



COUNTY OF SAN BERNARDINO

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March 30, 2011



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

COUNTY OF SAN BERNARDINO

IBLA 2010-153

March 30, 2011

Appeal from a decision of the State Director, California State Office, Bureau of Land Management, rejecting an application for a recordable disclaimer of interest in an existing road claimed to be an R.S. 2477 right-of-way. CACA 45327.

Affirmed.

1. Federal Land Policy and Management Act of 1976:
Disclaimers of Interest

The Secretary of the Interior has been granted the discretionary authority by section 315 of FLPMA, 43 U.S.C. § 1745 (2006), to issue a recordable disclaimer of interest in any lands where the disclaimer will help remove a cloud on title to such lands and where he determines, *inter alia*, that a record interest of the United States in the lands has terminated by operation of law or is otherwise invalid.

2. Administrative Procedure: Burden of Proof--Federal Land Policy and Management Act of 1976: Disclaimers of Interest

An exercise of the Secretary's discretionary authority must have a rational basis and be supported by facts of record demonstrating that an action is not arbitrary, capricious, or an abuse of discretion. If a decision has any rational basis, it will not be held arbitrary and capricious. An appellant appearing before the Department bears the burden of proof to show, by a preponderance of the evidence, that a challenged decision is in error. Where the basis for the decision is clear from the record, the Board will not substitute its judgment for that of the BLM decisionmaker.

3. Federal Land Policy and Management Act of 1976:
Disclaimers of Interest--Rights-of-Way: Nature of Interest
Granted--Rights-of-Way: Revised Statutes Sec. 2477

The Board will affirm a BLM decision denying a request for a recordable disclaimer of interest for a road claimed as an R.S. 2477 right-of-way when (1) there has been no administrative determination that the road constitutes an R.S. 2477 right-of-way; and (2) there has been no determination by the Secretary that a record interest of the United States has terminated by operation of law or is otherwise invalid, as required by section 315 of FLPMA, 43 U.S.C. § 1745 (2006), and 43 C.F.R. Subpart 1864.

4. Federal Land Policy and Management Act of 1976:
Disclaimers of Interest--Rights-of-Way: Nature of Interest
Granted--Rights-of-Way: Revised Statutes Sec. 2477

The Department's current policy of declining to issue recordable disclaimers of interest in R.S. 2477 rights-of-way until it has formulated further guidance regarding the process for reviewing applications for such disclaimers provides a rational basis for BLM's exercise of discretion to deny a specific application for a recordable disclaimer of interest in a road claimed as an R.S. 2477 right-of-way.

APPEARANCES: Ruth E. Stringer, Esq., and Mitchell L. Norton, Esq., County Counsel, County of San Bernardino, San Bernardino, California, for appellant; Erica Niebauer, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

The County of San Bernardino (the County) has appealed from a March 26, 2010, decision of the Acting State Director, California State Office, Bureau of Land Management (BLM), rejecting the County's April 29, 2003, application for a recordable disclaimer of interest (RDI) for the 27-mile section of Camp Rock Road that crosses public land in the western half of San Bernardino County, California, based on a claim of title under R.S. 2477.¹ The County filed its application pursuant

¹ R.S. 2477 is formally known as the Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253; was codified as section 2477 of the 1875 *Revised Statutes*; and subsequently
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to section 315 of FLPMA, 43 U.S.C. § 1745 (2006), and the implementing regulations at 43 C.F.R. Subpart 1864, which authorize the issuance of an RDI when a record interest of the United States in the land has terminated by operation of law or is otherwise invalid. For the following reasons, we affirm BLM's decision.

FACTUAL AND LEGAL BACKGROUND

The County's appeal is based upon its claim that BLM erred in not granting its April 29, 2003, application for an RDI with respect to Camp Rock Road (or the Road), which, according to the County, qualifies as an R.S. 2477 road. The County stated that its RDI application was being filed pursuant to "[n]ewly adopted regulations" at 43 C.F.R. Subpart 1860, which "enables BLM to transfer title of lands that contain roads on which the County has an interest by allowing the County to obtain Recordable Disclaimers from BLM for Right[s]-of-Way sufficient to continue to maintain the road and any drainage structures." Administrative Record (AR) at 000321 (Recordable Disclaimer Application for Camp Rock Road). The County explained that "Camp Rock Road is an excellent example to pioneer the use of these federal regulations to obtain Recordable Disclaimers for the lands under and adjacent to the road." *Id.*

The County's RDI application included a memorandum from Ken A. Miller, the County's Director, Department of Public Works–Transportation, dated April 28, 2003, recommending that the Board of Supervisors of the County approve the RDI application, noting that the 43 C.F.R. Subpart 1860 regulations "establish[] a process for resolving title to roads on public lands upon which states and counties had assertion rights under [R.S. 2477]." AR at 000322. Miller indicated that "[t]hese new regulations resolve the issue of passing title to a road under a 'recordable disclaimer' which is in essence a quitclaim deed for the land surface occupied by the road." *Id.* He stated that "[p]ossessing formal title will assure that there is no question that the County is expending maintenance funds on roads that are wholly and explicitly owned by the County," and that once the disclaimer has issued, "BLM will not prescribe any terms[,] conditions[,] or maintenance that will be required to maintain a right-of-way once a recordable disclaimer is issued." *Id.*

The RDI application included a report documenting Camp Rock Road's history and significance to the County. The northern point of the Road begins in the Mojave Valley near the Daggett/Yermo Road/Interstate 40 intersection, and

¹ (...continued)

became 43 U.S.C. § 932 (1970). The statute was repealed by section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, 90 Stat. 2743, 2793, effective Oct. 21, 1976, but valid existing rights were preserved. 90 Stat. at 2786; *see* 43 U.S.C. § 1701 note (a) (2006).

meanders southeasterly to State Highway 18 in the Lucerne Valley. *Id.* at 000325. The Road crosses approximately 27 miles of public lands in Ts. 5-9 N., Rs. 1-3 E., San Bernardino Meridian. *Id.* at 000339. According to the RDI application, the Road serves as access to patented homesteads and mining claims, has appeared in every County Road Book since 1932, is primarily unpaved but regularly graded, and has been maintained by the County consistently since 1948. *Id.* at 000325.

In his decision, the Acting State Director stated that he was exercising his discretion to deny the County's application on the basis that "the Department and BLM are currently evaluating whether the RDI process is an appropriate mechanism for recognizing R.S. 2477 rights-of-way." AR at A000002. He explained that "[u]ntil the Department and BLM formulate their policy with respect to that process, the BLM has decided not to issue recordable disclaimers of interest with respect to such rights-of-way." *Id.*

The Board has issued a number of decisions applying the core standard of section 315 of FLPMA and the RDI regulations, *i.e.*, that the Secretary must determine that a record interest of the United States in the lands has terminated by operation of law or is otherwise invalid. *E.g.*, *State of Alaska*, 180 IBLA 243, 254 (2010), and cases cited. Identifying a consistently applied standard in cases involving R.S. 2477 issues is more problematic, but it suffices to say at this point that "although BLM lacks primary jurisdiction to make determinations on the validity of the rights-of-way granted under R.S. 2477, it may properly determine the validity of R.S. 2477 rights-of-way (ROWs) for its own purposes, as an aid to rendering administrative decisions regarding the public lands." *Charles W. Nolen*, 168 IBLA 352, 359 (2006) (citing *Southern Utah Wilderness Alliance v. Bureau of Land Management (SUWA v. BLM)*, 425 F.3d 735, 757 (10th Cir. 2005)). Granting an application for an RDI in an R.S. 2477 ROW presents a series of unique questions that the Department has attempted over several years to address, as discussed below.

In *SUWA v. BLM*, the U.S. Court of Appeals for the Tenth Circuit stated that a claim under R.S. 2477 "involves one of the more contentious land use issues in the West: the legal status of claims by local governments to rights of way for the construction of highways across lands managed by [BLM]." 425 F.3d at 740. R.S. 2477 provided as follows, in its entirety: "The right of way for the construction of highways over the public lands, not reserved for public uses, is granted." R.S. 2477 (2d ed. 1878). In effect for 110 years, until its repeal with the passage of FLPMA on October 21, 1976, R.S. 2477 "required no administrative formalities: no entry, no application, no license, no patent, and no deed on the federal side; no formal act of public acceptance on the part of the states or localities in whom the right was vested." 425 F.3d at 741. In explaining the impact of the repeal of R.S. 2477, the Tenth Circuit stated:

In 1976, however, Congress abandoned its prior approach to public lands and instituted a preference for retention of the lands in federal ownership, with an increased emphasis on conservation and preservation. See FLPMA, 43 U.S.C. § 1701 *et seq.* As part of that statutory sea change, Congress repealed R.S. 2477. There could be no new R.S. 2477 rights of way after 1976. But even as Congress repealed R.S. 2477, it specified that any “valid” R.S. 2477 rights of way “existing on the date of approval of this Act” (October 21, 1976) would continue in effect. Pub. L. No. 94-579 § 701(a), 90 Stat. 2743, 2786 (1976). The statute thus had the effect of “freezing” R.S. 2477 rights as they were in 1976. *Sierra Club v. Hodel*, 848 F.2d 1068, 1081 (10th Cir. 1988), *overruled on other grounds by Village of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970, 971 (10th Cir. 1992) (en banc).

