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CRS Report for Congress

Federal Lands, "Disclaimers of Interest," and RS2477

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Summary

On January 6, 2003 the Department of the Interior published new final regulations, to be effective February 5, 2003, on "disclaimers of interest" issued under § 315 of the Federal Land Policy and Management Act of 1976. These new regulations amend existing regulations on disclaimers to broaden the availability of that procedure by allowing states, counties, and others to apply for disclaimers whether or not they are the record property owner. As a result, it is possible that the procedure may be used to confirm many more "RS2477" rights of way. The explanatory materials published with the new final disclaimer rule take the position that the rule is completely separate from possible RS2477 determinations. The issue is significant because Congress has directed that no rules "pertaining to" recognition or validity of an RS2477 right of way can be effective unless authorized by Congress. This report discusses the new regulations, RS2477 rights of way, and the congressional directive. It will be updated as warranted.

Background. On January 6, 2003 the Department of the Interior published new final regulations, to be effective February 5, 2003, on "disclaimers of interest" issued under § 315 of the Federal Land Policy and Management Act of 1976 (FLPMA).[1] These new regulations amend existing disclaimer regulations at 43 C.F.R. Part 1860 to allow states, state political subdivisions, and others to apply for disclaimers, regardless of whether they are the property owner of record, as was required by the previous regulations. A disclaimer is a recordable document in which the United States declares that it has no property interest in a piece of land (or it may disclaim a lesser interest). The issuance of a disclaimer can 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confirm many more "RS2477" rights of way - a reference to an 1866 statutory grant of highway rights of way that FLPMA repealed. FLPMA also protected valid RS2477 rights of way in existence in 1976 and many asserted rights of way are controversial because they run either through undeveloped areas that might otherwise qualify for wilderness designation,

[1] Pub. L. No. 94-579, 90 Stat. 2770, 43 U.S.C. § 1745.

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or across lands that are now private or included in federal reserves (such as parks or national forests) created after the highways might have been established.

Explanatory materials published with the new rule take the position that disclaimers are completely separate from RS2477 validity determinations. The possible relationship between the new disclaimer regulations and RS2477 determinations is important because Congress in § 108 of Pub. L. No. 104-208 stated that no rules "pertaining to" recognition or validity of RS2477 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 RS2477.

Section 315 and Regulations. Section 315 of FLPMA authorizes the Secretary to use 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 (2) the lands lying between the meander line shown on a plat of survey approved by the Bureau [Bureau of Land Management] or its predecessors and the actual shoreline of a body of water are not lands of the United States; or (3) accreted, relicted, or avulsed lands are not lands of the United States. [2]

When a party formally disclaims an interest in real property, the result is to 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 pre-amendment regulations add that although a disclaimer does not actually convey title,' presumably because the disclaimer indicates there is no title interest of the United States to be conveyed, it may estop the United States from later asserting a claim to the lands. The pre-amendment regulations also state that the purpose of the procedure is to eliminate the necessity for court action in certain circumstances:

> The purpose of a disclaimer 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 by the Secretary of the Interior that there is a cloud on the 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; or ... [language reflecting the statutory language on submerged lands].5

These provisions of the disclaimer regulations are not changed. However, the former regulations limited those who could apply to use the procedure to "any present

[2] 43 U.S.C. § 1745(a).
[3] 43 U.S.C. § 1745(c).
[4] 43 C.F.R. § 1864.0-2(b).
5 43 C.F.R. § 1864.0-2(a).

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. However, the new regulations also expand the definition of "state" to include not only the 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 even possibly a county) might choose to create for any purpose.[8]

What Are RS2477 Rights of Way and Why Are They Controversial?

RS2477 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** also 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 (notably Utah and Alaska), there was no clear system of acceptance or **recording and the existence and** maintenance of the highways as a factual matter was not clear and which roadbeds might qualify under the 1866 law has been controversial. The question is important because areas traversed by asserted RS2477 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. The proper interpretation of "construction" and "highway" in the federal granting language, and the appropriate scope of the role of state law also have been controversial.

Scope of §315 Disclaimers. What were the intended uses and scope of § 315? CRS has found no legislative history in which Congress elaborated on § 315. 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. In the 94th Congress that enacted FLPMA, §212 of the Senate bill, S. 501, and previous House bills[9] authorized disclaimers only if the title of the United States had terminated "by operation of law"- the section lacked the additional language "or is otherwise invalid." The Senate report does not elaborate on the provisionl° and the language was passed without amendment. Section 208 of the House bill, H.R. 13777, contained "or is otherwise invalid" language and also language on disclaimers having the

[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."
[9] See Pamela Baldwin, CRS Report for Congress 93-74-A: *Highway Rights of Way: The Controversy Over Claims Under R.S. 2477* (1993).

[9] See, *e.g., § 212* of H.R. 5622 (94t'Cong.); § 212 of S. 1292 (94' Cong.).

effect of a quitclaim deed, but there was no etanoration in the report on the aaaitions, and no explanation as to why the broader House language ultimately passed. [12]

Clearly the final language broadened the circumstances in which disclaimers could be used; many instances of title conflicts occur other than where the title of the United States has terminated by operation of law. But were there any implicit limits on how disclaimers could be used? Absent any 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 an "end-run" around 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 1972,13 which the Supreme Court has held is now the exclusive means by which adverse claimants can challenge the United States' title to real property." 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 waiver of sovereign immunity in the QTA is to be construed narrowly in favor of the United States. The Quiet Title Act mentions that the United States may file disclaimers of interest, and cases indicate that if a court confirms the disclaimer, further jurisdiction of the court ceases." 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."

