No. _____

In The
Supreme Court of the United States

STATE OF UTAH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Quiet Title Act, 28 U.S.C. §2409a, is the "exclusive means by which adverse claimants [may] challenge the United States' title to real property." *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 286 (1983). The Act plays a historic and vital role in our nation's public land management.

The Quiet Title Act waives the United States' sovereign immunity if a plaintiff establishes that (1) the United States "claims an interest" in the property at issue and (2) title to the property is "disputed." The Ninth Circuit has held the Act satisfied if past statements or actions by the United States put a "cloud on the state's title." The Tenth Circuit rejected that standard and held that "actions by the United States that merely produce some ambiguity regarding a plaintiff's title are insufficient." Applying its own test, the court held the State of Utah and Kane County – which must quiet title as the sole means of preserving their interest in rights of way critical to local economies – could not maintain an action under the Act. The question presented is:

To invoke a district court's jurisdiction under the Quiet Title Act to adjudicate the merits of a quiet title action, must a State establish facts that show affirmative action by the United States that demonstrates its claim to title in the property, or can a State rely on facts that raise a cloud on the State's title?

PARTIES TO THE PROCEEDING

Petitioner is the plaintiff-intervener, State of Utah, and Respondent is the United States of America. Additional parties not listed in the caption are Kane County, Utah, a Utah Political Subdivision, and co-plaintiff in the matters below. Also not listed are the conservation groups that appeared as amici in the proceedings below.

Kane County has a petition for writ of certiorari pending before this Court that asks: "Whether the district court had jurisdiction under the QTA to decide the merits of Kane County's title." *See* Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, No. 14-1497 (U.S. June 18, 2015).

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PETITION FOR WRIT OF CERTIORARI

The State of Utah petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Tenth Circuit, App. 1a-41a, is reported at 772 F.3d 1205 (10th Cir. 2014), *reh'g denied* (Feb. 17, 2015) (unreported), App. 88a-89a. The decision of the United States District Court for

the District of Utah, App. 42a-87a, is reported at 934 F. Supp. 2d 1344 (D. Utah 2013).

JURISDICTION

The district court took its jurisdiction from 28 U.S.C. §1346(f). The Tenth Circuit had jurisdiction under 28 U.S.C. §1291 and filed its opinion on December 2, 2014. En banc and panel rehearing were denied on February 17, 2015. This Court granted the State of Utah a collective forty-five day enlargement of time to seek certiorari, and has jurisdiction under 28 U.S.C. §1254(1).

PERTINENT STATUTORY PROVISION

The Quiet Title Act (QTA), 28 U.S.C. §2409a(a), states in pertinent part:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest.

INTRODUCTION

This case seeks to resolve disputed title ownership to historic highways forged by those who long ago traveled West to establish homes and livelihoods,

and that even today remain essential to state and local economies. The State of Utah and one of its political subdivisions request an answer to a basic and fundamental question regarding nearly 12,000 rights of way: Are they owned by the federal government? Or are they owned by the State under what is commonly known as "R.S. 2477," a federal law that granted "the right of way for the construction of highways over public lands, not reserved for public uses"? The State can obtain an answer only through actions brought under the Quiet Title Act, 28 U.S.C. §2409a – a law Congress enacted specifically to enable landowners to resolve disputes with the United States involving title to land. And so the State and its subdivision filed this action under that Act to resolve title to fifteen of the 12,000 roads, recognizing that its outcome will govern the fate of the remaining thousands.

The Tenth Circuit, however, construed the Quiet Title Act in a constricted and unprecedented way that defeated the State's effort to resolve who has title to the disputed land. According to the Tenth Circuit, to maintain an action under the QTA it is not enough for the property owner to show that the United States' previous actions created a cloud on the State's title – the widely accepted standard for when a quiet title action accrues. Instead, the plaintiff must show either "that the United States took direct action to close or deny access to a road" or took "indirect action or [made] assertions that actually conflict with a plaintiff's title."

Under the Tenth Circuit standard a State or other property claimant is placed in a legal "no man's land," in which a cloud on title prevents improvement (by counties) or maintenance (by states) of its roads but the claimant cannot resolve matters through a quiet title action. And so the uncertainty over who owns, and may regulate, remains indefinitely. Indeed, the United States – whose actions created the cloud in the first place – can unilaterally stop development simply by declining to take a definitive position on whether it claims title to the property. Making matters worse, because the QTA's limitations period begins running when a cloud is placed on title, the Tenth Circuit's rule means that many QTA actions will become time-barred before they even accrued.

Congress surely intended none of this when it enacted the Quiet Title Act to enable States and others to resolve title disputes with the United States. This Court's review is necessary.

STATEMENT

Legal Background. To encourage westward expansion and provide access to mining deposits located under federal lands, Congress passed Revised Statute (R.S.) 2477, granting rights of way for the construction of public highways. Enacted in 1866, R.S. 2477 is a "standing offer of a free right of way over the public domain." *San Juan Cnty. v. United States*, 754 F.3d 787, 791 (10th Cir. 2014). In its

entirety, R.S. 2477 states: "The right of way for the construction of highways over public lands, not reserved for public uses is hereby granted." Mining Act of 1866, ch. 262, §8, 14 Stat. 251, 253 (1866) (codified at 43 U.S.C. §932), *repealed by* Federal Land Policy Management Act of 1976 (FLPMA), Pub. L. No. 94-579, §706(a), 90 Stat. 2743, 2793.

Though Congress repealed R.S. 2477 in 1976 when it enacted the FLPMA, it did so subject to valid existing rights. 43 U.S.C. §1769(a). Even today, R.S. 2477 protects the rights of States and local governments to keep open rights of way blazed long ago, and yet still traveled and maintained by public users across federal lands.

R.S. 2477 was self-executing and did not require government approval or public recording of title. Uncertainty therefore arose regarding whether particular rights of way had in fact been established. That uncertainty, which continues today, has implications for a wide range of entities, including federal agencies, States, and local governments that assert title to R.S. 2477 rights of way.

To perfect an R.S. 2477 claim, a moving party must establish that the road was in continuous public use for a period of at least ten years prior to the Act's repeal – or commenced by October 1966. To make this showing against the federal government, a party must bring suit under the Quiet Title Act, the "exclusive means by which adverse claimants [may] challenge the United States' title to real property." *Block v.*

North Dakota ex rel. Bd. of Univ. & Sch. Lands, 461 U.S. 273, 286 (1983).

An action to quiet title is a lawsuit to establish ownership of real property – here, historic R.S. 2477 rights of way. The plaintiff in a quiet title action seeks a court order that prevents another party – here, the United States – from making an adverse claim to the property. 65 Am. Jur. 2d, Quieting Title §1 (*Quieting Title and Determination of Adverse Claims*), Larsen, Sonja, JD (May 2015). Quiet title actions are necessary to resolve title disputes.

A quiet title action is often called a suit to remove a cloud on title. A cloud on title is any claim or potential claim to ownership to the property. A title to property is clouded if the plaintiff may be forced to defend in court its ownership of the property at issue at some future date. *Id.*

A cloud can represent full ownership of the property, or it can be a claim of partial ownership, such as an easement or right of way. Similarly, a plaintiff may have less than a fee simple, or full ownership, in the property to maintain a quiet title action. So long as a plaintiff's interest is valid, and the adverse party's is not, the plaintiff can succeed in removing the cloud, or adverse claim, to the property. *Id.* at §13.

The QTA waives the United States' sovereign immunity and grants federal district courts jurisdiction to adjudicate disputed title to real property in which the United States claims an interest. *See* 43

U.S.C. §2409a(f). For the United States to be named as a defendant under the Act, a plaintiff must establish that the United States "claims an interest" in the right of way and that title to that right of way is "disputed." *Id.* at §2409a(a). This Court has observed that, "[f]rom top to bottom, . . . Congress thought itself to be authorizing bread-and-butter quiet title actions, in which a plaintiff asserts a right, title, or interest of his own in disputed land." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. ___, 132 S.Ct. 2199, 2207 n.5 (2012).

Factual Background. Kane County is a Utah political subdivision that covers 2.6 million acres of land, 2.2 million of which are comprised of federal land. On much of that land are the R.S. 2477 rights of way forged by the pioneers, miners, adventurers and entrepreneurs who accepted the United States's promise of an open land grant, moving west to expand and develop the nation's frontier. Many of those roads form the core of the County's transportation system, weaving access through a checkerboard of state, private, and federal lands.

Following years of litigation brought by the Bureau of Land Management and an amalgam of conservation groups to challenge Kane County's R.S. 2477 rights of way,[1] the County brought suit in April

[1] *See Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735 (10th Cir. 2005); *Wilderness Soc. v. Kane County*, 560 F. Supp.2d 1147 (D. Utah 2008), *vacated by* 632 F.3d 1162 (10th Cir. 2011) (en banc).

2008 to quiet title to five roads or road segments crossing federal land. App. 4a, 43a, 51a-59a. After losing its bid to adjudicate its interests by a means other than the QTA, *see Kane Cnty. v. Salazar*, 562 F.3d 1077 (10th Cir. 2009) (affirming dismissal of claims based on property interests as yet "unproven" under the QTA), the County later amended its complaint to cover a total of fifteen roads. App. 4a, 43a. The State of Utah moved and was granted the right to intervene as a co-plaintiff. The State filed its complaint in intervention in April 2010. Each plaintiff asserted that the roads were public highways pursuant to R.S. 2477, and each claimed to jointly own all of the rights of way. *Id.*

Before Utah intervened, the United States moved to dismiss the County's initial claims, stating a lack of subject matter jurisdiction. App. 43a-44a. The United States alleged it had neither interfered with nor denied the existence of the claimed R.S. 2477 rights of way. App. 44a. The United States, however, did not disclaim its own interest in the roads – something which under the QTA would have terminated the litigation and resolved the title dispute. *See* 43 U.S.C. §2409a(e). App. 69a. Instead, the United States alternatively contended there was no case or controversy on which to base the County's suit, and that absent a title dispute as to the roads, it had not waived its sovereign immunity under the QTA. App. 43a-44a.

The district court denied the United States' motion from the bench, and later issued a written

decision. Following the bench ruling, the United States answered the County's complaint, raising no additional jurisdictional claims respecting the court's subject matter jurisdiction. App. 44a.

The district court granted summary judgment in favor of Kane County, quieting title to it in eleven roads, leaving the title to only four roads under a cloud. In August 2011, the district court held a nine-day bench trial that included some 26 witnesses and more than 160 exhibits. A week before trial, the United States submitted a trial brief, where it asserted jurisdictional defects as to those four additional roads. App. 44a.

Following trial, the amicus Southern Utah Wilderness Alliance (SUWA) submitted a brief challenging the district court's subject matter jurisdiction over all of the roads at issue, contending that the QTA's statute of limitations had run prior to the time the County brought suit. App. 44a-45a. Implicit in SUWA's claim was the belief that the United States had asserted a sufficient disputed interest in the roads to have triggered the running of the limitations period. *See* 43 U.S.C. §2409a(g).

District Court Decision. The district court issued two orders. App. 5a. The first order addressing jurisdiction is germane here. There, the district court denied the United States' and SUWA's motions to dismiss. *Id.* Respecting the first prong of the quiet title analysis – which looks to whether the United States claims an interest in the property – the district

court determined that each of the roads was subject to one of two BLM management plans that demarked roads as "open, closed, or limited to motor vehicle use." App. 5a-6a, 65a. The court also looked to the United States' contention that improvements the State or County wished to make to the roads must be "done in consultation" with it. App. 6a, 75a. "Because the government has stated its interest in these roads and is exercising some oversight of them through management plans, the first prong of the Quiet Title Act has been met." App. 65a.

Respecting the Act's second prong – which looks to whether title to the property is disputed – the court found no Tenth Circuit decision on point and therefore looked to *Alaska v. United States*, 201 F.3d 1154, 1160 (9th Cir. 2000). App. 66a-68a. The court found the Ninth Circuit's cloud-on-title analysis persuasive and the facts from that case "directly in line with the United States' actions in this case." App. 68a-69a. The court adopted the *Alaska* standard.

The district court found dispositive that in each case the United States had refused to admit or deny many of the County's claims. Below, the United States argued that it did not dispute that Kane County *may* hold R.S. 2477 rights-of-way, but claimed it had not interfered with those putative rights. App. 69a ("[T]he United States has the temerity to stand before this judge and contend it is not disputing Kane County's right-of-way, even though it would not disclaim its interest in the right-of-way, and even though it had regulated the right-of-way under the

[management plan].”). But the district court found “[t]he fact that the United States has disputed the scope of Kane County’s alleged rights-of-way throughout this litigation shows an additional and ongoing dispute as to title.” App. 76a.

Looking to *Alaska*, the district court held that it would be inconsistent with Congress’s intent in enacting the QTA “‘if the United States could obtain dismissal of any state quiet title suit by *adopting a litigation position of refusing to state whether it asserted a claim or not*.’” App. 68a (quoting *Alaska*, 201 F.3d at 1161).

