent drone of motorized vehicles.

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126. In addition to the four cases described within the text, see also Camfield v. United States, 167 U.S. 518 (1897); United States v. Alford, 274 U.S. 264 (1927); United States v. Lindsey, 595 F.2d 5 (9th Cir. 1979); United States v. Moore, 640 F. Supp. 164 (S.D. W. Va. 1986).

127. Ronald F. Frank and John H. Eckhard, *Power of Congress Under the Property Clause to Give Extraterritorial Effect to Federal Lands Law: Will Respecting Property Go the Way of Affecting Commerce?*, 15 NAT. RESOURCES LAW 663, 678 (1983).

128. United States v. Vogler, 859 F.2d 638, 640 (9th Cir. 1988).

129. United States v. Brown, 552 F.2d 817, 822 (8th Cir. 1977).

130. Minnesota v. Block, 660 F.2d 1240, 1251 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

131. 16 U.S.C. §§ 1131-1136 (1988).

In all cases where the property clause was successfully applied to property outside federal ownership, no contention was made denying the significance of the threat. Indeed, this is wise policy (to restrict extra-territorial application of the clause) in order to prevent potential problems of "wide-ranging displacement of traditional state land regulations."[132]

Thus, under this standard, the regulation and conduct of a state is beyond the extra-territorial reach of the federal property clause if the regulation or conduct in question does not render the attainment of federal purposes on federal land impossible.

It is therefore appropriate that the standard in the second situation (federal title but state easement) fall somewhere between the extreme of a free exercise of control without limitation standard (federal land, no encumbrances) and the relatively relaxed standard of significant impact (no federal title) for conduct with effects that are inconsistent with federal purposes for federal lands. Lands to which the federal government retains title, but has granted special interests — like easements — to state sovereigns, should not be regulated by the same unfettered power of the *Kleppe* standard as lands for which the federal government is sole interest holder. At the same time, these lands, to which the federal government retains title, should not be subject to all state regulation and conduct save that which makes the attainment of federal purposes impossible. That is why the standard offered here was developed. It provides a midpoint balance that restricts unilateral federal power, yet makes it difficult, though not impossible, for states to arbitrarily impair federal management goals. The proposed standard recognizes the peculiar status of these lands, created by R.S. 2477.

Conclusion

With the development of consistent and understandable standards governing the existence and the scope of R.S. 2477

132. Joseph L. Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239, 254 (1976).

rights of way, predictability may return to land management in the West and far North. Once these standards are understood, both federal and state governments can conform their management plans and goals in a fashion which will prevent litigation and its attendant problems of delay, cost, demoralization, and stymied long term investment. Until this problem is resolved, it will continue to frustrate more coordinated and cooperative management of lands locked into the patchwork of mixed federal and state ownership. As a consequence of the current problem, optimal management strategies based upon ecosystems rather than jurisdictions will not evolve. Through the evolution of standards for R.S. 2477's application, hopefully this significant impediment to proper lands management will dissolve.