425 F.3d at 741. The Tenth Circuit stated that “[t]he difficulty is in knowing what that means.” *Id.*

The Tenth Circuit made clear that BLM’s position for over 100 years had been that state courts are the proper forum for determining whether there is a public highway under R.S. 2477, and that “[u]ntil very recently, the BLM staunchly maintained that it lacked authority to make binding decisions on R.S. 2477 rights of way.” *Id.* at 754; *see also id.* at n.7. In June 1993, the Department completed its *Report to Congress on R.S. 2477: The History and Management of R.S. 2477 Rights-of-Way Claims on Federal and Other Lands* (June 1993) (*1993 DOI Report to Congress*), in which it stated that “[n]o formal process for either asserting or recognizing R.S. 2477 rights-of-way currently is provided in law, regulations, or DOI policy,” and that “[c]ourts must ultimately determine the validity of such claims.” 425 F.3d at 755 (quoting AR at A000045 (*1993 DOI Report to Congress* at 25)).²

² The earliest regulation on R.S. 2477 rights-of-way provided:

The grant [under R.S. 2477] becomes effective upon the construction or establishing of highways, in accordance with State laws, over public lands not reserved for public uses. No application should be filed under said R.S. 2477 as no action on the part of the Federal Government is necessary.

43 C.F.R. § 244.55 (1939). Subsequent versions of this regulation carried forward the same language. See 43 C.F.R. § 244.58(a) (1963); 43 C.F.R. § 2822.2-1 (1974).

We note that when the land burdened by the asserted R.S. 2477 ROW is owned by the Federal government, the Quiet Title Act, 28 U.S.C. § 2409a (2006), provides the only waiver of the Government’s sovereign immunity, so an action can be brought only in Federal court under that statute. See *Kane County v. Salazar*, 562 F.3d 1077, 1088 (10th Cir. 2009); *Public Lands for the People, Inc. v. U.S. Dep’t*

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On August 1, 1994, BLM sought to address the absence of a formal process for adjudicating R.S. 2477 claims by proposing comprehensive regulations intended “to clarify the meaning of [R.S. 2477] and provide a workable administrative process and standards for recognizing valid claims.” 59 Fed. Reg. 39216, 39219-27 (Aug. 1, 1994). In these proposed regulations, BLM not only provided a definition of road construction under R.S. 2477,³ but proposed, for the first time, an administrative procedure by which BLM would adjudicate the validity of R.S. 2477 claims. However, before the R.S. 2477 proposed rule was published as a final rule, Congress responded with an appropriations provision prohibiting the Department from issuing final rules governing R.S. 2477:

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 (43 U.S.C. [§] 932) shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act [Sept. 30, 1996].

1997 U.S. Department of the Interior and Related Agencies’ Appropriations Act, § 108, enacted by the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009-200 (1996) (AR at 000208).⁴ The General Accounting Office (GAO) has concluded that this Congressional prohibition, referred to as the

² (...continued)

of Agriculture, 733 F. Supp. 2d 1172, 1194-95 (E.D. Cal. 2010); *Friends of the Panamint Valley v. Kempthorne*, 499 F. Supp. 2d 1165, 1176 (E.D. Cal. 2007).

³ Road construction was defined as “an intentional physical act or series of intentional physical acts that were intended to, and that accomplished, preparation of a durable, observable, physical modification of land for use by highway traffic.” 59 Fed. Reg. at 39225.

⁴ Prior to prohibiting the Department from issuing regulations, Congress had forbidden the Department from using funds for “developing, promulgating, and thereafter implementing a rule concerning rights-of-way under section 2477 of the Revised Statutes.” General Provisions, Department of the Interior § 110, enacted by the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-177 (1996).

Section 108 moratorium or prohibition, has the status of permanent law.⁵ GAO, Opinion B-277719 at 1-5 (Aug. 20, 1997); *see SUWA v. BLM*, 425 F.3d at 756.

On February 22, 2002, BLM “propose[d] to amend its regulations pertaining to recordable disclaimers of interest in land.”⁶ 67 Fed. Reg. 8216 (Feb. 22, 2002). These amended regulations make no mention of R.S. 2477 claims. BLM explained that its amendments were intended to “[f]urther the purpose of section 315 of FLPMA . . . to remove clouds on title to lands or interests in lands by allowing any entity claiming title—not just present owners of record—to apply for a recordable disclaimer of interest in the absence of other governing law or regulation,” and “[e]liminate the application deadline in § 1864.1-3, as it applies to States,” thereby conforming the regulations to the Quiet Title Act, 28 U.S.C. § 2409a(g) (2006), which exempts States, in most instances, from the 12-year statute of limitations under that Act. 67 Fed. Reg. at 8217. BLM explained that “removing the phrase ‘present owner of record’ and replacing it with ‘any entity claiming title to lands,’ . . . would clarify that it is the interest in the lands, rather than record ownership, that determines whether an entity is eligible to apply for a disclaimer in interest,” and “would also broaden the class of potential applicants for disclaimers of interest, which could include, among others, a state, corporation, county, or a single individual.” *Id.* BLM further explained that “[a]s enacted in 1972, the Quiet Title Act subjects all parties including States to the 12-year limitation period,” that “[i]n 1986, Congress amended the Quiet Title Act to exempt States from this 12-year statute of limitations,” but that “BLM [had] not updated 43 CFR 1864.1-3(a), issued in 1984,

⁵ In Instruction Memorandum No. (IM) 2005-185 (July 14, 2005), the Deputy Director, BLM, stated that since the repeal of R.S. 2477 in 1976, BLM had issued over 1,000 R.S. 2477 roads through ROW grants under Title V of FLPMA, noting, however, that “these authorizations were made prior to any of the prohibitions established by Congress, and none have been made since.” AR at 000208.

⁶ On Sept. 6, 1984, BLM published final regulations (43 C.F.R. Subpart 1864) implementing the Secretary’s authority to issue RDIs under section 315 of FLPMA, 43 U.S.C. § 1745 (2006). Those regulations explained the objective of the recordable disclaimer, defined the terms used in Subpart 1864, restricted applicants for a disclaimer to “any present owner of record” (43 C.F.R. § 1864.1-1 (1984)), and described the application process, fee, and costs. Those regulations also imposed a filing deadline, requiring BLM to deny an application for a disclaimer if “[m]ore than 12 years have elapsed since the owner knew or should have known of the alleged claim attributed to the United States.” 43 C.F.R. § 1864.1-3(a)(1) (1984).

to reflect the 1986 change in the Quiet Title Act.” *Id.* BLM’s proposed amendment would conform the regulations to the Quiet Title Act.⁷

BLM published its final RDI regulations on January 6, 2003. *See* 68 Fed. Reg. 495. In the preamble to the final rules, BLM stated that “[a] significant number of comments asked about the relationship between the proposed rule and R.S. 2477.” *Id.* at 496. “A coalition of California conservation organizations expressed concern . . . that the FLPMA disclaimer-of-interest procedure was not intended to include R.S. 2477 claims within its scope and that BLM has no legal authority to employ the disclaimer provisions to process, acknowledge or determine the existence or extent of R.S. 2477 rights-of-way.” *Id.* BLM responded that “[t]he uncertainty resulting from unrecorded rights-of-way under R.S. 2477 has created clouds on title,” and that section 315 of FLPMA authorizes the Secretary to issue RDIs “in specified cases if the disclaimer will help remove a cloud on the title to lands or interests in lands and if the Secretary finds no Federal interest.” *Id.* BLM explained that “[r]ecordable disclaimers may be issued where applicants assert title previously created under now expired authorities. For example, *after adjudicating the claim*, BLM may issue a recordable disclaimer of interest to disclaim the United States’ interest in a highway under R.S. 2477.” *Id.* (emphasis added).

BLM addressed the concern expressed by a consortium of environmental groups that the

proposed rule would be illegal because [S]ection 108 of the Omnibus Interior Appropriations Act for Fiscal Year 1997 prohibits Federal agencies from placing into effect any final rule or regulation pertaining to the recognition, management or validity of a right-of-way pursuant to R.S. 2477 unless expressly authorized by an Act of Congress (110 Stat. 3009-200).