The court therefore found it had jurisdiction: “If the state cannot get Quiet Title Act jurisdiction, then the potential claim will lurk over the shoulder of the state officials as they try to implement a coherent management plan. . . .” App. 68a.

The Tenth Circuit’s Decision. The United States appealed, challenging the district court’s jurisdiction to six roads on the ground that no “disputed title” existed. App. 6a-7a. The United States explained that it “tried to focus [its] appeal on several errors of law that could have significant consequences for the management of public lands and the future course of litigation over R.S. 2477 rights-of-way.” U.S. 10th Cir. Br. 18 n.9. As to those six roads, the Tenth Circuit reversed; resulting in a loss of title in three roads to Kane County, and in three roads to the United States.

Finding it an issue of first impression in that circuit, App. 8a, the Tenth Circuit surveyed cases from the Ninth Circuit respecting what constituted a "dispute" under the Act. App. 7a-11a. The Tenth Circuit rejected that court's test for finding a title dispute under the QTA, and held: "The 'cloud on title' standard provides little guidance to parties as to what constitutes a title dispute and could lead federal courts to issue advisory opinions." App. 10a. The Tenth Circuit held instead that "actions of the United States that merely produce some ambiguity regarding a plaintiff's title are insufficient to constitute a 'disputed title.'" App. 11a. The court preferred a test that would require a plaintiff to "show that the United States has either expressly disputed title or taken action that implicitly disputes it." App. 10a. That could be done by showing either "that the United States took direct action to close or deny access to a road" or took "indirect action or [made] assertions that actually conflict with a plaintiff's title." App. 11a. The Tenth Circuit offered no guidance on what action a plaintiff must show to prove an "implicit" dispute.

Applying its own test, the Tenth Circuit determined that maps that removed the Sand Dunes and Hancock Roads from management plans and that could be viewed as having the practical effect of closing those roads were at best "ambiguous" and under the court's test, insufficient to create a title dispute. App. 13a. And as to the four Cave Lakes Roads, the Court determined that denials in the United States' answer

as to the County's ownership were also insufficient to create a dispute. App. 13a-14a.

REASONS FOR GRANTING THE PETITION

The Quiet Title Act, this Court has found, is the "exclusive means by which adverse claimants [may] challenge the United States' title to real property." *Block*, 461 U.S. at 286. The QTA is also the sole means by which States and counties can perfect and protect their interest in vital R.S. 2477 rights of way. The Tenth Circuit's ruling, however, deprives the State of Utah from availing itself of a quiet title cause of action. That ruling creates a conflict among the circuits, contravenes the Act's purpose and allows claims to be time-barred even before they accrue. This Court's review is warranted.

I. The Tenth Circuit's decision conflicts with decisions from the Ninth Circuit.

The Tenth Circuit's holding that a district court has jurisdiction to hear an action under the Quiet Title Act only if the State establishes that the United States unequivocally disputes the State's title conflicts with a series of decisions from the Ninth Circuit that adopted a "cloud on the state's title" standard.

1. In the first of those decisions, *Lesnoi v. United States*, 170 F.3d 1188 (9th Cir. 1999) (*Lesnoi I*), the plaintiff, a Native American entity, received title

from the United States under a claims settlement act; the United States retained an easement. The plaintiff hoped to sell the property, but the transaction was stalled when a third-party took issue with the property transfer, claiming the United States' conveyance to the plaintiff was void. *Id.* at 1188. The plaintiff brought suit to clear its title.

The court looked to the text of the QTA and developed a two-part test under which a QTA action requires findings that (1) the United States claims an interest in the property at issue and (2) that title to the property be disputed. *Id.* at 1191. The court held both prongs satisfied.

Only the second prong is at issue here. Regarding that prong, the Ninth Circuit weighed the need to strictly construe the QTA's waiver of federal sovereign immunity against Congress's intent in adopting the QTA in the first instance: "We are aware that waivers of sovereign immunity are to be strictly construed in favor of immunity, but we are also subject to a duty to construe federal statutes in a manner that will accomplish their intended purpose." *Id.* at 1193.

And the manifest intent of the QTA, found the court, was to provide a remedy by allowing persons "'who feared that an outstand[ing] deed or other interest might cause a claim to be presented in the future [to] maintain a suit to remove a cloud on title.'" *Id.* at n.8 (quoting H.R. Rep. No. 92-1559, 1972 U.S.C.C.A.N. 4547, 4554).

Adhering to that intent, and yielding a construction of the QTA that provided a forum for resolving title disputes, the Ninth Circuit held the court had jurisdiction to reach the merits of the dispute: "We conclude that a third party's claim of an interest of the United States can suffice if it clouds the plaintiff's title." *Id.* at 1192. Applying that standard, the court found a sufficient dispute as to title because the United States retained an easement in the property, even absent a showing that the United States sought to assert that interest. *Id*. *See also Lesnoi v. United States*, 267 F.3d 1019, 1023 (9th Cir. 2001) (*Lesnoi II*) ("Any other conclusion would thwart the purposes of the Quiet Title Act; an attributed but infirm interest of the United States could cloud the title but not be subject to challenge.").

A year later, in *Alaska v. United States*, 201 F.3d 1154 (9th Cir. 2000), the Ninth Circuit considered disputed title to three Alaska river beds. Underlying that dispute was whether three rivers were navigable at statehood. The United States had taken different, and sometimes inconsistent, positions respecting each river, and at the time of suit made no formal claim to any river. *Id.* at 1159. The question was whether, and to what extent, the United States' prior positions created a dispute sufficient to invoke the district court's Quiet Title jurisdiction. *Id.* As before, the Ninth Circuit resolved the question by looking to Congress's intent.

"The Quiet Title Act must be construed strictly because it waives sovereign immunity, but that is too

general a point to resolve the case." *Id.* at 1160. Reading the statute and attributing to Congress a rational purpose for the QTA, the Ninth Circuit held that Congress enacted the QTA as "a means by which state governments can remove clouds on their title created by federal assertions of claims." *Id.* at 1161.

Pointing to the United States' changing positions, the Ninth Circuit underscored the need to resolve title disputes by not allowing questions of title to languish:

> Congress must have meant to empower state governments to eliminate clouds on their claimed title to state lands, yet it would have accomplished very little indeed if the United States could obtain dismissal of any state quiet title claim by adopting a litigation position of refusing to state whether it asserted a claim or not.

Id.

2. The Tenth Circuit adopted the Ninth Circuit's two-part test for stating a QTA action, App. 8a, but expressly rejected the Ninth Circuit's standard for the second part of that test. App. 10a. "To the extent the Ninth Circuit still utilizes a 'cloud on title' standard we would reject it as incompatible with the rule that conditions on waiver of sovereign immunity are to be specifically observed."

Believing that the cloud on title test provides insufficient "guidance to the parties as to what constitutes a title dispute," App. 10a, the panel decision

held "that to satisfy the 'disputed title' element of the QTA, a plaintiff must show that the United States has either expressly disputed title or taken action that implicitly disputes it." *Id.* (relying on *Mills v. United States*, 742 F.3d 400 (9th Cir. 2014)). Under that standard and in light of R.S. 2477, the court found that "a plaintiff need not show the United States took direct action to close or deny access to a road – indirect action or assertions that actually conflict with a plaintiff's title will suffice." *Id.*

The difference between the "cloud on title" standard and the Tenth Circuit standard is fundamental and outcome determinative, as the difference between the district court's ruling (which applied the "cloud on the title" and upheld its jurisdiction) and the Tenth Circuit ruling demonstrates.

Although drawing its test from *Mills*, that case did not recite the Tenth Circuit's standard, and did not reject the "cloud on title" test. In *Mills*, the Ninth Circuit found no title dispute, not because the United States refused to assert its interest, but because neither the state nor federal land management agencies named in the suit possessed lawful authority to grant the plaintiff's right of way. *Id.* at 405-06. *Mills* is simply irrelevant.

The Ninth and Tenth Circuits cover 1,557,188 square miles of land, a large percentage of which are owned by the United States. www.worldatlas.com/aatlas/infopage/usbysize.htm (last accessed 07/01/2015). Yet those two circuits hold clashing views of when

States and other land claimants can maintain quiet title actions against the United States. This Court should resolve that conflict.

II. The Tenth Circuit erroneously interpreted the Quiet Title Act and thereby undermined its objective.

The Tenth Circuit's standard finds no support in either the text of the Quiet Title Act or Congress's undisputed objective in enacting it. To the contrary, those two lodestars demonstrate that the Ninth Circuit got it right and the Tenth Circuit got it wrong. The Tenth Circuit's decision undermines Congress's effort to provide a judicial forum through which States and other property owners could clear clouds on title to their lands.

1. The QTA expressly grants district courts jurisdiction over quiet title actions "in which an interest is claimed by the United States." 28 U.S.C. §1346(f). And in specifically authorizing suit, the QTA reads, "The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest." *Id.* at §2409a(a). This language makes clear, and no court or party disputes, that to maintain an action under the QTA the plaintiff must show that the United States "claims an interest" in the property in question.

Nor is there any dispute that the United States "claims an interest" in the rights of way at issue. The district court had little difficulty concluding that the federal government – by issuing management plans that marked what "roads are open, closed, or limited to motor vehicle use" and stating "in briefing that any improvements made to the roads would need to be done in consultation with them" – claimed an interest in the rights of way. App. 5a-6a, 65a. And the United States did not appeal that holding.

The issue is what additional hurdle the phrase "disputed title" in §2409a(a) places on plaintiffs. The Tenth Circuit, agreeing with the United States' litigating position, adopted a test that makes it a high hurdle indeed and one in the United States' unilateral control.

Yet §2409a(a) does not say that the United States must dispute the State's (or other claimant's) title. It says merely that there must be "disputed title to property in which the United States claims an interest." And when a State or one of its political subdivisions claims ownership in a property sufficient to allow it to make improvements, and the United States maintains that any improvements must be done in consultation with it, there is a dispute over the title. Put slightly differently, the State disputes the United States' claim of interest, which has placed a cloud over the State's title.

This is not to suggest that *every* time the United States claims an interest in property to which another entity also claims an interest, there will be disputed

title. But where a property owner's claim of interest in property and the United States' claim of interest in that property are incompatible, there is "disputed title to" that property, which is all the QTA requires for an action to be maintained. As this Court recently stated, the QTA authorizes "a suit by a plaintiff asserting a 'right, title, or interest' in real property that conflicts with a 'right, title or interest' the United States claims." *Match-E-Be-Nash-She-Wish Band*, 132 S.Ct. at 2205 (quoting 43 U.S.C. §2409a(d)). There is no "the United States must affirmatively deem there to be a dispute" requirement.

2. The Tenth Circuit's standard also undermines Congress's manifest objective in enacting the Quiet Title Act. The QTA is a limited waiver of federal sovereign immunity, without which the State and other property owners could not clear their title. *See Block*, 461 U.S. at 280. Prior to the QTA's enactment in 1972, States, as others, that wished to assert title to land also claimed by the United States had limited recourse. A state could attempt to cajole the United States to quiet title against it or could seek relief from Congress or by Executive action. *See id*. Adopting the QTA, "Congress sought to rectify this state of affairs." *Id.* at 282.

As this Court recently explained, Congress intended the QTA to alleviate the "[g]rave inequity" to persons "excluded without benefit of a recourse to the courts from lands they [had] reason to believe [were] rightfully theirs." *Match-E-Be-Nash-She-Wish Band*, 132 S.Ct. at 2207 n.5. Congress enacted the QTA,

the Court held, to serve the interest of plaintiffs "whose title to land was continually being subjected to litigation in the courts," and also plaintiffs who feared that an outstanding interest "might cause a claim to be presented in the future." *Id.* *See also* H.R. Rep. No. 92-1559, p. 6, 92d Cong., 2d Sess. (1972), 1972 U.S.C.C.A.N. 4547, 4551 (purpose of the Act was to permit plaintiffs to "maintain suit to remove a cloud on title").

The Tenth Circuit's narrow interpretation undermines that objective in several respects. Most significantly, the Tenth Circuit standard – unlike the Ninth Circuit standard – creates a broad range of cases in which a State cannot maintain or a county cannot improve its land because its title is clouded, yet neither can quiet title to the land because the United States has not sufficiently "disputed" the title. That places the State in precisely the situation the Quiet Title Act sought to redress – lacking "recourse to the courts" to clear its title.

The test also allows the United States to prevent States from proving title to their lands by the simple expedient of declining to take a position on the State's claim to title. It permits the United States to have it both ways: to manage public lands in a manner that contradicts the State's title, but when sued to remove the cloud that the United States' management creates, to refuse to assert its interest in the property, by either express or implicit means. This Catch-22 leaves States and other claimants in precisely the position Congress sought to eliminate when it adopted the QTA.

