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Federal Lands, "Disclaimers of Interest," and R.S. 2477

Pamela Baldwin
Legislative Attorney
American Law Division

Summary

On January 6, 2003, the Department of the Interior published new final regulations on "disclaimers of interest" issued under § 315 of the Federal Land Policy and Management Act of 1976. The new regulations amend previous ones to broaden the availability of the disclaimer procedure by allowing states, counties, and others to apply for disclaimers. The explanatory materials published with the new rule asserts that the rule is completely separate from rules to determine the validity of "R.S. 2477" rights of way claims, yet the Department of the Interior has also stated that disclaimers will be used as part of an new process to acknowledge R.S. 2477 rights of way through memoranda of understanding executed with interested states, counties and others. The first memorandum was executed on April 9, 2003, with the state of Utah and an application to disclaim any federal interest in an alleged RS 2477 right of way has now been published. Congress has directed that no rules "pertaining to" recognition or validity of an R.S. 2477 right of way can be effective unless authorized by Congress, and the use of disclaimers in the R.S. 2477 context may be controversial. No bills on R.S. 2477 have been introduced so far in the 109th Congress. This report discusses the new regulations, R.S. 2477 rights of way, the congressional directive, and legislation. It will be updated as warranted.

Background. On January 6, 2003, the Department of the Interior (DOI) published new final regulations on "disclaimers of interest"[1] issued under § 315 of the Federal Land Policy and Management Act of 1976 (FLPMA).[2] These new regulations amend existing disclaimer regulations at 43 C.F.R. Part 1860, Subpart 1864, to allow states, state political subdivisions, and others to apply for disclaimers, dropping requirements from the previous regulations that a claimant be the owner of record, and creating exceptions to the 12 year statute of limitations. A disclaimer is a recordable document in which the United

[1] 68 Fed. Reg. 494.

[2] P.L. 94-579, 90 Stat. 2770, 43 U.S.C. § 1745.

States declares that it has no property interest in land. The issuance of a disclaimer can help remove a cloud from land title because it has the same effect as though the United States had conveyed any interest it has. Some comments on the proposed regulations expressed concern that disclaimers would be used to confirm many more "R.S. 2477" rights of way[3] — a reference to an 1866 statute that became Revised Statutes § 2477 and states that "... the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." FLPMA repealed this act, but also protected valid R.S. 2477 rights of way in existence at the time of FLPMA's enactment in 1976. Certain rights of way asserted under R.S. 2477 may be controversial because they run either through undeveloped areas that might otherwise qualify for wilderness designation, or across lands that are now private or included in federal reserves (such as parks or national forests).

Explanatory materials published with the new disclaimer rule take the position that disclaimers are completely separate from R.S. 2477 validity determinations. On the other hand, DOI executed a Memorandum of Understanding (MOU) with the state of Utah to acknowledge R.S. 2477 rights of way by disclaiming any interest of the United States and several applications for disclaimers to acknowledge R.S. 2477 rights of way in Utah were published.[4] The seeming relationship between the new disclaimer regulations and R.S. 2477 determinations may be controversial because Congress in § 108 of P.L. 104-208 stated that no rules "pertaining to" recognition or validity of R.S. 2477 rights of way could be effective unless authorized by Congress. This report reviews the disclaimer provision of FLPMA, the former and new regulations on disclaimers and the relationship of the regulations to R.S. 2477. For a more extensive discussion of the issues, see CRS Report RL32142, *Highway Rights of Way on Public Lands: R.S. 2477 and Disclaimers of Interest*.

Section 315 and Regulations. Section 315(a) of FLPMA authorizes the Secretary to issue disclaimers and reads in part:

> After consulting with any affected Federal agency, the Secretary is authorized to issue a document of disclaimer of interest or interests 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; or ....[5]

When a party formally disclaims an interest in real property, the result is to help clear title to the property interest that is the subject of the disclaimer. Section 315(c) states that a recordable federal disclaimer of interest has an *effect* equivalent to a quitclaim deed. The original disclaimer regulations add that although a disclaimer does not actually convey title,[6] presumably because the disclaimer indicates there is no title interest of the

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[3] 48 Fed. Reg. 496.

[4] 69 Fed. Reg. 6000 (February 9, 2004), later withdrawn when it became apparent the road in question was federally constructed; 70 Fed. Reg. 19500 (April 13, 2005) for Alexa Lane and Snake Pass Road.

[5] 43 U.S.C. § 1745(a).

[6] 43 C.F.R. § 1864.0-2(b).

United States to be conveyed, it may stop the United States from later asserting a claim to the lands. These regulations also state that the purpose of the procedure is to eliminate the necessity for court action in the circumstances set out in § 315. These aspects of the disclaimer regulations have not been changed. However, the original regulations limited those who could apply to use the procedure to "any present owner of record,"[7] a limitation that does not appear in the statute. The new regulations allow any entity to file an application for a disclaimer, and also provide that although most applicants must file within 12 years of the time they knew or should have known of the claim of the United States, this time limitation does not apply to states. The explanatory materials indicate that this is to make the § 315 regulations consistent with the Quiet Title Act (QTA), which has a strict 12-year limitation, except for states — and "state" has been narrowly construed. However, the new disclaimer regulations also add a definition of "state" that includes not only states, but also their political subdivisions and "any of its creations," and "other official local governmental entities." This language is not elaborated on, but appears to include any independent commission or body a state (or possibly a county) might choose to create for any purpose,[8] which implies that these entities may no longer be subject to the previous 12-year limitation on administrative claims (as opposed to court actions under the QTA).