Id. BLM rejected the environmental groups’ concern, stating that Section 108 “only applies to ‘final rules or regulations’ relating to the ‘recognition, management, or validity of a right-of-way’ pursuant to R.S. 2477”; that its “final rule merely amends BLM’s existing regulations, which define the administrative process by which

⁷ We note that the amended regulation expands the definition of “state” to include “any governmental instrumentality within a state, including cities, counties, or other official local governmental entities.” 43 C.F.R. § 1864.0-5(h). Although Congress waived the limitation for states, the waiver does not appear to extend to cities and counties. *See Calhoun County, Tex. v. United States*, 132 F.3d 1100, 1103 (5th Cir. 1998); *County of Inyo v. Dep’t of the Interior*, 2008 WL 4468747 (E.D. Cal. Sept. 29, 2008); *Hat Ranch, Inc. v. Babbitt*, 932 F. Supp. 1, 2-3 (D.D.C. 1995), *aff’d*, *Hat Ranch, Inc. v. United States*, 102 F.3d 1272 (D.C. Cir. 1996) (Table).

an entity can apply for a recordable disclaimer of interest under section 315 of FLPMA”; and that “the [S]ection 108 moratorium does not apply to this final rule.” 68 Fed. Reg. at 497. BLM explained that “[i]f [S]ection 108 were interpreted to prevent BLM from promulgating a regulation relating to recordable disclaimers of interest, [S]ection 108 would, in essence, partially repeal sections 310 and 315 of FLPMA (43 U.S.C. [§§] 1740, 1745 [(2006)].” *Id.* BLM explained further:

Today’s rule on recordable disclaimers does not provide standards for recognizing[,] managing, or validating an R.S. 2477 right-of-way. Rather, BLM’s rule merely makes technical changes to the existing regulations under which an applicant may submit an application to remove a cloud on title to lands to which the United States asserts no ownership or interest. . . . These changes to the existing regulations do not expand the kinds of circumstances in which a disclaimer could be issued, expand or modify any rights created, or create any new rights under R.S. 2477. BLM may issue recordable disclaimers relating to valid R.S. 2477 rights-of-way under the existing 1984 regulations, and this capability will continue under today’s final rule.

Id. In examining the interplay between the final rule and R.S. 2477, BLM stated that “[e]ven if [it] were to issue a disclaimer of the United States’ interest in a valid right-of-way under R.S. 2477, the recognition of such right-of-way would not be the result of this notice-and-comment rulemaking but, rather, an informal agency adjudication resulting in a final decision.” *Id.* Further, BLM noted that “[t]he legislative history of [S]ection 108 expressly states that Congress ‘does not limit the ability of the Department to acknowledge or deny the validity of claims under RS 2477 or limit the right of grantees to litigate their claims in any court.’” *Id.* (quoting H.R. Rep. No. 104-625, at 58 (1996)). BLM concluded that its final rule was not subject to the Section 108 moratorium.

BLM did not revise the regulatory language itself to explicitly allow the disclaimer of interests in uncontested R.S. 2477 ROWs because, as stated in the rule’s preamble, the “existing regulations already allow[ed] applications for disclaimers for R.S. 2477 rights-of-way,” and therefore no amendment to explicitly allow such applications was necessary. 68 Fed. Reg. at 498. The amended rule would allow any entity claiming title, rather than only a present owner of record, to apply for an RDI. By eliminating the document of conveyance requirement (R.S. 2477 ROW grants required no documentation to transfer the Government’s interest to the ROW grantee), the revision to the RDI regulation made certain that R.S. 2477 grant holders could qualify for an RDI. *Compare* 43 C.F.R. § 1864.1-1(a) *with* 43 C.F.R. § 1865.1-1(a) (1985-2002). Moreover, the original RDI rules required applicants to file an application no more than 12 years from when the owner knew or

should have known that the United States owns the lands sought by the applicant. 43 C.F.R. § 1864.1-3(a) (1985-2002). The revised regulations removed the previous 12-year statute of limitations as it applies to “the state and any of its creations including any governmental instrumentality within a state, including cities, counties, or other official local governmental entities.” 43 C.F.R. § 1864.0-5(h). Before this change, many R.S. 2477 grant holders would have been time-barred from filing an RDI application.

In addition, the Department rejected a comment asserting that RDI procedures are not intended to apply to R.S. 2477 interests and that BLM has no legal authority to employ the disclaimer provisions to process, acknowledge, or determine the existence or extent of an R.S. 2477 ROW claim, stating:

FLPMA authorizes the Secretary of the Interior to issue recordable disclaimers of interest in lands in specified cases if the disclaimer will help remove a cloud on the title to lands or interests in lands and if the Secretary finds no Federal interest (43 U.S.C. 1745(a)). Recordable disclaimers may be issued where applicants assert title previously created under now expired authorities. For example, after adjudicating the claim, BLM may issue a recordable disclaimer of interest to disclaim the United States’ interest in a highway right-of-way under R.S. 2477.

68 Fed. Reg. at 496.

A few months after publication of the final rule amending the RDI regulations, on May 12, 2003, the County filed its RDI application.⁸ Before BLM processed the County’s application, however, controversy regarding the recently-amended RDI rules

⁸ By letter dated May 5, 2003, the California State Director informed the Director of BLM that the County planned, on May 12, 2003, to “ceremoniously hand” BLM its RDI application for Camp Rock Road as an R.S. 2477 road. AR at 000316. The State Director stated that the County had “specifically selected Camp Rock Road as a test case because it appears to meet all the requirements for an RS 2477 Road.” *Id.* He further explained:

Provided this application is as well documented as we have been led to expect, and in light of existing regulations, current DOI policy, and existing precedent, we believe we currently have adequate guidance necessary to process this case. It is our reading of the Secretary’s statements in the preamble to the amended regulations and in the attendant publicity that DOI fully intends to utilize the disclaimer process for resolving RS 2477 questions.

AR at 000316.

erupted both State- and nationwide. California's Resources Agency expressed to the Secretary that "use of the Department's 'disclaimer of interest' rule to allow highway claims under . . . R.S. 2477 will have significant and unacceptable impacts on Federally protected lands in California." AR at 000310. Members of Congress also relayed their concern to the Secretary that the new RDI provisions "could suddenly make vulnerable millions of acres of land, including Federal lands protected as wilderness, national parks, national wildlife refuges, and national monuments." *E.g.*, AR at 000277 (July 2, 2003, Letter to Secretary Gale Norton from Senator Joseph I. Lieberman, Committee on Government Affairs at 1).

Because the new rules implicitly required BLM to determine the validity of an R.S. 2477 ROW grant before deciding to grant or deny an RDI application based on an R.S. 2477 claim, members of Congress, led by Senator Jeff Bingaman, Ranking Minority Member, Committee on Energy and Natural Resources, queried the GAO as to whether the RDI regulations violated the Section 108 moratorium on promulgating rules regarding the recognition and validity of R.S. 2477 ROW grants. In response to Congress' inquiry, the GAO issued a report on February 6, 2004, declaring that the amended regulations were within the purview of section 315 of FLPMA, not R.S. 2477, and therefore did not conflict with Congress' Section 108 moratorium regarding R.S. 2477 validity determinations. AR at 000222 (GAO Opinion, "Recognition of R.S. 2477 Rights-of-Way under the Department of the Interior's FLPMA Disclaimer Rules and its Memorandum of Understanding with the State of Utah," B-300912, at 9-10 (Feb. 6, 2004)).

In its February 6, 2004, response to Senator Bingaman, the GAO stated that "although the 2003 Disclaimer Rule itself is clearly a 'final rule or regulation,' we do not believe it is a final rule or regulation 'pertaining to the recognition, management, or validity' of R.S. 2477 rights-of-way subject to section 108." AR at 000217 (GAO Letter at 4).⁹ The GAO recognized that "[t]he preamble to the 2003 Disclaimer Rule

⁹ The GAO concluded, however, that the Utah Memorandum of Understanding (Utah MOU) constitutes a final rule or regulation subject to the Section 108 prohibition:

There is little question that the MOU pertains to the "recognition, management, or validity" of R.S. 2477 rights-of-way; the purpose of the MOU was to resolve years of conflict over these precise issues. We also believe the MOU is an [Administrative Procedure Act (APA), 5 U.S.C. §§ 551-706 (2006)], substantive rule and thus a "final rule or regulation" under Section 108. It both satisfies the APA's definition of "rule"—"an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy," *see* 5 U.S.C. § 551(4)—and meets the key test by which courts

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does discuss the recognition and validity of R.S. 2477 rights-of-way,” but concluded that “the preamble does not qualify as a substantive rule under the Administrative Procedure Act (APA), which we believe was Congress’ intention in using the term ‘final rule or regulation’ in Section 108.” *Id.* Further, stated the GAO, “because the 2003 Disclaimer Rule preamble does not prescribe procedural or substantive standards by which R.S. 2477 rights-of-way will be evaluated, it does not ‘pertain’ to R.S. 2477 rights-of-way within the meaning of Section 108.” *Id.*

GAO offered the opinion that “[a]part from Section 108’s prohibition, on balance, . . . FLPMA § 315 authorizes DOI to disclaim interests in R.S. 2477 rights-of-way.” *Id.* The GAO’s discussion of the nature of the interest in an R.S. 2477 ROW that could be disclaimed under the RDI regulations is pertinent to our conclusion that BLM properly denied the County’s RDI application, at this time, and is set forth below:

A number of key terms in FLPMA § 315 are ambiguous—notably, “lands,” “interests in lands,” and “cloud on title”—and in such instances, we afford considerable weight to the interpretation of the agency charged with implementing the statute so long as the interpretation is reasonable. We find the Department’s interpretation of these terms to be reasonable. The Department reads “lands” to include a partial interest in lands, consistent with its longstanding definition of that term in its FLPMA § 315 disclaimer regulations.

⁹ (...continued)

have defined substantive rules—it has binding effect on the agency and other parties and represents a change in law and policy.

AR at 000217 (GAO, B-300912, at 4).