3. The Tenth's Circuit's decision also conflicts with the showing it and other courts have held triggers the running of the QTA's limitations period that governs claims by local governments and private parties. *See* 28 U.S.C. §2409a(g). Universally, the courts that have considered it have held that the limitations period is triggered and begins to run when a cloud is placed on title. By adopting a different test for when a claimant may maintain a QTA action, the Tenth Circuit reads the Act as time-barring many claims before a cause of action ever existed. Such a result contravenes basic principles regarding the operation of statutes of limitations and therefore strongly suggests that either the four federal courts of appeals have misconstrued the limitations period or the Tenth Circuit has misconstrued the "disputed title" requirement in §2409a(a). Given the plain language of the QTA's limitations provisions and the discussion above, the answer is plainly the latter.

a. Section 2409a(g) provides that, except for actions brought by States, the QTA's 12-year limitations period "shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." Actions brought by States with respect to land on which the United States has made substantial improvements or has "conducted substantial activities pursuant to a management plan" accrue on "the date the State received notice of the Federal claims to the lands." 28 U.S.C. §2409a(i). In both situations, the statutory language is clear: The claims

accrue not based on actions taken by the United States to dispute title, but on when the claimant knows (or should have known) that the United States claimed an interest in the land. And courts have uniformly held that the claimant obtains the requisite notice when it becomes aware that its title is clouded.

In *California v. Yuba Goldfields, Inc.*, 752 F.2d 393 (9th Cir. 1985), the Ninth Circuit held that certainty is not required, but a QTA claim accrues – and the limitations period for counties and private parties begins to run – even when the United States fails to "communicate its claim in clear and ambiguous terms." *Id.* at 397. The Eighth Circuit agreed. That court holds that the QTA's limitations "standard does not require explicit notice of [the government's] claim. The government's claim need not be 'clear and unambiguous.'" *Spirit Lake Tribe v. North Dakota*, 262 F.3d 732, 738 (8th Cir. 2001). Adopting the reasoning of the Fourth Circuit, the court in *Spirit Lake* stated, "[a]s long as the interest claimed is a 'cloud on title,' or a reasonable claim with a substantial basis, it constitutes a 'claim'" under the Act. *Id.* (quoting *Richmond Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 769 (4th Cir. 1991)).

Decisions from the Tenth Circuit are in accord. In *Knapp v. United States*, 636 F.2d 279, 281-282 (10th Cir. 1980), the Tenth Circuit held that to start the running of the QTA's limitations clock, a party need not know the precise nature of the United States' interest. "All that is necessary is a reasonable awareness

that the Government claims some interest adverse to the plaintiffs." *Id.* at 282. "[T]he Quiet Title Act," the court found, "covers disputes in which 'the United States claims an interest.' Whether the interest claimed amounts to legal title in the United States is irrelevant if it constitutes a cloud on the plaintiff's title." *Id.* (citations omitted).

The court's observation in *Knapp*, is not one-off, but a consistent expression of the Tenth Circuit's prior statements respecting the nature of the "dispute" necessary to trigger a quiet title claim. *See Rio Grande Silvery Minnow v. Bureau of Reclamation*, 599 F.3d 1165, 1176 (10th Cir. 2010) ("Knowledge of the claims' full contours is not required." To trigger the Act's limitations period, "the claimed adverse interest in the title of the property merely must be substantial enough to create a cloud on title."); *see also George v. United States*, 672 F.3d 842, 947 (10th Cir. 2012) (finding statute of limitations has an exceedingly light trigger).

b. Requiring a stricter showing to invoke a district court's jurisdiction to adjudicate a quiet title action than is required to trigger the QTA's limitations period guarantees that the limitations period will often expire *before* a QTA action exists. As this Court has explained, however, the contention that a "limitations period commences at a time when the [plaintiff] could not yet file suit" is "inconsistent with basic limitations principles." *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Farber Corp.*, 522 U.S. 192, 200-201 (1997). Rather, "the default

rule [is] that Congress generally drafts statutes of limitations to begin when the cause of action accrues." *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 48-49 (2005). *See also Reiter v. Cooper*, 507 U.S. 258, 267 (1993) (rejecting "odd result" that a federal cause of action and statute of limitations arise at different times "absen[t] . . . any such indication in the statute").

The Ninth Circuit's construction of the Quiet Title Act, unlike the Tenth Circuit's construction, does not produce that "odd result" that conflicts with "the default rule" and "basic limitations principles." It is also consistent with the language and purpose of the Act. The Tenth Circuit's misguided ruling should not stand.

* * *

The case comes down to whether States and counties can rely on the Quiet Title Act's promise – to resolve disputes and move on – or whether the United States can adopt a public land management policy built on indecision and delay. Whether they can depends on the answer to the following question: To invoke the district court's jurisdiction to adjudicate the merits of its R.S. 2477 claims, must a State establish actions that show the United States claims an affirmative title interest, or can a State rely on facts that raise a cloud on the State's title?

The latter test must suffice: "Any other conclusion would thwart the purposes of the Quiet Title Act;

an attributed but infirm interest of the United States could cloud the title but not be subject to challenge." *Lesnoi II*, 267 F.3d at 1023. This Court's review is necessary to answer this question and this case presents the ideal vehicle to do so.

CONCLUSION

For the reasons stated above, this Court should grant the State's petition for a writ of certiorari.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

KANE COUNTY, UTAH, a Utah political subdivision, Plaintiff-Appellant/ Cross-Appellee, and THE STATE OF UTAH, Intervenor Plaintiff-Appellant/Cross-Appellee, v. UNITED STATES OF AMERICA, Defendant-Appellee/ Cross-Appellant. SIERRA CLUB; GRAND CANYON TRUST; NATIONAL PARKS CONSERVATION ASSOCIATION; SOUTHERN UTAH WILDERNESS ALLIANCE; THE WILDERNESS SOCIETY, Amici Curiae.	Nos. 13-4108, 13-4109, 13-4110

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH (D.C. No. 2:08-CV-00315-CW)

(Filed Dec. 2, 2014)

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Before **KELLY**, **BACHARACH**, and **PHILLIPS**, Circuit Judges.

KELLY, Circuit Judge.

This case involves a dispute between Kane County, Utah (joined by the State of Utah as intervenors) and the United States over the existence and breadth of the County's rights-of-way on federally owned land in Southern Utah. We previously affirmed the denial of intervention to the Southern Utah Wilderness Alliance, the Wilderness Society and the Sierra Club. *Kane Cnty. v. United States,* 597 F.3d 1129 (10th Cir. 2010). On March 20, 2013, the district court issued two final orders, *see Kane Cnty. v. United States,* 934 F. Supp. 2d 1344 (D. Utah 2013) [hereinafter *Kane I*]; *Kane Cnty. v. United States,* No. 2:08-cv-00315, 2013 WL 1180764 (D. Utah Mar. 20, 2013) [hereinafter *Kane II*], both of which are challenged in this appeal and cross-appeal. Our jurisdiction arises pursuant to 28 U.S.C. § 1291. We consider five issues involving the application of the Quiet Title Act, 28 U.S.C. § 2409a, and Section 8 of the Mining Act of 1866, more commonly known as "Revised Statute

(R.S.) 2477." We affirm in part, reverse in part, and remand.

Background

In April of 2008, Kane County brought an action under the Quiet Title Act (QTA), 28 U.S.C. § 2409a, to quiet title to five roads or road segments. It later amended its complaint to cover a total of fifteen roads or road segments. The QTA supplies a limited waiver of sovereign immunity for the settlement of property claims against the United States.

Kane County asserts rights-of-way over these roads pursuant to R.S. 2477, which states that "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." An Act granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes, ch. 262, § 8, 14 Stat. 251, 253 (1866) (codified at 43 U.S.C. § 932), *repealed by* Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, § 706(a), 90 Stat. 2743, 2793. R.S. 2477 was "a standing offer of a free right of way over the public domain." *San Juan Cnty. v. United States,* 754 F.3d 787, 791 (10th Cir. 2014) (quoting *S. Utah Wilderness Alliance (SUWA) v. Bureau of Land Mgmt.,* 425 F.3d 735, 741 (10th Cir. 2005)). Though R.S. 2477 was repealed in 1976 by the FLPMA, it preserved existing rights-of-way. 43 U.S.C. 1769(a).

On February 26, 2010, the State of Utah filed a motion to intervene as co-plaintiff and the motion

was granted. In August 2011, the district court held a nine-day bench trial that included the testimony of 26 witnesses and over 160 exhibits. On March 20, 2013, the district court issued two orders. In the first order, the district court held it had subject matter jurisdiction under the QTA over each of the fifteen roads at issue. *See Kane I,* 934 F. Supp. 2d 1344. In the second order, the district court made findings of fact and addressed the merits of Kane County and Utah's claims, finding they had proven R.S. 2477 rights-of-way on twelve of the fifteen roads at issue and setting proper widths for the rights-of-way. *See Kane II,* 2013 WL 1180764. Both orders are challenged in this appeal.

Plaintiffs-Appellants and Cross-Appellees Kane County and Utah challenge two of the district court's determinations. First, they argue the district court erred in finding that Public Water Reserve 107 reserved from the operation of R.S. 2477 two parcels of lands crossed by Swallow Park/Park Wash Road ("Swallow Park Road"). Second, they contend the district court erred in requiring that R.S. 2477 rights-of-way be proven against the United States by clear and convincing evidence.

Defendant-Appellee and Cross-Appellant United States also raises two issues. First, it contends the district court lacked jurisdiction over Kane County's claims regarding the Sand Dunes, Hancock and four Cave Lakes roads because of the absence of a "disputed title to real property in which the United States

claims an interest," 28 U.S.C. § 2409a(a), a prerequisite to federal court jurisdiction under the QTA. Second, the United States contends the district court erred in determining the widths of Plaintiffs' rights-of-way on Swallow Park Road, North Swag Road, and Skutumpah Road.

Additionally, amici Southern Utah Wilderness Alliance (SUWA), the Wilderness Society and the Sierra Club (collectively "amici") contend the district court lacked jurisdiction over Kane County's R.S. 2477 claim to North Swag Road because the QTA's limitations period had already run. This issue pertains to subject matter jurisdiction, a matter "essential to this court's review," which we would address "without regard to whether the parties dispute its existence." *Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.,* 407 F.3d 1091, 1104 (10th Cir. 2005). Accordingly, we address it alongside the jurisdictional arguments raised by the United States.

The issues before this court thus implicate nine roads: Sand Dunes Road, Hancock Road, the four Cave Lakes roads (denominated as K1070, K1075, K1087 and K1088), Swallow Park Road, North Swag Road and a portion of Skutumpah Road. The facts regarding these roads are discussed as they are pertinent to each issue.

Discussion

A. Quiet Title Act Jurisdiction

The United States and amici contend the district court lacked subject matter jurisdiction over certain of the QTA claims. The United States contends Kane County brought claims to roads on which no "disputed title" existed and amici contend Kane County brought claims to roads on which the QTA limitations period had run. The district court rejected these arguments, and we review its determinations de novo. *See Rio Grande Silvery Minnow v. Bureau of Reclamation,* 599 F.3d 1165, 1175 (10th Cir. 2010).

The United States cannot be sued absent a waiver of sovereign immunity. *See Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands,* 461 U.S. 273, 280 (1983). A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States v. King,* 395 U.S. 1, 4 (1969). The QTA provides such a waiver:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a *disputed title* to real property in which the United States *claims an interest.*

28 U.S.C. 2409a(a) (emphasis added). The QTA provides the "exclusive means by which adverse claimants [can] challenge the United States' title to real property." *Block,* 461 U.S. at 286. District courts are granted jurisdiction over § 2409a suits under 28 U.S.C. § 1346(f).

Thus, for a court to have jurisdiction over a QTA claim, the plaintiff must establish that: (1) the United States "claims an interest" in the property at issue; and (2) title to the property is "disputed." *See Leisnoi, Inc. v. United States (Leisnoi II),* 267 F.3d 1019, 1023 (9th Cir. 2001).[1] The district court found these two elements satisfied as to each of the fifteen roads at issue. The United States argues that the grounds on which the court found "disputed title" to Sand Dunes, Hancock and the four Cave Lakes roads were insufficient under § 2409a(a).

The issue of what is required to satisfy the QTA's "disputed title" requirement is one of first impression in this circuit. In interpreting § 2409a(a), we begin with the established principle that waivers of sovereign immunity are to be read narrowly and conditions on the waiver are to be "strictly observed." *Block,* 461 U.S. at 287; *see also Mills v. United States,* 742 F.3d 400, 405 (9th Cir. 2014) ("In construing the scope of the QTA's waiver, we have read narrowly the requirement that the title at issue be 'disputed.' ").

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[1] Though some courts appear to combine the two QTA elements into one, *see, e.g., Alaska v. United States,* 201 F.3d 1154, 1160 (9th Cir. 2000) (analyzing the issue as whether the United States "claim[ed] an interest"); *Mills v. United States,* 742 F.3d 400, 405 (9th Cir. 2014) (relying on *Alaska* but analyzing the issue simply as whether a "disputed title" exists), most courts appear to follow *Leisnoi II* and analyze the elements separately, as did the district court. *See, e.g., Mich. Prop. Ventures, LLC v. United States,* No. 14-10215, 2014 WL 2895485, at *4-6 (E.D. Mich. June 26, 2014).