The *Block* case held that states were subject to the statutory 12-year limitation on bringing suits under the QTA, but Congress subsequently provided that states are not generally subject to that limitation, though in some instances they are. l' Recent cases have held that this exception is to be interpreted narrowly, such that counties and other subdivisions of a state may not avail themselves of the exception. [18]

The original § 315 regulations reflect some of the elements of the QTA (see, e.g., the references to security interests, water rights, or Indian lands that are not in FLPMA, but

are in Q~1A1'), and the materials accompanying the new regulatory changes also reter to making the FLPMA disclaimers consistent with the QTA. Yet the new regulation broaden those who can apply for FLPMA disclaimers and those who can avoid the 12year limitation -an nportant difference from the QTA.

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 justifying disposal are present .2° Also, the general policy of the government is that there must be some authority for the disposal of federal property, and criminal penalties apply for unauthorized disposals.2' Although 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, an argument could be made that a conservative interpretation of the scope of §315 pertains, However, the brevity of § 315 and the absence of legislative history may allow z considerable range of discretion to the Secretary, and challenging the issuance of disclaimers might be problematic.

Congressional Language on Regulations "Pertaining To" RS2477, –

Language enacted by Congress relative to RS2477 may apply to the expansion of the availability of disclaimers. During the 1980's, controversy over determining the validit3 of RS2477 claims grew. In 1988 the Department of the Interior issued a policy on the subject that defined certain terms. At the request of Congress, the Department submitted a study of RS2477 issues in June 1993, and proposed regulations to process RS2477 claims. These regulations met with congressional opposition and resulted in a prohibition on using appropriated funds to promulgate or implement a rule concerning RS2477 right of way. This approach was reiterated and broadened in the 1997 Omnibus Appropriation 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.22

Similar statutory language was deleted from the Interior Appropriations Act for Fly 1998 in reliance on the assertion that the language in the 1997 Act was permanent law and hence an additional enactment was unnecessary.23 There have been no further statutory prohibitions since, and no further attempts at RS2477 regulations.

On January 22,1997, Secretary Babbitt issued a new policy on RS2477 that revoked the 1988 policy and changed some relevant definitions. Secretary Babbitt also instructec the BLM to defer processing RS2477 claims except in cases where there is a "demonstrated, compelling, and immediate need to make such determinations," and the

19 43 C.F.R. § 1864.1-3.
zo 43 U.S.C. § 1701(a)(1).
2' 18 U.S.C. § 641.
22 pub. L. No. 104-208, § 108, 110 Stat. 3009-200 (1996).
23 See H.R. Rep. 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.

Forest Service followed suit. The Clinton Administration submitted a legislative proposal on RS2477, but it was not introduced.

Arguably, § 108 of Pub. L. 104-208 was aimed only at preventing rules that set out specific standards for RS2477 rights of way,z' and is unrelated to the disclaimer rule changes, which may or may not impact RS2477 rights of way.25 However, the materials explaining the new regulations indicate that the disclaimers may be a part of a new agency adjudication process to clear up RS2477 claims. The Forest Service states that the disclaimers can be used for RS2477 rights of way and that "[c]urrently there is no administrative process available for states or land management agencies like the Forest Service to resolve such title claims; the process is time consuming and requires expensive litigation in Federal Courts ...."z'

The explanatory materials also note that there have been only 62 disclaimers issued under § 315 since its enactment ,2g and none is clearly indicated as resolving RS2477 issues. However, with the expansion of the parties who will now qualify to file for disclaimers, and fit within the administrative waiver of the 12-year limitation, many applications may be filed for § 315 disclaimers related to RS2477 rights of way, even though such claims could not be brought under **the QTA.** 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.' Therefore, it appears that both the federal agencies and the counties anticipate that § 315 disclaimers will be part of a process for RS2477 claims that cannot currently be carried out either via disclaimers or the QTA.3° It could be argued, therefore, the new regulations "pertain" to RS2477, and therefore must be approved by Congress before becoming effective.

In sum, the new disclaimer regulations present at least two questions: 1) whether the rule amendments, by significantly expanding those who can apply and the time within which they may do so, are consistent with § **315 and the QTA; and** 2) assuming the noRS2477 regulations language in Pub. L. No 104-208 continues in effect, whether the new changes to the disclaimer regulations "pertain to" recognition and validity of RS2477 rights of way within the meaning of Pub. L. No. 104-208, and must be approved by Congress.

24 H.R. Rep. 104-625, at 58 (1996).
zs Later committee report language indicates that § 108 sought to reserve to Congress approval of alternatives to processing RS2477 claims under the QTA. See discussion of S. Rep. No. 105160 (1998) in United States v. Garfield County, 122 F. Supp. 2d 1201, 1236 (C.D. Ut. 2000). However, H.R. Rep. No. 104-625 at 57-58 (1996) states that the language "does not limit the ability of the Department to acknowledge or deny the validity of claims under RS 2477 ....
z' 68 Fed. Reg. 497.
2' 68 Fed. Reg. 499.
z' 68 Fed. Reg. 498.
29 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 they may waive the fees.