The terms of the Utah MOU have no direct bearing upon our consideration of the County’s appeal herein. However, the Utah MOU identified specific standards for recognizing R.S. 2477 ROWs in Utah, and defined the process to be implemented by the Department in making such determinations. The process to be used was the section 315 RDI process for “eligible roads.” Utah MOU at 2-3. In June 2003, the Department issued additional guidance (Utah MOU Guidance) regarding how applications would be processed under the Utah MOU. The State of Utah or any Utah county would request initiation of the process and reimburse BLM for the processing costs; at least 90 days before making a final decision on an RDI application respecting an R.S. 2477 ROW, BLM would publish a notice in the *Federal Register* summarizing the application and noting the opportunity for public comment (*see* 43 C.F.R. § 1864.2); and adverse decisions would be appealable to this Board pursuant to 43 C.F.R. Part 4 (*see* 43 C.F.R. § 1864.4). For further discussion of the Utah MOU, *see* AR at 000228 through 000234 (GAO, B-300912, at 11-16).

Under this interpretation, a particular R.S. 2477 right-of-way—which is an “interest in lands”—suffers a “cloud on title” when there is uncertainty about whether the right-of-way has in fact been established, or whether instead the United States has retained its right to exclusive use of the surface property at issue. The remaining requirement of FLPMA § 315—that a “record interest of the United States in lands has terminated by operation of law”—also is satisfied. When an easement such as an R.S. 2477 right-of-way is granted, it creates two separate property interests: a servient estate (here, owned by the United States) and a dominant estate (here, owned by the holder of the R.S. 2477 right-of-way). At the same time, a record interest of the United States terminates because its interest in exclusive use of the land over which the right-of-way now runs terminates.

AR at 000218 (GAO Letter, B-300912, at 5).

Regardless of the controversy, BLM moved forward with implementing its amended RDI regulations. On July 14, 2005, BLM’s Deputy Director issued IM No. 2005-185, which outlined “the procedures to be used for processing disclaimer of interest applications filed to acknowledge valid R.S. 2477 rights-of-way.” See AR at 000207. The IM acknowledged that historically, “R.S. 2477 rights-of-way were not recorded on the public land records or in official county records because R.S. 2477 did not require any formal approval from the Secretary of the Interior or any other Federal government official,” and that “[t]he uncertainty resulting from unrecorded rights-of-way under R.S. 2477 has created clouds on title.” *Id.* The IM made clear that, under section 315 of FLPMA, “after adjudicating [an R.S. 2477] claim, BLM may issue a recordable disclaimer of interest to disclaim the United States’ interest in a highway right-of-way under R.S. 2477.” AR at 000209. The IM stated, *inter alia*, that the “changes to the existing regulations do not expand the kinds of circumstances in which a disclaimer could be issued, expand or modify any rights created, or create any new rights under R.S. 2477,” and that “BLM may issue recordable disclaimers relating to valid R.S. 2477 rights-of-way under the existing 1984 regulations, and this capability will continue under this final rule.” *Id.* at 000209-10. The IM noted that “seven disclaimer applications . . . have been filed under the authority of section 315 of FLPMA to acknowledge R.S. 2477 roads,” and that “[t]hese applications are currently being processed.” *Id.*

Later in 2005, the Tenth Circuit issued its decision in *SUWA v. BLM*, setting out in detail the history of R.S. 2477 and defining the scope of BLM’s authority to make determinations on R.S. 2477 claims. The Tenth Circuit stated:

[N]othing in the terms of R.S. 2477 gives the BLM authority to make binding determinations on the validity of rights of way

granted thereunder, and we decline to infer such authority from silence when the statute creates no executive role for the BLM. This decision is reinforced by the long history of practice under the statute, during which the BLM has consistently disclaimed authority to make binding decisions on R.S. 2477 rights of way. Indeed, there have been 139 years of practice under the statute—110 years while the statute was in force, and 29 years since its repeal—and the BLM has not pointed to a single case in which a court has deferred to a binding determination by the BLM on an R.S. 2477 right of way. . . .

This does not mean that the BLM is forbidden from determining the validity of R.S. 2477 rights of way for its own purposes. The BLM has always had this authority. It exercises this authority in what it calls “administrative determinations.” In its 1993 Report to Congress, the Department of the Interior explained that the BLM had developed “procedures for administratively recognizing and . . . record[ing] this information on the land status records.” *1993 D.O.I. Report to Congress*, at 25. These procedures “are not intended to be binding, or a final agency action.” *Id.* Rather, “they are recognitions of ‘claims’ and are useful only for limited purposes,” namely, for the agency’s internal “land-use planning purposes.” *Id.* at 25-26. Nonetheless, they may reflect the agency’s expertise and fact-finding capability, and as such will be of use to the court. [Footnote omitted.]

425 F.3d at 757 (citing *Southern Utah Wilderness Alliance*, 111 IBLA 207, 214 (1989); *Leo Titus, Sr.*, 89 IBLA 323, 337-38, 92 I.D. 578, 587 (1985); *Nick DiRe*, 55 IBLA 151, 154 (1981); *Homer D. Meeds*, 26 IBLA 281, 298-99 (1976)).¹⁰ The Court concluded that “federal law governs the interpretation of R.S. 2477, but . . . in determining what is required for acceptance of a right of way under the statute, federal law ‘borrows’ from long-established principles of state law, to the extent that state law provides convenient and appropriate principles for effectuating congressional intent.” 425 F.3d at 768.

¹⁰ In *Charles W. Nolen*, 168 IBLA at 359, the Board stated, in discussing the effect of *SUWA v. BLM*:

[T]he need to consider whether lands are within the purview of R.S. 2477 arises when BLM has an “administrative concern” that requires inquiry into the status of a claimed R.S. 2477 right-of-way. *Southern Utah Wilderness Alliance*, 111 IBLA 207, 213-214 (1989). Review is appropriate “in cases where a determination would be helpful in the administration of the public lands.”

(Quoting *Leo Titus, Sr.*, 89 IBLA at 338, 92 I.D. at 587.

On March 22, 2006, then Secretary Norton issued what is referred to as the “Norton Memo” on R.S. 2477, explaining that the decision in *SUWA v. BLM* “necessitat[ed] that the Department of the Interior revisit its existing policies interpreting and implementing the statute commonly known as ‘R.S. 2477.’” AR at 000185 (Norton Memo at 1). She stated that *SUWA v. BLM* applied nationwide, and that the interim Departmental policy on R.S. 2477, including the 1997 Babbitt Policy,¹¹ would be revised. She directed all Departmental bureaus to revise any existing policies on R.S. 2477 to make them consistent with the Tenth Circuit opinion, and provided guidelines to assist the bureaus in this undertaking. Those guidelines referred to “a number of options available for addressing claimed rights of way that may be preferable to administrative R.S. 2477 determinations,” and stated that “Title V of FLPMA or other right of way authorities, recordable disclaimers, and the Quiet Title Act each may offer more certainty to bureaus and to claimants.” AR at 000190 (Norton Memo, Attachment 1, at 6). With regard to disclaimers, the guidelines provided:

¹¹ In 1988, Secretary Donald Hodel issued the so-called Hodel Policy, stating that, although R.S. 2477 did not authorize the Department to “adjudicate” applications for R.S. 2477 rights-of-way, it could “administratively recogniz[e]” and record them on Departmental lands. The Hodel Policy directed Departmental bureaus to develop internal procedures for issuing such administrative recognitions and laid out the criteria by which recognitions could be made. Memorandum from the Acting Assistant Secretary for Fish and Wildlife and Parks and the Assistant Secretary for Land and Minerals Management to the Secretary of the Interior, approved by Secretary Hodel, “Departmental Policy on Section 8 of the Act of July 26, 1866, Revised Statute 2477 (Repealed), Grant of Right-of-Way for Public Highways (RS2477)” (Dec. 9, 1988); see AR at 000221 (GAO, Opinion B-300912, at 3). In response to the Section 108 prohibition, Secretary Bruce Babbitt issued the so-called Babbitt Policy in 1997.

The Babbitt Policy revoked the Hodel Policy, stating that until any R.S. 2477 rules become effective, and as an alternative to litigation in Federal court, the Department will continue to “process” and “give its views” on “assertions” of R.S. 2477 rights-of-way, but only in cases where there was a “demonstrated, compelling, and immediate need” to do so. In such cases, the Department would issue “determinations” that “recognize” those ROWs meeting the R.S. 2477 statutory criteria. Memorandum from the Secretary of the Interior to the Assistant Secretaries for Fish and Wildlife and Parks, Land and Minerals Management, and Water and Science, “Interim Departmental Policy on Revised 2477 Right-of-Way for Public Highways; Revocation of December 7, 1988 Policy” (Jan. 22, 1997). The Department had previously articulated these aspects of the Babbitt Policy in its *1993 DOI Report to Congress* at 5 and App. II, Ex. A. See AR at 000222 (GAO, Opinion B-300912, at 4).

Recordable disclaimers, which are authorized by FLPMA § 315, 43 U.S.C. § 1745, and discussed in detail in 43 CFR § 1864, likewise remain available to settle questions regarding the United States' interest in rights of way. Such disclaimers have the same effect as a quitclaim deed, estopping the United States from asserting a claim to the interest that is disclaimed.