The parties rely on a pair of Ninth Circuit cases analyzing the scope of § 2409a(a)'s waiver of sovereign immunity. In *Alaska v. United States,* Alaska's title to the Kandik, Nation and Black rivers depended upon whether the rivers were navigable at the date Alaska obtained statehood. 201 F.3d 1154, 1156-57 (9th Cir. 2000). QTA jurisdiction thus hinged on whether the United States had claimed an interest in the rivers by asserting they were not navigable at the time of statehood. Before the district court, the United States refused to admit or deny Alaska's allegations that the rivers were navigable at statehood. Despite the United States' failure to formally claim an interest in the case at hand, the Ninth Circuit found it had claimed an interest in the Kandik and Nation rivers. The court relied upon the United States' previous assertion before an administrative law judge that the rivers were not navigable at statehood, explaining that this past assertion created a "present cloud on the state's title." *Id.* The court expressed a preference against allowing potential federal claims to "lurk over the shoulder of state officials as they try to implement a coherent management plan" for the state's waterways. *Id.* at 1161. However, the court found no QTA jurisdiction over the Black River because the United States never "expressly asserted a claim" to it. *Id.* at 1164.

Though *Alaska* dealt with whether the United States "claimed an interest" in the rivers, other Ninth Circuit cases have applied this "cloud on title" standard to the "disputed title" element of § 2409a(a). *See*

Leisnoi II, 267 F.3d at 1024 (holding the "disputed title" requirement of the QTA can be satisfied by a third-party's assertion of an interest of the United States that "clouds the plaintiff's title"); *Leisnoi, Inc. v. United States (Leisnoi I),* 170 F.3d 1188, 1192 (9th Cir. 1999). However, more recently in *Mills,* the Ninth Circuit did not reference the "cloud on title" standard and emphasized that the "disputed title" requirement must be "read narrowly." 742 F.3d at 405. In *Mills,* a miner sought access to a mine site over an R.S. 2477 right-of-way and brought suit under the QTA. *Id.* at 403-05. The court found no "disputed title" where land management agency officials had previously denied the plaintiff's petitions for a right-of-way on the grounds that they lacked the legal authority to grant the petition. *Id.* at 405-06. The court explained that the United States had not "expressly dispute [d]" the plaintiff's title, nor had it "taken an action that implicitly disputes" the title. *Id.*

To the extent the Ninth Circuit still utilizes a "cloud on title" standard, we would reject it as incompatible with the rule that conditions on a waiver of sovereign immunity are to be specifically observed. *See Block,* 461 U.S. at 287. The "cloud on title" standard provides little guidance to parties as to what constitutes a title dispute and could lead federal courts to issue advisory opinions. Instead, we hold that to satisfy the "disputed title" element of the QTA, a plaintiff must show that the United States has either expressly disputed title or taken action that implicitly disputes it.

Under this standard, a plaintiff need not show the United States took direct action to close or deny access to a road – indirect action or assertions that actually conflict with a plaintiff's title will suffice. Nor is the United States shielded by sovereign immunity where it previously disputed a plaintiff's title but does not do so presently. *Cf. Alaska,* 201 F.3d at 1162. Thus, concerns about potential claims "lurk[ing] over the shoulder of state officials" are ameliorated. *Id.* at 1161. However, actions of the United States that merely produce some ambiguity regarding a plaintiff's title are insufficient to constitute "disputed title." This accords with both the purpose of the QTA – allowing parties to settle disputes with the United States over land – and the principle that waivers of sovereign immunity are construed narrowly.

We now turn to each of the roads at issue in this appeal.

1. Sand Dunes and Hancock Roads

Sand Dunes Road is a 20-mile road running from the Utah-Arizona border to Utah State Highway 89. Near Sand Dunes is Hancock Road, a paved, two-lane road roughly ten miles in length. Both roads fall within the land administered by the Kanab Field Office, a branch of the Bureau of Land Management (BLM).

On October 31, 2008, the Kanab Field Office released the Kanab Field Office Management Plan ("the Plan"). *Kane I,* 934 F. Supp. 2d at 1353. The

Plan provides guidance for the management of roughly 554,000 acres of land administered by the BLM and was based on "a complete route inventory in 2005 and 2006." *Id.* It specifies that "[n]atural and cultural resource protection is . . . accomplished by limiting motorized travel to the routes designated." *Id.* However, the Plan explicitly states it "*does not* affect valid existing rights" and "*does not* adjudicate . . . or otherwise determine the validity of claimed rights-of-way." *Id.* (emphasis added).

Map 9 of the Plan identifies areas that are open to cross-country, motorized vehicle use, closed to such use, or open only on designated routes. Hancock and Sand Dunes roads fall in an area where off-highway vehicle use is "Limited to Designated Open Roads and Trails." *Id.* Map 10 of the Plan shows which routes in the designated area are open, closed, or limited for motor vehicle use. Hancock and Sand Dunes roads are not identified in Map 10. On January 30, 2009, after Kane County filed its amended complaint to include these roads, BLM published additional maps on its website identifying Hancock and Sand Dunes roads as "Class 3 primary roads," a term used to denote major thoroughfares. The changes to the maps were not the product of a formal amendment process. *Id.*

The district court found that the Plan's omission of Hancock and Sand Dunes roads from the initial maps had the practical effect of closing the roads. *Id.* at 1357. Because the republished maps were not the product of a formal amendment process, the court

held that an "ambiguity" existed as to the legal status of the roads, creating a "cloud on title" sufficient for jurisdiction under § 2409a(a). *Id.* at 1354, 1358. We disagree.

The effect of the Plan's omission of Sand Dunes and Hancock roads is at best ambiguous and insufficient to create a disputed title under § 2409a(a). The Plan *explicitly* declared it did not adjudicate or affect rights-of-way. Further, though the Plan marked certain roads as closed, Hancock and Sand Dunes were not marked as closed; they simply were not marked at all. Though a provision of the Plan suggested travel was limited to designated routes, the effect of this provision is unclear, as the United States took no action to limit travel to such routes. Regardless of whether the United States was entitled to clarify the original maps with additional maps online, *see id.* at 1357-58, the original maps did not amount to a disputed title. The district court was correct in concluding an "ambiguity exist[ed] regarding the legal status of the roads," *id.* at 1354; however, this ambiguity is insufficient to constitute a "disputed title" under § 2409a(a).

Kane County relies upon several other grounds for finding a "disputed title" to the Sand Dunes, Hancock and four Cave Lakes roads that were not addressed by the district court. Kane Reply Br. 9-17. The County does not explain how any of these grounds create a "disputed title" to Sand Dunes, Hancock or the Cave Lakes roads specifically, and so we find its argument without merit. Thus, we reverse

the district court and find it had no jurisdiction over the QTA claims to Sand Dunes and Hancock roads.

2. The Four Cave Lakes Roads

a. The United States' Answer

The Cave Lakes roads (denominated as K1070, K1075, K1087 and K1088) are four short roads in southwestern Kane County crossing BLM-administered land. All four were designated as "open" under the Kanab Field Plan. *Kane I,* 934 F. Supp. 2d at 1354. Paragraph 29 of Kane County's amended complaint stated: "After 1866 and prior to the repeal of R.S. 2477 on October 21, 1976, Kane County, by and on behalf of the public, accepted R.S. 2477 rights-of-way for . . . the Cave Lakes roads." JT App. 41. The United States' answer as to this paragraph stated: "The allegations . . . are legal conclusions to which no responsive pleading is required. To the extent a responsive pleading is required, the United States lacks sufficient information to form a belief as to the truth of the allegations." *Id.* at 113. Under Fed. R. Civ. P. 8(b)(5), this response is treated as a denial. The district court found this denial of the allegations created a "disputed title" sufficient for jurisdiction under the QTA. *Kane I,* 934 F. Supp. 2d at 1358. We disagree.

The district court likened the United States' answer to *Alaska,* where the Ninth Circuit held that a past claim of interest before an administrative law judge as to the Nation and Kandik Rivers amounted

to a present "cloud" on the plaintiff's title. 201 F.3d at 1162. However, *Alaska* itself found no jurisdiction over the QTA claim to the Black River where, as here, the United States refused to admit or deny allegations of the river's navigability at the pleading stage because the allegations "consist[ed] of conclusions of law not requiring an answer." *Id.* at 1163-65. *Alaska* thus suggests that a failure to admit allegations cannot alone suffice to show a "disputed title" under § 2409a(a). Though a disclaimer of title by the United States does operate to remove the jurisdiction of the court under the QTA, *see* 28 U.S.C. § 2409a(e), a disclaimer is not necessary for the United States to challenge jurisdiction under § 2409a(a). *See Leisnoi I,* 170 F.3d at 1192 ("Subsection (a) is the one that confers jurisdiction. . . . Nothing in subsection (e) qualifies those requirements."). Moreover, as a practical matter, requiring the United States to either admit allegations or waive sovereign immunity under § 2409a(a) would place a tremendous and unfair burden upon it at the pleading stage. Thus, we conclude the United States' answer is insufficient to constitute a "disputed title" under § 2409a(a).

b. The United States' Grant of Title V Permits

As to three of the Cave Lakes roads (K1070, K1075 and K1087), the district court found that the BLM's grant of Title V permits to private entities provided an additional ground for "disputed title" under § 2409a(a). On July 25, 2008, the BLM issued

Title V permits to a private entity to use these three roads. Supp. App. 337-55. The Title V permits grant the right to "construct, operate, maintain, and terminate an access road for the purpose of accessing private property on public lands." *Id.* at 337. The permits state that roads must be "surfaced to specifications set by Kane County for a subdivision road and to Kane County standards for subdivision roads with a travel surface of 28 feet." *Id.* at 338. The permits are "not intended to extinguish or limit any R.S. 2477 right-of-way," and if an R.S. 2477 right-of-way was found by a court or the Secretary of the Interior, the permit "would be superseded thereby." *Id.* The district court held these permits "conflict [ed] with Kane County's ability to manage its alleged rights-of-way" and thus amounted to a dispute of title under 2409a(a). *Kane I,* 934 F. Supp. 2d at 1358. We disagree.

Nothing about the grant of Title V permits to third parties expressly or implicitly disputes Kane County's right-of-way. "Easements and servient estates can (and usually do) peaceably coexist." *George v. United States,* 672 F.3d 942, 947 (10th Cir. 2012). Here, the permits require that the roads be maintained in accordance with Kane County standards. Further, like the Kanab Field Plan, the Title V permits state they do not affect R.S. 2477 rights-of-way; even more, they *explicitly* state they are "superseded" by any R.S. 2477 rights-of-way. The permits, if anything, seem a deliberate attempt *not* to dispute Kane County's title.

To be sure, "owners of the dominant and servient estates 'must exercise [their] rights so as not unreasonably to interfere with the other.'" *S. Utah Wilderness Alliance (SUWA) v. Bureau of Land Mgmt.,* 425 F.3d 735, 746 (10th Cir. 2005) (quoting *Big Cottonwood Tanner Ditch Co. v. Moyle,* 174 P.2d 148, 158 (Utah 1946)). But, Kane County has produced no evidence as to how the permits interfered with any development plans. Absent such evidence, we must conclude that the Title V permits do not create a "disputed title" under § 2409a(a).

Thus, as to all four of the Cave Lakes Roads (K1070, K1075, K1087 and K1088) we reverse the district court's finding of jurisdiction under the QTA.

3. North Swag Road – QTA Limitations Period

Amici contend that the district court lacked jurisdiction over Plaintiffs' R.S. 2477 claim to North Swag Road because the QTA's limitations period had already run. The district court found that the limitations periods had not run, *Kane I,* 934 F. Supp. 2d at 1360-64, and the United States has not challenged this finding on appeal. At an earlier stage of litigation, the United States in fact conceded the QTA limitations period had not run. *See Kane Cnty. v. United States,* No. 2:08-CV-00315, 2011 WL 2489819, at *7 (D. Utah June 21, 2011). Nevertheless, the QTA's limitations period is a jurisdictional bar, *see Rio Grande Silvery Minnow,* 599 F.3d at 1175-76, and thus we address it.

As discussed above, the QTA provides the exclusive means by which claimants can challenge the United States' title to real property. But, "what the QTA gives it often proceeds to take away." *George,* 672 F.3d at 944. The QTA provides two limitations provisions, one for non-states and one for states. Section 2409a(g), applicable to non-states including counties, provides:

> Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

28 U.S.C. § 2409a(g). Thus, the twelve-year limitations period for non-states is triggered when a party knows or should know of a claim of the United States.

As to states, the QTA provides that for land on which the United States has made "substantial improvements" or has "conducted substantial activities pursuant to a management plan," actions are barred unless commenced "within twelve years after the date the State received notice of the Federal claims to the lands." *Id.* § 2409a(i). "Notice" for states must be either by public communications "sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands" or "by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open

and notorious." *Id.* § 2409a(k)(1)-(2). Both the 2409a(g) and 2409a(i) standards are relevant here, as amici argue the limitations periods ran on both Kane County and Utah's QTA claims.