What Are R.S. 2477 Rights of Way and Why Are They Controversial? R.S. 2477 rights of way are those obtained under an 1866 statute, reenacted as § 2477 of the Revised Statutes, and later repealed by § 706 of FLPMA. The 1866 statutory language was succinct, stating simply that "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Section 701 of FLPMA provided that valid rights of way in existence at the time of repeal in 1976 were to be recognized. In most states it was clear which highway beds were valid because there had been some form of acceptance process under state law (typically a system of county maintenance) that made the roadways identifiable. In a few states, however, there was no clear system of acceptance or recording and the existence and maintenance of the highways as a factual matter was not always clear. In these circumstances determining whether a way qualifies as a R.S. 2477 "highway" can be difficult because the proper interpretation of "construction," "highway," and "not reserved" in the federal granting language and the appropriate scope of the role of state law have been controversial. The issues are significant because areas traversed by asserted R.S. 2477 highways may be disqualified from consideration for possible inclusion in the National Wilderness Preservation System, or might now be private lands, or lands in federal reserves (such as parks or national forests) created after the establishment of the rights of way. On the other hand, validating R.S. 2477 rights of way may increase access to and across the federal lands and facilitate economic development.

Scope of FLPMA §315 Disclaimers. What were the intended uses and scope of § 315? There is little legislative history of § 315, except that it was to be used when the United States had no interest in certain lands, and it was to eliminate the necessity for

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[7] Former 43 C.F.R. § 1864.1-1(a).

[8] A computer search of the U.S. Code finds no instance where Congress has enacted a similar definition of "state."

court action or private relief legislation in that circumstance.[9] Absent more detailed legislative history to indicate the intent of Congress, a court might look to other provisions and to the history of title disputes.

Historically, it was difficult to correct title problems involving the United States. The United States, as the federal sovereign, is immune from suit, except as it may waive its sovereign immunity, and one cannot "adversely possess" property against the United States and thereby obtain title. Typically, special acts of Congress were used to clear up title problems. Some lawsuits attempted to avoid the sovereign immunity problem by suing an officer of the United States, rather than the United States itself. These "officer suits" were eliminated by the enactment of the Quiet Title Act (QTA) in 1972,[10] which the Supreme Court has held is now the exclusive means by which adverse claimants can challenge the United States' title to real property in court (as opposed to seeking administrative remedies).[11] There has always been a tension between the enabling of suits to clear up title problems on the one hand and the cabining of those suits in order to maintain parameters on the waiver of sovereign immunity on the other hand. As a result, the Court has held that the waiver of sovereign immunity in the QTA is to be construed narrowly in favor of the United States.[12] The QTA mentions that the United States may file disclaimers of interest during the course of a QTA suit, and cases indicate that if a court confirms the disclaimer, further jurisdiction of the court ceases.[13] However, the cases also make clear that the QTA is the exclusive judicial remedy for controverted claims, and that a court may refuse to confirm a disclaimer of interest issued in the context of a QTA suit.[14] Congress amended the QTA to provide that states are not generally subject to the 12-year statute of limitation of that act,[15] but recent cases have held that this state exception is to be interpreted narrowly, such that counties and other subdivisions of a state cannot avail themselves of the exception.[16] The original § 315 regulations reflect some of the elements of the QTA,[17] and the materials accompanying the new regulatory changes refer to making the FLPMA disclaimers consistent with the QTA. The new regulations diverge from the prior disclaimer regulations and the QTA by broadening those who can apply for FLPMA disclaimers and avoid the 12-year limitation.

FLPMA was a complicated and detailed statute that developed over several years to consolidate and modernize the statutes on the remaining public domain lands managed by the Bureau of Land Management. One of the major policy changes of FLPMA was to put in place a policy of retention of the remaining federal lands, unless certain facts

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[9] S.Rept. 94-583 at 50-51 (1975).

[10] P.L. 92-562, 86 Stat. 1176, 28 U.S.C. § 2409a.

[11] Block v. North Dakota, 461 U.S. 273 (1983).

[12] *Id.* at 287.

[13] 28 U.S.C. § 2409a(e).

[14] LaFargue v. United States, 4 F. Supp. 2d 580 (E.D. La. 1998).

[15] P.L. 99-598, 100 Stat. 3351 (1986).

[16] See, e.g., Calhoun County v. United States, 132 F. 3d 1100, 1103 (5th Cir. 1998).

[17] 43 C.F.R. § 1864.1-3.

justifying disposal are present.[18] The general policy of the government is that there must be some authority for the disposal of federal property to be lawful.[19] The issuance of a disclaimer of interest indicates that there is no interest of the United States and is technically not a conveyance. Given the FLPMA policy of retention of lands, however, an argument may be made that a conservative interpretation of the scope of §315 is prudent. On the other hand, the brevity of § 315 and the sparse legislative history may allow a considerable range of discretion to the Secretary.