As the *SUWA v. BLM* court noted, ultimately deciding who holds legal title to an interest in real property, including an R.S. 2477 right of way, “is a judicial, not an executive, function.” 425 F.3d at 752. Thus, if a claimant seeks a definitive, binding determination of its R.S. 2477 rights, it must file a claim under the Quiet Title Act, 28 U.S.C. § 2409a.

Id.

In a letter dated April 17, 2006, to Acting Secretary Lynn Scarlett, a number of United States Senators, including then Senator Ken Salazar, expressed “deep concern” about the “recently proposed R.S. 2477 Policy,” as reflected in the Norton Memo, which they viewed as “flawed for several reasons.” AR at 000183. They disagreed with the conclusion that *SUWA v. BLM* required the new policy, “or that, in any event, the court’s decision should be applied on a national level.” *Id.* They stated that “the decision in no way requires a wide-reaching new policy for sensitive lands (such as National Parks),” or “necessarily app[lies] . . . outside the six States in which it is binding.” *Id.* They referred to the Department’s policy as “ill-advised.” *Id.*

By letter dated May 3, 2006, Acting Secretary Scarlett responded to the Senators’ letter, explaining that *SUWA v. BLM* required the Department to “revisit existing policies interpreting and implementing R.S. 2477,” and that “[t]he policy was neither designed [n]or intended to have the effect stated in [the Senators’] letter and will not have such effect.” AR at 000180. She stated:

We have also concluded that the *SUWA v. BLM* decision provides sound legal guidance on the resolution of R.S. 2477 road disputes between the federal government and counties. Although it is a Tenth Circuit decision, its analysis and holding are comprehensive and persuasive, and do not appear to conflict with any other circuit’s decisions. For this reason, the Department is applying its principles nationwide, bearing in mind, of course, that the Tenth Circuit has ruled that state law, in general, must be followed to assess the validity and scope of R.S. 2477 claims, and that the exact rules that will be applied will therefore vary from state to state.

....

The *SUWA v. BLM* decision clarifies that the Department lacks authority to make binding determinations of the validity of R.S. 2477 ownership claims. The Tenth Circuit confirmed, however, that the Department may make nonbinding ownership determinations for its own land management purposes. As made clear throughout this response, if and when such administrative determinations are made, they will be done in accordance with law and only after the public is given an opportunity to comment on the evidence on which the determinations are based.

AR at 000181.¹²

On May 26, 2006, the Director, BLM, issued IM No. 2006-159 for purposes of outlining BLM's process for making "informal, non-binding validity determinations (NBD[s])" regarding the validity of a claimed R.S. 2477 ROW. AR at 000143 (IM No. 2006-159 at 1). The IM stated that BLM State or Field Offices were authorized to make NBDs for claimed R.S. 2477 ROWs for their "own land use planning and management purposes," applying standards expressed in the Norton Memo and in accordance with state law. AR at 000144. The IM made clear that "NBDs are useful only for planning purposes and do not create any binding legal rights," and that "[i]f the NBD is undertaken in response to a proposal by a county or other entity, the claimant has the burden of bringing forth appropriate evidence that the right-of-way may exist." *Id.* This IM expired by its terms on September 30, 2006.

The County, whose application for an RDI for Camp Rock Road had been placed on hold, asked BLM to reinitiate processing of the application. AR at 000178 (Letter from the California State Director, BLM, to the County, dated Jan. 11, 2006). BLM agreed, informing the County that it had "carefully reviewed [the County's] application and believe[d] the application [was] adequate to warrant the initiation of processing . . . , if that is still the County's desire." *Id.* The agency informed the County that the next step in the process was to publish a public notice of the application in the *Federal Register*. On February 9, 2007, the State Director finalized

¹² On July 29, 2010, Secretary Salazar issued a memorandum clarifying that while the Mar. 22, 2006, Norton Memo is not binding on the Department, it has the authority to make all appropriate arguments under applicable law to defend the United States' interests in R.S. 2477 claims litigation. Notably, the Secretary did not revoke the policy stated in the Norton Memo, and as explained in Acting Secretary Scarlett's letter, the Tenth Circuit's decision in *SUWA v. BLM* was to be given nationwide effect. See BLM's Notification of Recent BLM/Departmental Communications RE: R.S. 2477, Attach. 1; see also *Greg L. Watkins*, 179 IBLA 102, 108 (2010) (referring to the Norton Memo).

and sent for review to BLM's Headquarters in Washington, D.C., a notice titled "CACA 45327 Notice of Application for Recordable Disclaimer of Interest in Public Highway Right-of-Way Established Pursuant to Revised Statute 2477 (43 U.S.C. § 932, repealed October 21, 1976); Camp Rock Road in San Bernardino County, California." AR at 000092-109. The proposed public notice languished in Washington D.C. for two years.¹³

On February 20, 2009, the Acting Director, BLM, issued a memorandum to all BLM State Directors, stating:

Pending further review and direction from the Secretary, the Bureau of Land Management has been directed not to process or review any claims under RS 2477, including the use of the disclaimer rule.

This interim step, which is effective immediately, is designed to preserve the status quo and is not a final policy decision on RS 2477 Claims.

AR at 000018.

On November 16, 2009, the Acting Director, BLM, issued IM No. 2010-016 clarifying the scope of the Acting Director's February 20, 2009, memorandum pertaining to R.S. 2477 claims. The IM clarified that the Acting Director's memorandum did not affect BLM's ability to authorize ROWs under Title V of FLPMA or any NBD made before February 20, 2009, and does not prohibit the use of RDIs for "purposes *not pertaining* to R.S. 2477." AR at A000010 (IM No. 2010-016 at 1) (emphasis added). The IM stated that "BLM's issuance of an RDI is authorized under section 315 of FLPMA and the regulations at 43 C.F.R. Subpart 1864," and that the direction "to temporarily suspend work on applications for RDI's based on assertions of valid R.S. 2477 rights-of-way is consistent with Section 315." *Id.* at A000011 (IM No. 2010-016 at 2).

It was with this lengthy background and in this context that the Deputy State Director issued his March 26, 2010, decision denying the County's RDI application. He stated that "RDIs are a discretionary mechanism available to BLM" under section 315 of FLPMA and the implementing regulations at 43 CFR Subpart 1864, "to remove a cloud on title to lands attributable to the United States in certain

¹³ Having waited more than 5 years for a decision, on Jan. 14, 2009, the County filed a Writ of Mandate in Federal court against the Department seeking to compel BLM to process its RDI application. The suit was dismissed as moot on May 4, 2010, after the State Director issued the decision at issue in this case. *See County of San Bernardino v. U.S.*, No. 5:09-cv-0082-VAP-RC (C.D. Cal, filed Jan. 14, 2009).

limited circumstances.” AR at A000001 (Decision at 1). He explained that “[t]he recognition of R.S. 2477 claims generally, and more specifically, the availability and appropriateness of the RDI as a mechanism to recognize R.S. 2477 rights-of-way, has a complex and controversial history that is highlighted by three relatively recent events.” *Id.* First, he referred to the Section 108 moratorium with regard to any final rule or regulation “pertaining to the recognition, management or validity” of R.S. 2477 ROWs. Second, he offered the following characterization of the RDI regulations adopted on January 6, 2003, as they relate to R.S. 2477 ROWs:

The regulations make no mention of R.S. 2477. Although it is true that the *preamble* to the rulemaking amending the regulations indicates that the process *may* be appropriate to recognize R.S. 2477 claims, those statements do not mean that BLM *must* exercise its discretionary RDI authority in the context of R.S. 2477. In fact, the Department’s historic practice has been to resolve R.S. 2477 claims by other means.

Id. at A000002 (Decision at 2) (citing *1993 DOI Report to Congress*). Also, he asserted that “the potentially available process described in the 2003 preamble is recognized to have been novel, *see February 6, 2004 GAO Response to Senator Bingaman . . .*, and thus far BLM has never exercised its discretionary RDI authority to recognize an R.S. 2477 right-of-way.” AR at A000002 (Decision at 2). “The 2003 preamble must also be read in light of Section 108,” he stated. *Id.* Third, he referred to the *SUWA v. BLM* decision, in which the “Tenth Circuit held, among other things, that the BLM was without authority to make binding determinations on the validity of R.S. 2477 claims; instead, it has the authority only to make non-binding determinations for its own administrative purposes.” *Id.* He explained that “[a]s a result of this complex history, including particularly Section 108 and the *SUWA* decision, BLM and the Department are evaluating the recognition of R.S. 2477 claims generally, including the appropriateness of using the RDI process to resolve R.S. 2477 claims.” *Id.* He concluded:

Therefore, because the decision whether to issue an RDI is a matter of discretion and the Department and BLM are currently evaluating whether the RDI process is an appropriate mechanism for recognizing R.S. 2477 rights-of-way, I am exercising my discretion to deny your application. Until the Department and BLM formulate their policy with respect to that process, the BLM has decided not to issue recordable disclaimers of interest with respect to such rights-of-way. However, . . . we are still able to process applications for FLPMA Title V rights-of-way on asserted R.S. 2477 claims upon submission of an application in accordance with 43 CFR part 2800.

Id.