In interpreting the QTA's limitations provisions, we begin again with the familiar proposition that waivers of sovereign immunity are construed narrowly and conditions upon the waiver strictly observed. *Block,* 461 U.S. at 287. This court has held that the trigger for starting the QTA limitations period is an "exceedingly light one." *George,* 672 F.3d at 944. A "range war" is not required, and plaintiffs cannot wait until the United States' claims to title "crystallize into well-defined and open disagreements." *Id.* at 946-47 (quoting *Rio Grande Silvery Minnow,* 599 F.3d at 1188). Concrete action by the United States is not required; "[a]ll that is necessary is a reasonable awareness that the Government claims some interest adverse to the plaintiff's." *Knapp v. United States,* 636 F.2d 279, 283 (10th Cir. 1980). Thus, though "[k]nowledge of the claim's full contours" is unnecessary, *id.,* the plaintiff must be on notice of an *adverse* interest asserted by the government. *George,* 672 F.3d at 946.

This court recently explained in *San Juan County v. United States* that in order to trigger the QTA limitations period against a party claiming an R.S. 2477 right-of-way, the United States must claim "exclusive control" of a road. 754 F.3d 787, 793 (10th Cir. 2014); *see also McFarland v. Norton,* 425 F.3d 724, 727 (9th Cir. 2005) (requiring an exclusive claim

to trigger the QTA limitations period against a party claiming a right-of-way); *Michel v. United States,* 65 F.3d 130, 132 (9th Cir. 1995) (same). As a public right-of-way can generally "peaceably coexist" with an underlying ownership interest, *see George,* 672 F.3d at 947, the United States must provide a county or state with "sufficient notice of the United States' claim of a right to exclude the public." *San Juan Cnty.,* 754 F.3d at 794.

Amici contend that two events triggered the QTA limitations periods: (1) the BLM's 1980 designation of the Paria-Hackberry Wilderness Study Area and publication of this designation in the Federal Register; and (2) a 1991 meeting of the Kane County Commissioner with BLM representatives to discuss the procedures necessary for obtaining recognition of R.S. 2477 rights-of-way. The district court found these events insufficient to trigger the QTA limitations period, and we review its determinations de novo. *See Rio Grande Silvery Minnow,* 599 F.3d at 1175.

a. The 1980 Designation of the Paria-Hackberry WSA

In 1976, as part of a "statutory sea change," Congress passed the Federal Land Policy and Management Act (FLPMA), initiating a "conservation and preservation" approach to federal land management. *SUWA,* 425 F.3d at 741. Pursuant to the FLPMA, the Secretary of the Interior was directed to conduct an inventory of "those roadless areas of five thousand

acres or more" to determine which areas had wilderness characteristics as defined by the Wilderness Act. 43 U.S.C. § 1782(a). An area of wilderness was defined to mean "an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation." 16 U.S.C. § 1131(c).

On November 14, 1980, the BLM published its Final Intensive Inventory Decision for Utah in the Federal Register. *See* 45 Fed. Reg. 75,602 (Nov. 14, 1980). This inventory designated Paria-Hackberry, which encompassed North Swag Road, as a Wilderness Study Area (WSA). Upon designation of land as a WSA, the Secretary of the Interior is directed to manage such lands "in a manner so as not to impair the suitability of such areas for preservation as wilderness" and to "take any action required to prevent unnecessary or undue degradation of the lands and their resources." 43 U.S.C. § 1782(c). This standard requires the BLM to "ensure that an area's existing wilderness values are not degraded" in a manner that might threaten the WSA's designation as protected wilderness. Interim Management Policy and Guidelines for Land Under Wilderness Review (IMP), 44 Fed. Reg. 72,014 (Dec. 12, 1979).

Though the FLPMA applies to "roadless" areas, a "road" for purposes of the Wilderness Act is not coterminous with a "road" under R.S. 2477. The same year the BLM designated the Paria-Hackberry WSA, the BLM Director for Utah issued a memorandum stating the following:

> The wilderness inventory process uses a definition of a road that is distinct from the definition of "public" road contemplated by R.S. 2477 (43 USC 932) and is a definition for inventory purposes only, not for establishing rights of counties, etc. A determination that an area should not be excluded from wilderness review because the area does not have any "roads" as defined in the Bluebook is not a determination that a road is or is not a "public" road. This is a factual determination that does not relate to wilderness. . . .

Instruction Memorandum No. UT '80-240 (Mar. 6, 1980), JT App. 2300-01. A subsequent nationwide BLM memorandum stated that where WSAs overlap with R.S. 2477 rights-of-way, "the WSA/wilderness designation is subject to the terms and conditions of the pre-existing R/W grant." Instructional Memorandum No. 90-589 (Aug. 15, 1990), JT App. 2295; *see also id.* at 2296 (noting that R.S. 2477 rights-of-way "may in fact exist within a WSA"); IMP, 44 Fed. Reg. 72,015 (WSAs "shall be subject to valid existing rights"). Moreover, an opinion from the Secretary of the Interior shortly after the Paria-Hackberry WSA designation explained that valid existing rights, including rights-of-way, were excepted from the non-impairment requirements of 43 U.S.C. § 1782(c). *See* United States Dep't of the Interior Solicitor's Opinion M-36910, 88 I.D. 909, 1981 WL 29226 (Oct. 5, 1981). In light of this evidence, the district court found that the Paria-Hackberry designation did not constitute

an adverse claim to North Swag and was thus insufficient to trigger the QTA limitations period.

Amici argue the designation of Paria-Hackberry as a WSA and publication of this designation were sufficient to give Kane County and Utah notice of the claim of the United States. They contend this claim was adverse to the rights of Kane County and Utah because the WSA designation meant that the land was to remain "roadless" and imposed upon the BLM a duty to manage the roads on a non-impairment standard that conflicted with any claimed R.S. 2477 rights-of-way. SUWA Br. 22-31.

Amici are correct that publishing an interest in the Federal Register is sufficient to give notice to affected parties. *See George,* 672 F.3d at 944 (quoting 44 U.S.C. § 1507). However, as the district court recognized, publication in the Federal Register is sufficient notice to trigger the limitations period only where the published notice conflicts with a plaintiff's interest. *Kane I,* 934 F. Supp. 2d at 1362. Thus, if the published interest does not amount to a claim that a plaintiff lacks R.S. 2477 rights-of-way within a WSA, the limitations period is not triggered. As *San Juan County* explained, in the context of R.S. 2477 claims, a published claim by the United States must amount to a claim of "exclusive control" to trigger the QTA limitations period. 754 F.3d at 794. Thus, the determinative issue is whether the Paria-Hackberry designation amounted to a claim of exclusive control or whether it permitted the United States' ownership

interest and the Plaintiffs' right-of-way to "peaceably coexist." *George,* 672 F.3d at 947.

We conclude the Paria-Hackberry designation was insufficient to trigger QTA limitations periods against Kane County and Utah. The fact that the Wilderness Act covers "roadless" areas is inapposite, as the definitions for roads under the Wilderness Act and R.S. 2477 are not the same. Nor is the non-impairment standard by which the BLM was to manage the WSA sufficient to amount to a claim to North Swag road. As a preliminary matter, the Department of the Interior itself did not believe the non-impairment standard served to limit valid existing rights, including rights-of-way. *See* Solicitor's Opinion M-36910, *supra.* Even if the non-impairment standard did apply to R.S. 2477 rights-of-way, amici have not shown how this would amount to a claim by the United States of "exclusive control" over North Swag.

Several other BLM memoranda, both contemporaneous with and subsequent to the 1980 wilderness designation, strongly suggest that wilderness designations do not preclude the recognition of R.S. 2477 rights-of-way. The 1980 Instruction Memorandum issued by the Utah BLM Director, which preceded the Paria-Hackberry wilderness designation, establishes that the BLM did not believe wilderness designations rendered an area "roadless" for R.S. 2477 purposes. The 1990 BLM Memorandum stated with even greater clarity that wilderness designations are "subject to the terms and conditions" of pre-existing rights-of-way. JT App. 2295. Amici cast these BLM documents

as an attempt to "unring the bell" that the 1980 Paria-Hackberry designation "chimed," especially given their status as informal agency pronouncements. *See* SUWA Br. 29; SUWA Reply Br. 16 (citing *Spirit Lake Tribe v. North Dakota,* 262 F.3d 732, 741-42 (8th Cir. 2001); *Kingman Reef Atoll Invs., LLC v. United States,* 541 F.3d 1189, 1200 (9th Cir. 2008)). But unlike the cases amici cite, the BLM memoranda are not meant to unring the bell, but to show the bell never rang in the first place. If the BLM did not believe wilderness designations conflicted with rights-of-way within the land, it would be strange indeed to declare that Kane County or Utah should have.

This court's analysis in *San Juan County* provides further support for our decision. There, San Juan County and Utah brought several QTA claims against the United States, who argued that the § 2409a limitations periods had run. As to the County's claim, the court rejected the United States' contention that the closures of two different segments of the same road amounted to an adverse claim to the road at issue. *San Juan Cnty.,* 754 F.3d at 793-94. More pertinent here, the court explained that as to Utah's claim, the United States failed to show that either the road closures or "a variety of other park management activities," including "the National Park Service's 1970 recommendation that the upper canyon be designated as wilderness," amounted to notice of a claim *adverse* to Utah's claimed right-of-way. *Id.* at 796. Because these management activities left the

road "fully accessible to the public," they did not suffice to trigger the limitations period.[2] *Id.*

Similarly here, the BLM took no action to deny the public access to North Swag Road. *See Kane I,* 934 F. Supp. 2d at 1362. Nor have amici established that any of the BLM's management responsibilities pursuant to the wilderness designation were inconsistent with Kane County or Utah's right-of-way on North Swag.

Amici cite three district court opinions for the proposition that the publication of a wilderness designation suffices to trigger the QTA limitations periods. *See* SUWA Br. 24 (citing *S.W. Four Wheel Drive Assoc. v. Bureau of Land Mgmt.,* 271 F. Supp. 2d 1308, 1312 (D.N.M. 2003), *aff'd on other grounds,* 363 F.3d 1069, 1070 (10th Cir. 2004); *Bd. of Comm'rs of Catron Cnty. v. United States,* 934 F. Supp. 2d 1298, 1306 (D.N.M. 2013); *Cnty. of Inyo v. Dep't of Interior,* No. CV F 06-1502 AWI DLB, 2008 WL 4468747 (E.D. Cal. Sept. 29, 2008)). These cases ignore the distinction – acknowledged by the BLM itself – between "roads" for the purpose of the

[2] We read *San Juan County* to be in line with our precedent holding that a "range war" or physical actions to "enforce" a claim are unnecessary to trigger the QTA's limitations clock. *George,* 672 F.3d at 946. The *San Juan County* court ultimately concluded that the QTA was not triggered because Salt Creek Road remained open to the public, but left room for the possibility that "management activities [that] were inconsistent with the claimed right-of-way" could provide the necessary notice to start the limitations period. 754 F.3d at 794.

Wilderness Act and "roads" under R.S. 2477. *See Bd. of Comm'rs of Catron Cnty.,* 934 F. Supp. 2d at 1304-07; *S.W. Four Wheel Drive*, 271 F. Supp. 2d at 1310-12. Moreover, these cases are unpersuasive in light of this court's decision in *San Juan County.*

Thus, we conclude the designation of the Paria-Hackberry WSA and publication of this designation in the Federal Register were insufficient to trigger the limitations period against Kane County under § 2409a(g) and Utah under § 2409a(i). Because we find Utah was not reasonably aware of an adverse claim by the United States, we need not address whether the United States "conducted substantial activities" or "made substantial improvements" to the land under § 2409a(i).

b. The 1991 Meeting of the Board of Commissioners

Next, amici contend the County received notice of the United States' adverse claim to North Swag in 1991, when BLM officials met with County officials to inform them of the necessary procedures for obtaining recognition of R.S. 2477 rights-of-way. SUWA Br. 26. This meeting was brought about by the Secretary of the Interior's December 7, 1988 statement that it was "necessary in the proper management of Federal land to be able to recognize with some certainty the existence, or lack thereof, of public highway grants obtained under R.S. 2477." *Kane I,* 934 F. Supp. 2d at 1361. Nothing in the minutes of these meetings

amounts to an adverse claim by the United States. That some commission members recognized a need to quiet title to R.S. 2477 rights-of-way does not establish that Kane County had reasonable awareness of an adverse claim of the United States. Thus, we affirm the district court's decision finding jurisdiction over North Swag Road under the QTA.

B. PWR 107 and Lands Reserved for Public Uses Under R.S. 2477

R.S. 2477 rights-of-way can only be established over public lands "not *reserved* for public uses." *SUWA,* 425 F.3d at 784 (emphasis added). The district court concluded that Public Water Reserve (PWR) 107, a 1926 executive order, operated to "reserve" from the operation of R.S. 2477 two parcels of land across which Swallow Park Road runs. *Kane II,* 2013 WL 1180764, at *58-59. We disagree.