Congressional Language on Regulations "Pertaining To" R.S. 2477. Language enacted by Congress relative to R.S. 2477 may apply to the expansion of the availability of disclaimers. Following the issuance of proposed R.S. 2477 regulations in 1993 that generated controversy, Congress enacted a prohibition on using appropriated funds to promulgate or implement a rule concerning R.S. 2477 rights of way. This approach was reiterated and broadened in the 1997 Omnibus Appropriations Act which stated:

> 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.[20]

Similar statutory language was deleted from the Interior Appropriations Act for FY1998 in reliance on the assertion that the language in the 1997 Act was permanent law and hence an additional enactment was unnecessary.[21] There have been no further statutory prohibitions since, and no further attempts at R.S. 2477 regulations. On January 22, 1997, Secretary Babbitt, after congressional opposition to the proposed regulations and enactment of the 1997 Omnibus Appropriations Act, issued a new policy on R.S. 2477 that deferred processing R.S. 2477 claims except in cases where there is a "demonstrated, compelling, and immediate need to make such determinations." The Forest Service followed suit. Committee report language states that the statutory language "does not limit the ability of the Department to acknowledge or deny the validity of claims under R.S. 2477 ...."[22] The Clinton Administration submitted a legislative proposal on R.S. 2477, but it was not introduced.

Arguably, § 108 of P.L. 104-208 technically only prevents *rules* that set out specific standards for R.S. 2477 rights of way,[23] and is unrelated to the disclaimer rule changes.[24]

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[18] 43 U.S.C. § 1701(a)(1).

[19] 18 U.S.C. § 641.

[20] P.L. 104-208, § 108, 110 Stat. 3009-200 (1996).

[21] See H.Rept. 105-337 at 73-74 (1997). The Report indicates that Congress was relying on the Opinion B-277719 of the Comptroller General dated August 20, 1997, concluding that § 108 was permanent law.

[22] H.Rept. 104-625 at 57-58 (1996).

[23] H.Rept. 104-625, at 58 (1996).

[24] Later committee report language indicates that § 108 sought to reserve to Congress approval (continued...)

However, the Utah MOU confirms that the new regulations are a part of a new adjudication process to clear up R.S. 2477 claims.[25] It is not clear whether the disclaimer process can be used to disclaim less than a full fee title interest in lands, or, if so, whether disclaimers are appropriate in the R.S. 2477 context. The explanatory materials with the new regulations note that there have been only 62 disclaimers issued under § 315 since its enactment,[26] and none resolved R.S. 2477 issues. However, with the expansion of parties who may now qualify to file for disclaimers, and fit within the waiver of the 12-year limitation on administrative claims, many applications may now be filed for § 315 disclaimers related to R.S. 2477 rights of way.[27]

By what criteria R.S. 2477 claims will be evaluated is not set out in the MOU; neither "construction" nor "not reserved" is defined. "Highway" is equated with "road" without any elaboration, but another term requires that the road "was and continues to be public and capable of accommodating automobiles or trucks with four wheels and has been the subject of some type of periodic maintenance." Under the MOU, the acknowledgment process will not be used for roads in congressionally designated Wilderness areas, Wilderness Study Areas designated on or before October 21, 1993 under FLPMA, roads in units of the National Park System[28] or within the National Wildlife Refuge System, or roads administered by a federal agency other than one in the DOI unless that agency consents to the use of the process. Other states, including Alaska and Colorado, have begun the process to also negotiate MOUs, possibly with different terms. It could be argued, therefore, that the new regulations do "pertain to" R.S. 2477, and therefore must be approved by Congress before becoming effective.

Congress also may address the situation directly,[29] but there are no RS 2477 proposals thus far in the 109th Congress.

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[24] (...continued)
of alternatives to processing R.S. 2477 claims under the QTA. See discussion of S. Rep. No. 105-160 (1998) in United States v. Garfield County, 122 F. Supp. 2d 1201, 1236 (C.D. Ut. 2000)

[25] 68 Fed. Reg. 497.

[26] 68 Fed. Reg. 498.

[27] In commenting on the proposal, some counties objected to the costs that will result from their expected filings, indicating that "hundreds" of filings for routes could be involved in some counties. See 68 Fed. Reg. 499-500, referring to comments of Gilpin County, Colorado, Valley County, Idaho, and San Bernadino County, California. In response, BLM noted that the fees may be waived.

[28] This wording appears to allow the use of the process in the Grand Staircase-Escalante National Monument because it is managed by the BLM not the Park Service.

[29] H.R. 1639 in the 108th Congress would have defined terms and established an administrative process for determining the validity of R.S. 2477 claims. The House approved an amendment to the DOI Appropriations bill, H.R. 2691, that would have prohibited implementation of the amendments to the disclaimer regulations in National Monuments, Wilderness Study Areas, or units of the National Park System, National Wildlife Refuge System, or the National Wilderness Preservation System. This language was adopted instead of a more general prohibition on implementation, but was eliminated in conference.