ARGUMENTS OF THE PARTIES

The County contends on appeal that BLM's decision should have been "based on a consideration of the relevant factors," *i.e.*, "the County's maintenance activities, the road's classification as a highway, and the date that the road was mechanically constructed." Statement of Reasons (SOR) at 3. The County argues that it "included extensive documentation of these factors in its application, including historical information regarding maintenance of the road, geographical descriptions, photographs, and other supporting documents and the BLM has never asserted that the application was deficient in any way." *Id.* The County questions BLM's reliance upon the February 20, 2009, memorandum, directing BLM not to utilize the RDI process, as justification for its failure to act on the County's application, which was submitted 6 years earlier. The County argues that "[t]he use of the word 'may' in the 2003 preamble cited by BLM does not authorize BLM to entirely circumvent the RDI regulations," and that "[t]he discretionary component of the RDI regulations is the agency's ability to analyze the merits of an RDI application and deny or approve the application based on that analysis." *Id.* at 4. The County emphasizes that "BLM has never acted to have the disclaimer regulations invalidated or repealed and those regulations exist on the books today," and that "BLM cannot simply abrogate its responsibilities in the cavalier fashion embodied in its denial." *Id.*

In response to the County's SOR, BLM claims that the Department has "discretion to decide against using the RDI process for particular types of claims, including those involving R.S. 2477," with the only "constraint [being] that BLM must exercise its discretion rationally." Answer at 9 (citing *Terry Kayser*, 136 IBLA 148 (1996); *Red Rock Hounds, Inc.*, 123 IBLA 314 (1992); *Four Corners Expeditions*, 104 IBLA 122 (1988)). BLM emphasizes that its authority to issue RDIs is discretionary under section 315 of FLPMA, 43 U.S.C. § 1745 (2006), which provides that "the Secretary is authorized to issue a document of disclaimer of interest or interests," and under 43 C.F.R. § 1864.0-1, which provides that "[t]he Secretary of the Interior has been granted discretionary authority by section 315 of [FLPMA] to issue recordable disclaimers of interests in lands." In BLM's view, "even if the requirements of the statute are met (*i.e.*, the disclaimer will help remove a cloud on title, etc.) the regulation still provides that BLM *may* issue an RDI." Answer at 10. Had BLM "intended through its regulations to require issuance of an RDI if the requirements were met[,] it could have done so simply by stating 'shall' instead of 'may.'" *Id.* According to BLM, "[i]t follows that BLM and the Department can decide as a matter of policy that some types of claims are not appropriate for the RDI process (*i.e.*, they can refuse to issue an RDI even if the statutory prerequisites are satisfied)." *Id.* (citing *Phillips Petroleum Co.*, 117 IBLA 255 (1991)).

BLM argues that it is well within its discretion to decide, as a matter of updated, unpublished interpretive policy, against using the RDI process for particular

types of claims, including those involving alleged R.S. 2477 ROW grants, because the RDI laws, section 315 of FLPMA and 43 C.F.R. Subpart 1864, “do not even mention R.S. 2477.” Answer at 11. Thus, BLM’s change in policy creates no change to the existing regulatory program because the law imposes no binding obligation on BLM to accept or adjudicate RDI applications relating to R.S. 2477 claims. The law’s silence on what types of claims are appropriate for the RDI process allows BLM to “rely on its discretion to deny [RDI] applications based on determinations of policy.” *Id.* at 20. And, while BLM acknowledges that the preamble to the revised RDI regulation discusses the filing and adjudication of R.S. 2477 claims, it agrees with GAO that the preamble is simply an interpretation of the RDI process. Answer at 4-5, 11, 17-18. Current agency policy, BLM argues, *i.e.*, to refuse to adjudicate R.S. 2477 claims in any form, is not inconsistent with the regulation’s language and therefore lawfully prescribes the outcome of this case. *Id.* at 15. BLM argues that it has presented a rational basis for denying the County’s RDI application, *i.e.*, the Department has decided as a matter of policy, at least temporarily, that R.S. 2477 claims are not appropriate for the RDI process.

BLM disagrees with the County’s argument that BLM should have considered the following relevant factors in reaching its decision to deny its RDI request: the extent of the County’s maintenance activities, the road’s classification as a highway under State law, and the date the road was mechanically constructed. *See* SOR at 3. BLM’s analysis, set forth below, appears to us to reflect an accurate understanding of the troublesome interplay between BLM’s authority to reach an administrative determination as to Camp Rock Road’s status as an R.S. 2477 road and its separate authority to render RDIs in appropriate circumstances:

The factors identified by the County are some of the appropriate factors to consider in the analysis of an R.S. 2477 assertion. Administrative Record (“AR”) pp. 46-47. If the BLM needed to analyze these factors in order to make an administrative determination for its management purposes as to the non-binding validity of an asserted R.S. 2477 claim, it certainly would take these factors into consideration. However, the BLM does not need to reach an administrative determination on the County’s R.S. 2477 claim. The BLM has not changed and does not intend to change the status quo management of the claimed land in any manner that might require the BLM to consider the County’s asserted R.S. 2477 claim. The sole expressed need for BLM to undertake an analysis of the R.S. 2477 claim is due to the filing of the RDI application by the County. But the County’s need for an R.S. 2477 determination does not create a need for the same with the BLM. Unless and until the BLM makes a determination that it needs to

analyze, and administratively reach a decision on an expressed R.S. 2477 [claim], there exists no reason for it to analyze the claims.

Answer at 12.

BLM argues correctly that the County's RDI application was deficient in that the factors presented by the County "are not the correct factors to present to support an application for an RDI." *Id.* at 13. The factors offered by the County "support an R.S. 2477 assertion," but "do not appear to satisfy the factors needed to support its application for an RDI." *Id.* BLM concludes that "it is impossible to conclude that BLM was arbitrary and capricious in its denial based on the factors presented by Appellant." *Id.*

BLM states that it was directed to wait until the Department provides further guidance on the use of RDIs based on R.S. 2477 assertions, and that the status quo is preserved while the Department and BLM "evaluat[e] the appropriateness of the use of an RDI to recognize an R.S. 2477 claim." *Id.* at 14. BLM asserts that the Acting State Director "did not have to reach the merits of analysis under the RDI regulations because his ability to do so had been suspended by the Department, as expressed by the BLM Director," and that "[t]his policy framework coupled with the fact that the regulations themselves do not specifically authorize or prohibit use of an RDI upon R.S. 2477 grounds, supports the action of the BLM California State Director." *Id.* at 15. BLM states that "the Administration has not yet expressed its formal position on whether RDIs based on R.S. 2477 assertions are to be allowed." *Id.* BLM argues that this "policy framework" provides the necessary rational basis for the Acting State Director's decision to deny the County's RDI application. Further, in BLM's view, "the legitimacy of a conservative approach with respect to RDIs is highlighted by the nature of an RDI as a disclaimer of a property interest of the United States." *Id.* at 16. BLM concludes that "[a] cautious approach, particularly when a statute as controversial as R.S. 2477 is at issue, is a legitimate and rational approach to employ." *Id.*

DISCUSSION

[1] The Secretary of the Interior has been granted the discretionary authority by section 315 of FLPMA, 43 U.S.C. § 1745 (2006), to issue an RDI "in any lands in any form suitable for recordation, where the disclaimer will help remove a cloud on the title of such lands and where he determines (1) a record interest of the United States in lands has terminated by operation of law or is otherwise invalid." The objective of an RDI is to

eliminate the necessity for court action or private legislation in those instances where the United States asserts no ownership or record

interest, based upon a determination of the Secretary of the Interior that there is a cloud of title to the lands, attributable to the United States, and that: (1) A record interest of the United States in lands has terminated by operation of law or is otherwise invalid.

43 C.F.R. § 1864.0-2(a); *see also* 43 C.F.R. § 1864.0-1. A disclaimer has the same effect on title “as a quitclaim deed in that it operates to estop the United States from asserting a claim to an interest in or the ownership of lands that are being disclaimed.” 43 C.F.R. § 1864.0-2(b). A disclaimer “does not grant, convey, transfer, remise, quitclaim, release or renounce any title or interest in lands” *Id.*; *see State of Alaska*, 180 IBLA at 254.

[2] In making a decision in the exercise of its discretionary authority, BLM must provide a rational basis for its decision and support it by facts of record demonstrating that the action is not arbitrary, capricious, or an abuse of discretion. *E.g.*, *Mark Patrick Heath*, 175 IBLA 167, 176 (2008); *Wiley F. & L’Marie Beaux*, 171 IBLA 58, 66 (2007); *Larry Amos d/b/a Winterhawk Outfitters, Inc.*, 163 IBLA 181, 188 (2004). As this Board has often stated, to successfully challenge a discretionary decision,

[t]he burden is upon an appellant to demonstrate, by a preponderance of the evidence, that BLM committed a material error in its factual analysis or that the decision generally is not supported by a record showing that BLM gave due consideration to all relevant factors and acted on the basis of a rational connection between the facts found and the choice made.

International Sand & Gravel Corp., 153 IBLA 293, 299 (2000); *Utah Trail Machine Association*, 147 IBLA 142, 144 (1999).