At the start of the twentieth century, monopolization of public water sources in the West had become a significant problem. *See* The Classification of the Public Lands, U.S. Geological Survey Bull. 537, at 42-43 (1913). "Water controlled the range," and it became common practice for a landowner to file land scrips upon all water springs in a district, effectively allowing him to exclude all competition. *See* James Muhn, *Public Water Reserves: The Metamorphosis of a Public Land Policy,* 21 J. Land Resources & Envtl. L. 67, 68, 81 (2001) (citation omitted). This practice led to regular struggles for possession of watering holes and

eventually garnered the attention of Congress and federal land agencies.

In 1910, Congress enacted the Pickett Act (or General Withdrawal Act) granting the President authority to make withdrawals for "water-power sites, irrigation, classification of lands, *or other public purposes.*" Act of June 25, 1910, ch. 421, 36 Stat. 847 (emphasis added).[3] Pursuant to the "other public purposes" language of the Pickett Act, in 1912 President Taft signed what became Public Water Reserve No. 1, a withdrawal order for 16,200 acres covering roughly 32 watering springs in Western Utah. Similar withdrawals of federal land containing water came in a somewhat piecemeal fashion. Opponents of these withdrawals, such as Congressman Frank Mondell of Wyoming, were concerned they might interfere with settlement and acquisition of land in the West. Department of the Interior Secretary Walter Fisher, in defense of the policy, assured Congressman Mondell that the withdrawals did "not

[3] The Act additionally provided that withdrawn lands "shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals." 37 Stat. 947. Kane County argues that because R.S. 2477 was enacted as Section 8 of the Mining Act of 1866, which (in other provisions) dealt with metalliferous minerals, R.S. 2477 is a "mining law" that "appl [ies] to metalliferous minerals." Kane Br. 15-16. We reject this argument and conclude that the mere coincidence of R.S. 2477's location in a law that later came to be known as the Mining Act of 1866 is insufficient to bring it within the Pickett Act's exception.

mean that [the water sources] are reserved from private uses; on the contrary, it means that those private uses are encouraged and permitted." Muhn, *supra,* at 85-86.

In the face of uncertainty regarding the legal authority for such withdrawals, Congress in 1916 passed the Stock-Raising Homestead Act (SRHA), Section 10 of which provides:

> [L]ands containing water holes or other bodies of water needed or used by the public for watering purposes . . . may be reserved under the provisions of the [Pickett Act] and such lands heretofore or hereafter reserved shall, while so reserved, be kept and held open to the public use for such purposes and under such general rules and regulations as the Secretary of the Interior may prescribe. . . .

Act of Dec. 29, 1916, ch. 9, 39 Stat. 862, 865 (codified at 43 U.S.C. §§ 291 et seq.), *repealed by* FLPMA.

Pursuant to the SRHA and Pickett Act, in 1926 President Calvin Coolidge signed PWR 107, which provides:

> [I]t is hereby ordered that every smallest legal subdivision of the public-land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land be, and the same is hereby, withdrawn from settlement, location,

> sale, or entry, and reserved for public use in accordance with the provisions of [the SRHA] and in aid of pending legislation.

Public Water Reserve No. 107 (Apr. 17, 1926). Unlike prior withdrawals of water, PWR 107 was a "blanket" withdrawal. Muhn, *supra,* at 110.

In sending the order to the President, the Secretary of the Interior explained:

> The control of water in the semiarid regions of the west means control of the surrounding areas. . . . Private parties have used various lieu selection and scrip acts as a vehicle of acquiring small areas surrounding these springs and water holes, thus withdrawing them from the common use of the general public . . . and for this reason . . . it is believed advisable to make a temporary general order of withdrawal.

Letter from Hubert Work, U.S. Sec'y of the Interior, to President Calvin Coolidge (Apr. 17, 1926).

In 1929, the Secretary of the Interior construed PWR 107 to include, *inter alia,* two parcels of land through which Swallow Park Road crosses. It is undisputed that the Secretary properly determined that PWR 107 applies to these parcels. Thus, the issue before this court is whether the two parcels were "reserved for public use" – thus preventing the operation of R.S. 2477 – or merely "withdrawn."

The distinction between a reservation and a withdrawal for purposes of R.S. 2477 was set forth by

this court in *Southern Utah Wilderness Alliance (SUWA) v. Bureau of Land Management,* 425 F.3d 735, 784-86 (10th Cir. 2005). The court in *SUWA* addressed whether the Coal Withdrawal of 1910, which stated that certain federal lands were "withdrawn from settlement, location, sale or entry, and *reserved* for classification and appraisement with respect to coal values," operated to "reserve" those lands for public use under R.S. 2477. *Id.* at 784 (emphasis added). The court explained that a withdrawal merely "ma[de] land unavailable for certain kinds of private appropriation," whereas a reservation not only withdraws the land from the operation of the public lands laws, but also dedicates the land to a *particular* public use. *Id.* (emphasis added). Further, "just because a withdrawal uses the term 'reserved' does not mean that it reserves land 'for public uses.'" *Id.* at 785.

The court found that despite the coal withdrawal's language, it did not reserve the land at issue "for public use." The historical context of the coal withdrawal established that it "narrowly, and temporarily, removed potential coal lands from certain kinds of private appropriation." *Id.* at 785. The land was withdrawn to allow the United States to "reexamine and reclassify lands which it thought might have exceptional value" – insufficient, in the court's view, to amount to a reservation. *Id.* (citation omitted). Further, common sense dictated that the withdrawal, which permitted widespread settlement under public law, "was not meant to cut off the right to establish

access to those claims." *Id.* at 786. "[I]t would make little sense for Congress to open public lands to private claims but forbid settlers to construct highways to access those claims." *Id.*

Whether PWR 107 "reserves" land for "public use" presents a closer question than the coal withdrawal at issue in *SUWA*. PWR 107 goes beyond the mere temporary appropriation *SUWA* found the Coal Withdrawal to be. Further, PWR 107 withdrew land to "be kept and held open to the public" for "watering purposes" under the SRHA – certainly more of a "public use" than withdrawing lands for reclassification and appraisal. However, *SUWA* explained that a reservation must set aside land for a *specific* public purpose – such as a park, military post, or Native American land – and PWR 107 simply set aside land for the *general* purpose of preserving water access to the public. *See id.* at 784 (citing 63C Am. Jur. 2d Public Lands § 31 (2005)).

Determinative here is the fact that if PWR 107 did in fact operate to "reserve" land from the operation of R.S. 2477, its effect was the precise opposite of its purpose. PWR 107 sought to prevent private appropriation and monopolization of water sources in order to guarantee public access to these water sources. If PWR 107 "reserved" land from R.S. 2477, the sole means for the public to construct roads to access these water sources would be eliminated. *See id.* at 786 ("R.S. 2477 was essentially the only authority by which highways could be established across public lands by state and local governments." (quoting

BLM in previous litigation)). As in *SUWA,* it would be nonsensical for Congress and the President to preserve the public's access to watering springs "but forbid settlers to construct highways to access" these springs. *Id.* at 786. That Congress or the President intended to set aside this land for public watering purposes yet silently deny the public the right-of-way to access it is highly improbable.

The United States suggests that R.S. 2477 rights-of-way are not the only ways for the public to access watering holes reserved under PWR 107 and suggests three alternatives. First, it contends that the 1925 Department of Interior regulation Circular No. 1028 "fully protected public access to water sources." Aplee. Br. 56. But Circular No. 1028 merely allowed citizens to apply for a permit to "improve the productivity of any water hole or source of water supply" within a reserve or "conduct such waters from their source within a reserve to a point or place more convenient for public use"; the regulation does not provide for general public access to use the sources. *See* Supp. App. 103. Next, the United States points to federal regulations setting forth procedures for obtaining a right-of-way across reserved lands. Aplee. Br. 57 (citing 43 C.F.R. § 244.47 (1943)). But these regulations did not come about until 1943, seventeen years after PWR 107. Finally, the United States argues that, as the district court observed, Plaintiffs could simply request a right-of-way pursuant to the FLPMA Title V permit process. Aplee Br. 58 n.27. Perhaps so, but this argument suffers the same flaw as the prior

one: the Title V permit process did not become available until the passage of the FLPMA in 1976. *See* Pub. L. No. 94-579, Title V, § 501, 90 Stat. 2776 (Oct. 21, 1976) (codified at 43 U.S.C. § 1761). The logical consequence of this argument is that PWR 107, an executive order aimed at ensuring public access to water, had precisely the opposite effect until the passage of the FLPMA in 1976. This argument is untenable.

In *SUWA,* the court found that common sense dictated that a coal withdrawal that permitted widespread settlement under homestead laws "was not meant to cut off the right to establish access to those claims." 425 F.3d at 786. The same rationale applies here. R.S. 2477 was "essentially the only authority" by which the public could establish roads across federal lands. *Id.* If PWR 107 cut off that authority, no roads could be developed to access the very water PWR 107 aimed to preserve for public use.

For the foregoing reasons, we conclude PWR 107 was not a "reservation" for the purposes of R.S. 2477 and thus reverse the district court's determination that Plaintiffs could not establish a right-of-way on the segment of Swallow Park Road crossing these parcels. On the remainder of Swallow Park Road, the district court found Plaintiffs presented sufficient evidence to establish an R.S. 2477 right-of-way. *Kane II,* 2013 WL 1180764, at *52. Because the district court found that "no evidence was presented that the public has been denied access to [the] portions of the road crossing . . . the PWR 107 parcels" and that "the

public was able to travel the full length of [Swallow Park Road] as often as it found it convenient or necessary," Kane County and Utah have also established an R.S. 2477 right-of-way over the portion of Swallow Park Road that crosses the PWR 107 parcels as well. *Id.*

C. Standard of Proof

The district court required Plaintiffs to prove their R.S. 2477 rights-of-way by clear and convincing evidence and found that Plaintiffs had not met this burden as to three of the Cave Lakes roads, K1075, K1087 and K1088. *Kane II,* 2013 WL 1180764, at *43-45, *55. Kane County and Utah appeal as to K1075 and contend that "preponderance of the evidence" is the appropriate standard of proof for establishing R.S. 2477 rights-of-way. Because we concluded above that the district court erred in exercising jurisdiction over Cave Lakes Road K1075, we do not reach the issue of the appropriate standard of proof.

D. Scope of the Rights-of-Way: North Swag, Swallow Park, and Skutumpah Roads

Swallow Park Road is a narrow, five-mile stretch of dirt road in Western Kane County. A four-mile stretch of the road has a 10-12 foot travel surface with vehicles unable to pass. Similarly, North Swag Road is a narrow dirt road approximately five miles long with a travel surface of ten feet. Skutumpah Road is a major two-lane thoroughfare with a travel surface of 24-28 feet.

The district court found Plaintiffs had established R.S. 2477 rights-of-way on North Swag, Swallow Park, and Skutumpah roads. *Kane II,* 2013 WL 1180764, at *51-53, *60-62. It determined Plaintiffs held 24-foot rights-of-way on Swallow Park and North Swag Road and a 66-foot right-of-way on Skutumpah Road. The United States contends that the district court committed two errors. First, the United States argues the court failed to base the North Swag and Swallow Park right-of-way widths on uses that were established as of 1976, when R.S. 2477 was repealed.[4] Aplee. Br. 38-44. Second, it contends the district court improperly allowed room for unspecified future improvements to North Swag, Swallow Park and Skutumpah roads. *Id.* at 45-50. We agree with the United States on both points and remand to the district court.

1. "Reasonable and Necessary" in Light of Pre-1976 Uses

The FLPMA repealed R.S. 2477 in 1976 but preserved existing rights-of-way. *See* 43 U.S.C. § 1769(a). Thus, R.S. 2477 rights-of-way were preserved "as they existed on the date of passage" of the FLPMA, October 21, 1976. *Hodel,* 848 F.2d at 1083; *see also SUWA,* 425 F.3d at 746 ("[T]he scope of an R.S. 2477

[4] The United States does not challenge the district court's width determination as to the wider portion of Swallow Park Road that is below its intersection with Skutumpah. Aplee. Br. 36 n. 17.

right of way is limited by the established usage of the route as of the date of the repeal of the statute.").

The width of the road, however, is not limited to the actual beaten path as of October 21, 1976. *Hodel,* 848 F.2d at 1083; *SUWA,* 425 F.3d at 746. Courts look to state law to determine the appropriate width, *Hodel,* 848 F.2d at 1083, and under Utah law, the width of a public road is that which is "reasonable and necessary under all the facts and circumstances." *Memmott v. Anderson,* 642 P.2d 750, 754 (Utah 1982). Thus, the road can be "widened to meet the exigencies of increased travel," including where necessary to ensure safety. *Hodel,* 848 F.2d at 1083-84 (citation omitted). However, the "'reasonable and necessary' standard *must be read in the light of traditional uses to which the right-of-way was put.*" *Id.* at 1083 (emphasis added). Thus, the proper inquiry is what width is reasonable and necessary in light of the pre-1976 uses of the road. *Id.* at 1084 (holding that improvement of the Burr Trail was "reasonable and necessary to ensure safe travel" in light of the pre-1976 uses of livestock transportation, oil, water and mineral development and tourism).