Wiley F. & L’Marie Beaux, 171 IBLA at 66. Therefore, the question before us is whether the County has, by a preponderance of the evidence, shown error in BLM’s analysis, or the lack of a rational connection between the facts, applicable regulatory criteria, and the choice made. Where the basis for the decision is clear from the record, this Board will not substitute its judgment for that of the BLM official exercising his or her discretion. *Mark Patrick Heath*, 175 IBLA at 176; *Judy K. Stewart d.b.a. Western Wilderness Outdoor Adventure*, 153 IBLA 245, 252 (2000), and cases cited.

[3] We have reviewed the GAO Opinion responding to Senator Bingaman’s inquiry regarding the validity of the new RDI regulations if applied to issue disclaimers in ROWs claimed under R.S. 2477. A closer look at GAO’s analysis

reveals that the interplay of section 315 of FLPMA and R.S. 2477 raises many unanswered questions regarding the efficacy of utilizing the RDI regulations in resolving R.S. 2477 claims. In its Opinion, GAO summarized the Department's position, as set forth in the Department's response to GAO, that the new section 315 regulations could be applied to disclaim an interest in an R.S. 2477 ROW, as follows:

First, the Department asserts that disclaimer by the United States "will help remove a cloud on the title" of an R.S. 2477 right-of-way. Congress did not elaborate on the meaning of the phrase "cloud on the title" either in FLPMA § 315 or its legislative history. Under real property law, a "cloud on title" generally refers to an outstanding claim or encumbrance attached to real property that, if valid, would affect or impair the title of the owner of the property. In this case, the Department posits, the "cloud" on title to a particular R.S. 2477 right-of-way results from the uncertainty surrounding whether it was established prior to the repeal of R.S. 2477 in 1976. DOI Response to GAO at 7; 68 Fed. Reg. at 496. As discussed above, R.S. 2477 was self-executing, meaning that no government approvals were necessary and typically no recording was made in public land records when an R.S. 2477 right-of-way was perfected by fulfillment of the statutory elements—"construction" of a "highway" over non-reserved public lands. If an R.S. 2477 right-of-way was not established over public lands, then the U.S. retained its 100 percent fee simple title in the lands—including interests in using and transferring the lands, interests in excluding others from trespassing on the lands, any mineral rights in the lands, and all other property interests. On the other hand, if an R.S. 2477 right-of-way was established, then one of the United States' property interests—the right to exclusive use of the surface property covered by the right-of-way—was terminated by operation of law or became "invalid." The lack of certainty about which of these circumstances exists at a given site can create a cloud that disclaimer of the U.S. interest will "help remove." Although as DOI's FLPMA § 315 regulations make clear, a disclaimer does not literally "grant, convey, transfer, remise, quitclaim, release or renounce any title or interest in lands," it has the effect of a quitclaim deed in the sense that it acts as an estoppel against the United States asserting a competing claim to the property interest being disclaimed. *See* 43 C.F.R. § 1864.0-2(b). Thus issuance of a disclaimer for an R.S. 2477 right-of-way means the United States would no longer assert a competing claim to the right-of-way, removing a "cloud" on its "title."

Second, the Department asserts that the requirement for "a record interest of the United States in lands [to have] terminated by operation

of law or [become] otherwise invalid” is satisfied if the conditions of R.S. 2477 were satisfied—that is, if, at some time between 1866 and 1976, there was “construction” of a “highway” over non-reserved public lands. At this point, in the Department’s view, the complete fee simple ownership of the United States in the land was altered to that of a holder of the servient estate. DOI Response to GAO at 10. In property law parlance, the land became “burdened” by the right-of-way or easement and the owner of the land—the United States—was required to abstain from acts that impermissibly interfered with or were inconsistent with use of the easement. See *United States v. Garfield County*, 122 F. Supp. 2d 1201, 1243 (D. Utah 2000). Thus the unburdened fee interest of the U.S. was terminated or invalidated by creation of the R.S. 2477 right-of-way. See *Estes Park Toll-Road Co. v. Edwards*, 32 P. 546 (1893) (“After entry and appropriation of the right of way granted, and the proper designation of it, the way so appropriated ceased to be a portion of the public domain, was withdrawn from it.”).

AR at 000235-236 (GAO Opinion, B-300912, at 17-18).

GAO agreed with the Department’s reasoning and rejected the opposing view that “the holder of an R.S. 2477 right-of-way does not have technical title to the right-of-way, but only a usufruct right in it—the right to use property owned by another—and therefore FLPMA § 315 cannot be said to remove a cloud on it.” AR at 000236 (GAO Opinion, B-300912, at 18). GAO stated that “‘title’ is a term often used synonymously with various types of ownership,” and that “disclaimer of U.S. interests in an R.S. 2477 right-of-way would remove a cloud on its ‘title’ for purposes of FLPMA § 315.” *Id.* (citing DOI Response to GAO at 8; *United States v. Garfield County*, 122 F. Supp. 2d at 1241-42 (discussing the county’s ownership of an R.S. 2477 ROW while clarifying that R.S. 2477 did not grant the county fee simple title); *Dover Veterans Council v. City of Dover*, 407 A. 2d 1195, 1196 (S.Ct. N.H. 1979) (“Title” can denote any estate or interest, including a leasehold or merely the right of possession.)).

GAO also rejected the view that “by its terms, FLPMA § 315 requires the ‘cloud’ to be on title to ‘lands,’ not on an interest in lands such as a right-of-way.” AR at 000236 (GAO Opinion, B-300912, at 18). GAO again agreed with the Department’s position that in providing for a disclaimer in an “interest or interests in any land,” Congress “potentially refer[red] either just to the land itself or to both the land as well as lesser interests in the land,” and that “it is plausible to conclude, as the Department did when it promulgated the 1984 regulations and today, that ‘lands’ in FLPMA § 315 means ‘lands and interests in lands.’” AR at 000237 (GAO Opinion, B-300912, at 19). GAO accepted the Department’s argument that “the creation of an

easement involves the creation of two separate interests in real property: a servient estate, here owned by the United States, and a dominant estate, here owned by the holder of the R.S. 2477 right-of-way.” AR at 000238 (GAO Opinion, B-300912, at 20). Thus, the creation of these two interests involves the termination of a record interest of the United States: “its interest in exclusive use of the surface property over which the right-of-way ran.” *Id.* GAO concluded that “[a]lthough the Department’s interpretation is not necessarily the only reasonable one, DOI is the agency responsible for management of the public lands and for administration of FLPMA,” and found that “the Department’s interpretations of these terms [“lands,” “interests in lands,” and “cloud on title”] and of FLPMA § 315 as a whole to be reasonable.” AR at 000239 (GAO Opinion, B-300912, at 21).

A prerequisite to granting an RDI under section 315 of FLPMA and 43 C.F.R. § 1864.0-2 is for the Secretary to make a determination that “a record interest of the United States in lands has terminated by operation of law or is otherwise invalid.” Rendering an RDI with respect to an R.S. 2477 ROW would necessarily require a determination by the Secretary that the requirements of R.S. 2477 have been met. Taking this step would be consistent with the holding of the Tenth Circuit in *SUWA v. BLM* stating that “nothing in the terms of R.S. 2477 gives the BLM authority to make determinations on the validity of the rights of way granted thereunder,” but that “[t]his does not mean that the BLM is forbidden from determining the validity of R.S. 2477 rights of way for its own purposes,” *i.e.*, to make “what it calls ‘administrative determinations.’” 425 F.3d at 757.¹⁴ Such an administrative determination, made for the Department’s own purposes, would be consistent with 43 C.F.R. § 1864.0-2(b), which provides that a disclaimer “does not grant, convey, transfer, remise, quitclaim, release or renounce any title or interest in lands.” While an administrative determination is “not binding on the parties,” the Tenth Circuit emphasized in *SUWA v. BLM* that nothing in its decision “impugns the BLM’s authority to make non-binding administrative determinations, or the introduction and use of BLM findings as evidence in litigation.” 425 F.3d at 758. The RDI regulations go further in providing that a disclaimer “operates to estop the United States from asserting a claim to an interest in or the ownership of lands that are being disclaimed.” 43 C.F.R. § 1864.0-2(b).

According to *SUWA v. BLM*, an administrative determination that Camp Rock Road constitutes an R.S. 2477 ROW would amount to a recognition that the County is entitled to maintain the Road, and make improvements, consistent with “traditional uses to which the right of way had been put, fixed as of October 21,

¹⁴ This administrative procedure was involved in *Sierra Club v. Hodel*, where the Tenth Circuit stated that “precedent requires that the initial determination of whether activity falls within an established right-of-way is to be made by the BLM and not the court.” 848 F.2d at 1074 (footnote and quotation marks omitted).

1976.” 425 F.2d at 748. The Tenth Circuit stated that “[d]rawing the line between maintenance and construction based on ‘preserving the status quo’ promotes the congressional policy of ‘freezing’ R.S. 2477 rights of way as of the uses established as of October 21, 1976.” *Id.* (quoting *Sierra Club v. Hodel*, 848 F.2d at 1081). Such an approach “protects existing uses without interfering unduly with federal land management and protection.” 425 F.2d at 749.