The district court made only a passing reference to *Hodel* and *SUWA*'s mandate that the reasonable and necessary standard be viewed in light of pre-1976 uses and did not appear to apply this standard to Swallow Park and North Swag roads. *Kane II,* 2013 WL 1180764, at *63-65. It made substantial factual findings regarding pre-1976 uses of Swallow Park and North Swag and considered these findings in

evaluating whether R.S. 2477 rights-of-way existed at all. *See id.* at *51-52 (Swallow Park), *52-53 (North Swag). However, it did not consider these findings in evaluating their scope. *Id.* at *65. Instead, the court relied chiefly on travel guidelines published by the American Association of State Highway and Transportation Officials (AASHTO) suggesting road widths for roads providing access to recreational or agricultural areas. These Guidelines may be relevant to the determination of what width is reasonable and necessary in light of the pre-1976 uses of Swallow Park and North Swag roads. However, because the district court did not discuss these pre-1976 uses, we must remand.

The FLPMA "had the effect of 'freezing' R.S. 2477 rights as they were in 1976." *SUWA,* 425 F.3d at 741. It brought about a "statutory sea change" that "instituted a preference for retention of the lands in federal ownership, with an increased emphasis on conservation and preservation." *Id.* These policies inform our determination of the scope of R.S. 2477 rights-of-way and call for caution in allowing improvements or expansions beyond the width of R.S. 2477 roads in 1976. As this court has consistently held, rights-of-way may be expanded beyond their 1976 widths only where reasonable and *necessary* in light of pre-1976 uses.

2. Unspecified Future Improvements

The district court determined that a 60-foot right-of-way was appropriate for Skutumpah Road and explained that this width would allow "room to

address any future realignments or other improvements needed to increase safety." *Kane II,* 2013 WL 1180764, at *64. As to Swallow Park and North Swag roads, the court determined 24-foot rights-of-way were appropriate, explaining that this width "allow[ed] for maintenance and improvements." *Id.* at *65. The United States contends that the district court erred in allowing room for unspecified future improvements. We agree.

Hodel explained 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 1084 (citation omitted). *SUWA* clarified this statement by drawing a sharp distinction between "routine maintenance" and "improvements" to R.S. 2477 rights-of-way. 425 F.3d at 749. When a right-of-way holder undertakes routine maintenance, it need not consult with the pertinent federal land management agency. But, before a holder makes "improvements" to a right-of-way, the land management agency must be consulted to allow it an opportunity to determine if the improvement is "reasonable and necessary" and to "study potential effects, and if appropriate, to formulate alternatives that serve to protect the lands." *Id.* at 748. Only in the event of a disagreement at this stage can the parties resort to the courts. *Id.*

Plaintiffs argue that the United States' right under *SUWA* to be consulted prior to improvements on the right-of-way was not violated because the district court explained that "realignments or improvements

would require consultation with the BLM before they are undertaken." *Kane II,* 2013 WL 1180764, at *64 n.33. But this places the cart before the horse. A court can find, as did the court in *Hodel,* that certain proposals for improvement are "reasonable and necessary" in light of the traditional uses of the road, so long as the BLM was consulted in advance. 848 F.2d at 1084. But to allow for unspecified improvements ex ante deprives the BLM of the opportunity to perform its duties effectively. The process set forth in *SUWA* contemplates a precise order of actions for holders of rights-of-way seeking improvements. First, they consult with the BLM as to the proposed improvements; then, "[i]n the event of a disagreement, the parties may resort to the courts." 425 F.3d at 748. Thus, we find the district court erred in allowing for unspecified improvements in setting the widths of the rights-of-way on Skutumpah, Swallow Park and North Swag roads. Therefore, we remand the question of the scope of the R.S. 2477 rights-of-way on these roads.

AFFIRMED in part, REVERSED in part, and REMANDED.[5]

[5] We grant the motion of Sierra Club, Grand Canyon Trust and National Parks Conservation Association for leave to file an amicus brief.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

KANE COUNTY, UTAH, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	**MEMORANDUM DECISION AND ORDER** Case No. 2:08-cv-00315 Judge Clark Waddoups

INTRODUCTION

(Filed Mar. 20, 2013)

Plaintiff Kane County, Utah seeks to quiet title to fifteen roads that cross lands owned by the United States.[1] Kane County asserts the roads are public highways under R.S. 2477 and it is the owner of the rights-of-way. The United States has challenged the court's jurisdiction to hear claims on nine of the roads because it claims there is no case or controversy about them. The Southern Utah Wilderness Alliance ("SUWA"), as amicus curiae, has also challenged the court's jurisdiction based on the statute of limitations. For the reasons stated below, the court concludes it

[1] Kane County asserts only twelve roads are at issue. Two of the roads have spurs or segments that are named differently from the main road. For ease of reference, the court refers to them as roads, even though the court concludes they are merely a segment of the main road.

has jurisdiction to hear the claims asserted by Kane County.

PROCEDURAL BACKGROUND

Kane County filed this action against the United States on April 25, 2008, pursuant to the Quiet Title Act, 28 U.S.C. § 2409a. In its initial complaint, Kane County sought to quiet title to roads called Mill Creek (including the Tenny Creek and Oak Canyon segments) and Bald Knoll (including the Old Leach Ranch segment). On November 10, 2008, Kane County amended its complaint to assert claims for additional roads, namely, Skutumpah, Sand Dunes, Hancock, Swallow Park/Park Wash, North Swag, Nipple Lake, and the four Cave Lake roads.[2] Kane County then filed a second amended complaint on February 20, 2009. That complaint did not assert claims for any additional roads. Instead, it added more facts pertaining to the claims already asserted. Subsequently, the State of Utah intervened in the matter and filed its complaint on April 29, 2010. Kane County and the State claim joint ownership of these roads based on Section 8 of the Mining Law of 1866, which is more commonly known as R.S. 2477.

Prior to the State's involvement, the United States moved on March 9, 2009, to dismiss claims for five of the roads at issue due to lack of subject-matter

[2] *See* Memorandum Decision filed concurrently herewith for a more complete description of these roads.

jurisdiction. Specifically, the United States contended it had not interfered with or denied the existence of an R.S. 2477 right of way for Skutumpah, Tenny Creek, Oak Canyon, Sand Dunes, or Hancock. Consequently, it contended Kane County lacked standing because there was no case or controversy. It further asserted it had not disputed title, and therefore, had not waived its sovereign immunity under the Quiet Title Act. The court disagreed and issued its ruling from the bench, but stated it would issue a written decision at a later time. This memorandum decision sets forth the court's reasoning for denying the United States' motion to dismiss.

After the court denied the motion, the United States filed its Answer. It did not assert there were problems with subject matter jurisdiction for any other road at issue in this case. One week before trial, however, the United States asserted in its Trial Brief that the same problems about subject matter jurisdiction also existed for the four Cave Lake roads. Trial Brief, 39-42 (Dkt. No. 164). Because a challenge to subject matter jurisdiction may be made at any stage of a legal proceeding, the court also addresses that challenge. *See* Federal Rule Civil Procedure 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

Following the trial, SUWA submitted a brief that challenged subject matter jurisdiction for *all* roads at issue in this case on the ground that the statute of limitations had run before Kane County filed suit.

SUWA has the status of an amicus curiae in this case. "*Amicus curiae* is a latin phrase for 'friend of the court' as distinguished from an advocate before the court." *Newark Branch, NAACP v. Harrison,* 940 F.2d 792, 808 (3d Cir. 1991) (quotations and citation omitted). Because an amicus curiae "participates only for the benefit of the court," and "is not a party to the litigation," the court has the sole discretion "to determine the fact, extent, and manner of participation by the amicus." *Id.* (quotations, citation, and alteration omitted).

Here, the statute of limitations has already been addressed by the parties, with the United States' stipulating that it had not run. *Kane County v. United States,* No. 2:08-cv-315, 2011 U.S. Dist. LEXIS 66218, at *25-26 (D. Utah June 21, 2011); *see also* Pretrial Order, at 26 (Dkt. No. 174). The Tenth Circuit has concluded, however, that the Quiet Title Act's statute of limitations is a jurisdictional bar rather than merely an affirmative defense. *Rio Grande Silvery Minnow v. Bureau of Reclamation,* 599 F.3d 1165, 1175-76 (10th Cir. 2010) (citations omitted). Consequently, the court must "satisfy itself of its power to adjudicate [this] case . . . at every stage of the proceedings." *State Farm Mut. Auto. Ins. Co. v. Narvaez,* 149 F.3d 1269, 1271 (10th Cir. 1998) (quotations and citation omitted). Although the parties have already addressed the statute of limitations, the court elects to address it again to assure itself of jurisdiction.

The jurisdictional assertions made by the United States and SUWA are highly fact dependent and

involve cases and other matters that arose prior to this lawsuit. Because the court's analysis depends upon those facts, it sets them forth below.

FACTUAL BACKGROUND

As stated above, Kane County claims ownership of the roads at issue in this case based on R.S. 2477. The text of the Act states: "*And be it further enacted,* That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253, *codified* at 43 U.S.C. § 932. Through this Act, Congress authorized the public to enter federal lands, create roads across the land, and obtain a vested right-of-way. The law remained in effect from 1866 until October 1976, when it was repealed by the Federal Land Policy and Management Act of 1976 ("FLPMA"), Pub. L. No. 94-579 § 706(a), 90 Stat. 2793. After Congress had repealed it, the Act applied only prospectively. Thus, any valid R.S. 2477 right-of-way existing by October 1976 was grand-fathered in by FLPMA.

FLPMA and the Wilderness Act

FLPMA marked a sea change by Congress. Because no new roads could be created across federal land by the public after 1976, the State and its political subdivisions had to undertake the task of documenting the R.S. 2477 roads that existed across federal land as of October 1976. At the same time,

FLPMA required that federal lands, with "roadless areas of five thousand acres or more," be inventoried to determine which areas had wilderness characteristics as defined in the Wilderness Act. 43 U.S.C. §§ 1711, 1782(a). According to the Wilderness Act, an area has wilderness characteristics when "the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain." 16 U.S.C. § 1131(c). It further means "an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation," so that "the imprint of man's work [is] substantially unnoticeable." *Id.*

On November 1980, the BLM's Final Wilderness Inventory Decision for Utah was published in the Federal Register. *See* 45 Fed. Reg. 75,602 (Nov. 14, 1980). That inventory designated the Paria-Hackberry region as a Wilderness Study Area. According to SUWA, "[o]ne of the defining elements of wilderness eligibility is the lack of roads." Amicus Brief of Southern Utah Wilderness Alliance, 5 (Dkt. No. 215) (hereinafter "SUWA's Amicus Brief") (citing 43 U.S.C. § 1782(a); *Utah v. Babbitt,* 137 F.3d 1193, 1213 (10th Cir. 1998)). Thus, by designating the Paria-Hackberry region as a Wilderness Study Area in 1980, SUWA contends this provided formal notice to Kane County that the United States claimed an adverse title to Swallow Park/Park Wash and North Swag since those roads were located by or in that region.

Although FLPMA does reference "roadless" areas, the definition of what constitutes a "road" under the

Wilderness Act is not necessarily coterminous with a "road" under R.S. 2477. In 1980, the BLM Director for Utah issued an Instruction Memorandum to the BLM District Managers for Utah. In that memorandum, the Director stated the following:

> The whole issue of roads is made more significant because of the relationship of road to the wilderness inventory. The two are, however, not necessarily related issues. *The wilderness inventory process uses a definition of a road that is distinct from the definition of "public" road contemplated by R.S. 2477 (42 USC 932) and is a definition for inventory purposes only, not for establishing rights of counties, etc.* A determination that an area should not be excluded from wilderness review because the area does not have any "roads" as defined in the Bluebook is not a determination that a road is or is not a "public" road. This is a factual determination that does not relate to wilderness, except if a determination is made that a public road exists, the right-of-way should be excluded from a wilderness study area as with any other intrusion. . . .

Instruction Memorandum, UT '80-240 (Mar. 6, 1980) (Pl. Trial Ex. 154; Dkt. No. 46, Ex. 2 at 2) (emphasis added).

During the bench trial in this action, Ken Mahoney testified about his work on the wilderness inventory conducted by the BLM. Trial Tr., at 1361 (K. Mahoney). His work occurred during the time

period when the above Instruction Memorandum was in effect. *See id.* at 1361-62, 1400. Mr. Mahoney testified about traveling on the Swallow Park/Park Wash road and North Swag road, which were sufficiently visible to be recorded on his inventory. *Id.* at 1393-95; *see also* Pl. Trial Ex. 75. Because North Swag was a primitive two track road, his team inventoried it as a non-maintained "way." *Id.* This, however, was not intended to be a determination about the road's status as an R.S. 2477 right-of-way. *See* Trial Tr., at 1397, 1400 (K. Mahoney).