The claim to an interest that the Department would disclaim with respect to an R.S. 2477 ROW would be the “right to exclusive use of the surface property covered by the right-of-way,” to follow GAO’s analysis, with such right to exclusive use having terminated by operation of law upon establishment of the ROW under R.S. 2477. However, the extent of the County’s right to use Camp Rock Road, *i.e.*, to maintain, improve, and use the road, would have to be defined with reference to the nature and condition of the road in 1976, when its uses were fixed. The County is clearly mistaken that BLM would no longer have an interest in how the Road is maintained and/or improved. A BLM determination that Camp Rock Road qualifies as an R.S. 2477 ROW, and a disclaimer of the United States’ “record interest” in the Road, would not result in the outright ownership and unlimited use of the Road contemplated in Miller’s Memorandum to San Bernardino County’s Board of Supervisors. Indeed, as *SUWA v. BLM* makes clear, the RDI sought by the County would not have the effect of a disclaimer of BLM’s interest in managing the servient estate according to its mandate under FLPMA. BLM’s interest in ensuring that Camp Rock Road, or any ROW that it administratively determines is R.S. 2477, is maintained consistent with BLM’s management responsibilities under section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2006), is not one that is subject to disclaimer under section 315 of FLPMA. Any disagreement as to the scope of the interest disclaimed to the County, as an interest in an R.S. 2477 ROW, would have to be resolved in the courts.

As BLM recognized, the County provided documentation to the effect that Camp Rock Road meets the R.S. 2477 criteria, and the record shows that BLM was inclined to agree, at least at the time the County submitted its RDI application. As demonstrated by the Tenth Circuit in *SUWA v. BLM*, and as the Department’s posture with regard to R.S. 2477 questions makes clear, a determination of the rights and responsibilities of the stakeholders, when an R.S. 2477 ROW is claimed, often involves contentious and problematic issues. In fact, in *SUWA v. BLM*, the Counties had graded and realigned the roads in question, claiming the right to make such improvements under R.S. 2477, but BLM contended that “the Counties’ actions went beyond prior levels of maintenance, exceeded the authorized scope of prior rights of way (if any), and were performed unilaterally without consultation with federal land managers.” 425 F.3d at 735. The Tenth Circuit followed the principles set out in *Sierra Club v. Hodel*, 848 F.2d at 1083:

[T]he scope of an R.S. 2477 right of way is limited by the established usage of the route as of the date of repeal of the statute. That did not mean, however, that the road had to be maintained in precisely the same condition it was in on October 21, 1976; rather, it could be improved ‘as necessary to meet the exigencies of increased travel,’ so long as this was done ‘in the light of traditional uses in which the right-of-way was put’ as of repeal of the statute in 1976.

425 F.3d at 746 (quoting *Sierra Club v. Hodel*, 848 F.2d at 1083). The Tenth Circuit stated that “BLM needed to make an ‘initial determination’ regarding the reasonableness and necessity of any proposed improvements beyond mere maintenance of the previous condition of the road.” 425 F.3d at 746 (quoting *Sierra Club v. Hodel*, 848 F.2d at 1084-85).

In *SUWA v. BLM*, the Tenth Circuit also followed *United States v. Garfield County*, 122 F. Supp. 2d at 1241-43, which involved an R.S. 2477 ROW within a National Park. The Tenth Circuit stated that “[t]he principle that the easement holder must exercise its rights so as not to interfere unreasonably with the rights of the owner of the servient estate, derives from general principles of the common law of easements rather than the peculiar status of National Parks.” 425 F.3d at 747; see also *United States v. Jenks*, 22 F.3d 1513, 1518 (10th Cir. 1994) (holding, under “basic principles of property law,” that easement rights are subject to regulation by the Forest Service as the owner of the servient estate). The Tenth Circuit stated: “Just as the National Park Service has obligations to protect National Park land, the BLM has obligations to protect the land over which the roads at issue here pass.” 425 F.3d at 747 (citing section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2006) (“In managing the public lands, the Secretary shall, subject to this Act and other applicable law and under such terms and conditions as are consistent with such law, regulate, through easements [and] licences . . . the use, occupancy, and development of the public lands.”)). The Counties argued that “as long as their activities are conducted within the physical boundaries of a right of way, their activities cannot constitute a trespass.” 425 F.3d at 747. The Tenth Circuit responded that “this misconceives the nature of a right of way,” which “is not tantamount to fee simple ownership of a defined parcel of territory. Rather, it is an entitlement to use certain land in a particular way.” *Id.* The Tenth Circuit reasoned that “[t]his does not mean that no changes can ever be made, but that any improvements must be made in light of the traditional uses in which the right of way had been put, fixed as of October 21, 1976.” *Id.* at 748 (citing *Sierra Club v. Hodel*, 848 F.2d at 1084). The Tenth Circuit held that, under *Sierra Club v. Hodel*, 848 F.2d at 1084-85,

the right of way holder may sometimes be entitled to change the character of the roadway when needed to accommodate traditional uses, but even legitimate changes in the character of the roadway

require consultation when those changes go beyond routine maintenance. Just because a proposed change falls within the scope of a right of way does not mean that it can be undertaken unilaterally.

425 F.3d at 748; *see also United States v. Garfield County*, 122 F. Supp. 2d at 1241-42.

Thus, for BLM to issue an RDI in Camp Rock Road on the basis of its R.S. 2477 status, it would have to make several determinations. BLM would first have to make an administrative determination that Camp Rock Road qualifies as an R.S. 2477 ROW. BLM would also have to determine that a record interest of the United States has terminated or is otherwise invalid. Making a determination that the United States' record interest in Camp Rock Road has terminated or is otherwise invalid would raise many questions. A determination that Camp Rock Road is an R.S. 2477 ROW would amount to a recognition on BLM's part that the County enjoys an ROW with the reasonable and necessary uses fixed as of October 21, 1976. The United States remains owner of the public lands within which the ROW is situated. The County's utilization of that ROW remains subject to BLM's obligations to protect the land over which the ROW passes. *See* 425 F.3d at 747 (citing section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2006); *see also 1993 DOI Report to Congress* at 33-41 (AR at A000054 through A000063) (providing a discussion of the tension between asserted R.S. 2477 ROWs and the land-management agency's ability to manage public lands according to the agency's mission). Issuing an RDI with regard to an R.S. 2477 ROW can be effective only in disclaiming what the County already owns by operation of law, *i.e.*, the right to use Camp Rock Road in the manner pertaining as of October 21, 1976. The only possible consequence of BLM's issuing an RDI would be to estop BLM from asserting that Camp Rock Road is an R.S. 2477 ROW. It could not be read as adjudicating any other rights under either section 315 of FLPMA or R.S. 2477.

[4] In light of the foregoing history, we conclude that the County has not demonstrated that it is unreasonable for BLM to decline to utilize the new RDI regulations to recognize an R.S. 2477 ROW. BLM argues that “[t]he complex history and uncertainty of the RDI process is a perfectly legitimate and certainly *rational* reason for denying an RDI application.” Answer at 15. Indeed, much of our review has involved setting out the conflicting viewpoints regarding whether the Department even has the authority to issue an RDI to acknowledge an R.S. 2477 ROW. *See, e.g.*, GAO Report at 18.

As we have explained, to issue the RDI requested by the County, BLM must identify the “record interest” subject to disclaimer. Such a finding would require an administrative determination as to the validity of Camp Rock Road as an R.S. 2477 ROW. We conclude that it would be inappropriate for the Board to require BLM to make the necessary findings regarding the record interest in Camp Rock Road that

would be subject to disclaimer under section 315 of FLPMA and the RDI regulations. BLM has stated, as reflected in the Deputy State Director's decision, that it will not issue RDIs for ROWs claimed under R.S. 2477 until the Department has formulated its policy with regard to the process of issuing such RDIs. Viewed in these terms, we cannot agree that BLM's denial of the County's request for an RDI was arbitrary and capricious, or an abuse of BLM's discretion. See SOR at 3-4.¹⁵

We conclude that the County has failed to show that BLM's exercise of its discretionary authority in denying the County's application for an RDI in Camp Rock Road lacks a rational basis. While BLM's review of the County's application may have been protracted, we reject the County's assertion that BLM's review was cavalier.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

_____/s/_____
James F. Roberts
Administrative Judge

I concur:

_____/s/_____
Christina S. Kalavritinos
Administrative Judge

¹⁵ Implicit in the County's challenge is a request for the Board to compel BLM to formulate a policy or procedure that would allow for the application of the new RDI regulations in disclaiming the Government's interest in Camp Rock Road. The approach advocated by the County is not required by section 315 of FLPMA, R.S. 2477, or the regulations. At most, the preamble to the new RDI regulations suggested that BLM might, in an appropriate situation, apply those regulations in disclaiming an interest in an ROW claimed under R.S. 2477. But, as noted by GAO, the preamble does not have the force of law and in no way compels BLM to undertake such an analysis.

In addition, we note, as BLM points out, "Title V FLPMA right-of-way grants are available as discussed by the BLM Director in his clarification memo," and the County has the option of filing a suit to quiet title under the Quiet Title Act, as it has in fact done in *County of San Bernardino v. U.S.A.*, EDCV06-1179 VAP (C.D. Cal.). Answer at 18.