Moreover, a nationwide instruction memorandum discussed "standards for boundary setbacks along existing roads in designated wilderness areas" and recognized that "the width for some roads R/W established under 2477 . . . will exceed the [standard setback]." *Id.* at 1388 89 (quoting Instruction Memorandum 90-589) (Pl. Trial Ex. 149). "When such overlaps" occur, the BLM was instructed to adjust the Wilderness Study Area "to eliminate the encroachment of such boundaries with the R.S. 2477 right-of-way." *Id.* at 1389. In Utah, that setback could be as much as 100 to 300 feet to allow for "road maintenance, temporary vehicle pull-off, and trailhead parking." *Id.* at 1391-92 (citing Statewide Wilderness Final Environmental Impact Statement, Volume 1 (Nov. 1990) (Pl. Trial Ex. 299)). Thus, simultaneously with the Paria-Hackberry designation in the Federal Register and thereafter, the BLM acknowledged that Wilderness Study Areas were subject to prior existing R.S. 2477 roads traversing through such areas.

Minutes of the Board of Commissioners

Besides contending the BLM inventory and Federal Register publication started the statute of limitations running for Swallow Park/Park Wash and North Swag, SUWA also contends the statute of limitations started to run on all the roads at least by June 3, 1991. To support this contention, SUWA cites to the minutes taken at a Board of County Commissioners meeting. The minutes state the following:

> Verlin Smith, Area Manager, and Mike Noel of the Kanab Office, met with the Commission regarding 2477 determination on county roads. He explained that 2477 federal land use plans require a determination on county roads which state three items: (1) The date a road was constructed or use was established; (2) A statement that the road is public and has been used by the public for at least ten years and (3) The established width of the road or right of way if recorded. Mr. Smith said he was glad to know the county was working on some of these roads such as Warm Creek which would be essential in the Andalex Coal mine proposal. He said he would send a letter to the Commission requesting the information needed on all county 2477 roads. Commissioner Lopeman assured him the county would respond.

Minutes of the Board of County Commissioners Meeting, June 3, 1991 (Dkt. No. 215, Ex. A at 16). SUWA contends the minutes reflect "that the BLM formally notified Kane County . . . that it did not recognize the

County's R.S. 2477 rights-of-way, and would not recognize them unless the County provided the BLM with certain information to prove the validity of its rights." SUWA's Amicus Brief, at 4.

During this same period of time, however, Kane County continued to exercise control over roads it deemed Class B or D roads. On August 12, 1991, the Commission received a report that a project had been completed on the Hancock road. The Commission authorized the posting of signs regarding speed limits, curves, and the distances to certain locations, including the Coral Pink Sand Dunes. Both the Hancock and Sand Dunes roads are at issue in this lawsuit. The Commission further provided direction about the Warm Creek road project including width, length, and road base materials. *See* Minutes of the Board of County Commissioners Meeting, Aug. 12, 1991 (Dkt. No. 215, Ex. A at 19).

1996 Trespass Suit Against Kane County

On December 6, 1993, Verlin Smith again met with the Commissioners. Gordon Staker from the BLM was also present. They requested that the Commissioners send a letter to the BLM anytime road work was going to be done on roads within the BLM areas. The Commissioners refused to enter into a written agreement on this issue, but agreed to talk with the BLM periodically. Minutes of the Board of County Commissioners Meeting, Dec. 6, 1993 (Dkt. No. 215, Ex. A at 22). Earlier that year, Kane County

had realigned portions of Skutumpah, which resulted in the BLM issuing trespass notices against Kane County. *See* Complaint, at 4-5 (Case no. 2:96-cv-884) (Dkt. No. 216, Ex. A at 4-5). After Kane County allegedly intruded into wilderness study areas when grading other roads in 1996, the BLM filed suit against the County on October 18, 1996 for "trespass damages for unauthorized road grading." *Id.* at 3-4.

Notably, the suit did not challenge whether Kane County had an R.S. 2477 right-of-way for Skutumpah or the other roads. The BLM's position was that Kane County had trespassed on federal land regardless of whether the County had a right-of-way. Draft BLM R.S. 2477 Administrative Determinations, Kane County Claim (Dkt. No. 216, Ex. A, at 18). The district court disagreed and required the BLM to make a determination about whether the roads were an R.S. 2477 highway, and if so, the scope of the right-of-way. *Id.* at 18-19. Only then could it determine whether Kane County had trespassed. The BLM undertook this determination for the Swallow Park/Park Wash and North Swag roads as well because trespass notices also had been issued for them on a subsequent date. *See id.* at 22. Had the United States determined it held an adverse interest to Kane County's claimed rights-of-way, it could have simply asserted its claim to the whole area. Rather than making such a declaration, however, it undertook an analysis to determine whether Kane County held a valid right to the area where the work had been performed.

On December 6, 1999, the BLM issued a draft report, which found that Kane County had an R.S. 2477 right-of-way for Skutumpah, but not for the new trespass sections. The BLM also found that Swallow Park/Park Wash and North Swag were not R.S. 2477 public highways. It issued its final report in January 2000, but the report was non-binding. *S. Utah Wilderness Alliance v. BLM,* 425 F.3d 735, 757 (10th Cir. 2005) (hereinafter "*SUWA*") (stating "nothing in the terms of R.S. 2477 gives the BLM authority to make binding determinations on the validity of the rights of way granted thereunder, and we decline to infer such authority from silence when the statute creates no executive role for the BLM").

On June 25, 2001, the district court upheld the BLM's administrative determination and granted summary judgment in favor of the government. *See* Order (Dkt. No 350 in Consolidated Case No. 2:96-cv-836). Kane County appealed that decision. On September 8, 2005, the Tenth Circuit reversed and remanded because the district court had not conducted a *de novo* review of the BLM's decision and the BLM had used too narrow of a standard when evaluating whether a route was an R.S. 2477 public highway. On remand, the parties agreed to dismiss the trespass action. *See* Order of Voluntary Dismissal of Actions Brought by the U.S. (Dkt. No. 456 in Consolidated Case No. 2:96-cv-836).

The Wilderness Society Lawsuit

One month before the BLM sued Kane County for trespass, President William J. Clinton established the Grand Staircase-Escalante National Monument (the "Monument") by Presidential Proclamation 6920. The Proclamation directed the Secretary of the Interior to develop a management plan for the Monument, but expressly preserved all valid existing rights-of-way. On July 29, 1999, the BLM published a proposed management plan. 64 Fed. Reg. 41129 (July 29, 1999). On November 15, 1999, the final management plan was signed, with an effective date of February 29, 2000. *See generally* 65 Fed. Reg. 10819. The management plan specified what roads were open or closed to vehicular travel within the Monument. It also addressed where off-road vehicles could be used.

In Summer 2003, Kane County removed some of the road signs erected by the BLM on roads claimed by the County to be R.S. 2477 roads. In 2005, Kane County then erected its own signs on some of the roads, stating that the roads were open to off-road vehicles. The Wilderness Society filed suit against Kane County in October 2005, alleging that the County's actions violated the Supremacy Clause. The Wilderness Society sought to enjoin Kane County from adopting ordinances or posting signs on any road closed under the Monument Plan. It further sought to compel Kane County to remove all County signs from federal land that conflicted with federal authority.

On May 16, 2008, the district court granted summary judgment in favor of The Wilderness Society because it found Kane County had violated the Supremacy Clause. Additionally, the district court issued the following injunction:

> Kane County shall *not adopt ordinances, post signs,* or *otherwise purport to manage* or open to vehicle use any route or area closed to such use by governing federal land management plan or federal law.
>
> . . . .
>
> Kane County is enjoined from any action described above relating to *any* route *unless and until Kane County proves in a court of law that it possesses a right-of-way to any such route and establishes the proper scope of such right-of-way in a court of law.*

The Wilderness Soc'y v. Kane County, 560 F. Supp. 2d 1147, 1166 (D. Utah 2008) (emphasis added), rev'd by *Wilderness Soc'y v. Kane County,* 632 F.3d 1162 (10th Cir. 2011). Notably, because Kane County's right-of-way in Skutumpah had only been determined by an administrative action, rather than in a court of law, the district court concluded that Kane County had no established right-of-way in that road. *Id.* at 1160-61. Consequently, it could not "post signs or otherwise purport to manage" that road.

The Kempthorne Lawsuit

While *The Wilderness Society* suit was being litigated, Kane County was involved in another lawsuit with the United States. Kane County filed that suit on November 14, 2005, alleging that the Monument's Transportation Plan was contrary to law because it improperly sought to control the County's rights-of-way. Even roads designated as "open" under the Plan, such as Skutumpah, had restrictions placed on them. Hearing Tr., 6-7, 33 (Dkt. No. 102 in Case No. 2:05-cv-941).

The United States moved to dismiss the complaint. During a hearing on the motion, held on October 26, 2006,[3] the United States stated the following:

> It is our position that in order for plaintiffs to be able to bring their claims in this case, in order to have standing, they must have R.S. 2477 rights-of-way, and *the only way that we can determine if they, in fact, had those R.S. 2477 rights-of-way* that are violated by the monument management plan *is to actually adjudicate the validity of those claims.*

[3] The October 2006 hearing was before the Honorable Ted Stewart. Shortly thereafter, he recused from the case. The United States then appeared before the Honorable Bruce S. Jenkins.

Hearing Tr., at 6 (Dkt. No. 102 in Case No. 2:05-cv-941) (emphasis added). With regards to the restrictions on Skutumpah, the United States stated:

> I really feel if they want to bring an action that pertains specifically to [Skutumpah], they should have brought an altogether different complaint, *a quiet title action* that seeks to determine the scope of those rights-of-way, and then determines whether the BLM has placed unreasonable restrictions upon those rights-of-way.

Id. at 10 (emphasis added). The United States then cited to *The Wilderness Society* case to support that until Kane County had proved its rights-of-way in a court of law, its "unproven assertions of ownership do not create judicially enforceable rights. *Id.* at 17. The United States made this statement despite acknowledging at the hearing "[t]here are other roads out there and the BLM knows it." *Id.* at 36. Nevertheless, the United States argued again that if Kane County believed the BLM was interfering with the County's rights or scope of its rights-of-way, the County needed to file a quiet title action. *Id.* at 37-38.

On January 22, 2007, a second hearing was held on the motion to dismiss. In that hearing, the United States' position was that Kane County lacked standing to assert injury as a result of the Monument's Transportation Plan because the County did not have any duly adjudicated rights-of-way. Hearing Tr., at 4-8 (Dkt. No. 61 in Case No. 2:05-cv-941). Additionally, the United States argued the County had improperly

brought the action under the Administrative Procedures Act because "plaintiff's challenges are inherently premised upon *threshold adjudications of title.*" *Id.* at 8 (emphasis added). Another attorney for the United States then reiterated at the hearing:

> [T]hese claims at root implicate title, and the *Block v. North Dakota* case is clear that where the *claims for relief implicate title,* the only waiver of sovereign immunity for such claims to bring such claims is the *Quiet Title Act.*

Id. at 13 (emphasis added).

When Kane County argued that the Monument's Transportation Plan did cause injury because it impacted its ability to maintain County roads, the United States asserted the County could maintain any road designated as "open" under the Plan. In support of its contention, the United States cited to the following language of the Plan:

> With the exception of those segments listed below, open routes may be maintained *within the disturbed travel surface area* as of the date of this Plan. No widening, passing lanes or other travel service upgrades could occur."

Id. at 61 (citing Monument Transportation Plan, at 47) (emphasis added).

The district court adopted the United States' arguments and dismissed Kane County's action. *See generally Kane County v. Kempthorne,* 495 F. Supp. 2d 1143 (D. Utah 2007), aff'd by *Kane County v. Salazar,*

562 F.3d 1077 (10th Cir. 2009). In so doing, the court stated:

> *It is for the Counties as R.S. 2477 claimants to step forward and pursue their unresolved R.S. 2477 claims in a proper forum,* demonstrating the historical existence of rights-of-way that they now assert to exist. *In the meantime,* the Counties' assertion of R.S. 2477 claims by itself *cannot forestall the BLM implementation of the travel route system* formulated through its internal planning process.

Id. at 1157 (citation omitted) (emphasis added). In further keeping with the United States' position, the court stated the property interests in question had to be brought under the Quiet Title Act. *Id.* at 1159. Thus, at the time Kane County filed its Amended Complaint, two district court decisions informed Kane County that it could only proceed on its claims through a quiet title action, and that until its rights were adjudicated in a court of law, it had no recognized R.S. 2477 rights-of-way.

Kanab Field Office Management Plan

Some of the roads at issue in this lawsuit are not located within the Monument. They nevertheless are still located on land managed by the BLM and are subject to the federal Kanab Field Office Record of Decision and Approved Management Plan (the "Kanab Field Plan"). The Kanab Field Plan was approved on October 31, 2008. *See* 73 Fed. Reg. 64,983 (Oct. 31,

2008); *see also* Declaration of Harry Barber, ¶ 2 (Mar. 9, 2009) (Dkt. No. 69, Ex. I) (hereinafter "Barber Decl."). The following roads are subject to that Plan: Hancock, Sand Dunes, part of Skutumpah, Bald Knoll, Old Leach Ranch, Mill Creek, Tenny Creek, Oak Canyon, and the four Cave Lake roads. The Plan states it "does not affect valid existing rights." Kanab Field Plan, at 17. It also states it "does not adjudicate, analyze, or otherwise determine the validity of claimed rights-of-way." *Id.*

Nevertheless, like the Monument Plan, the Kanab Field Plan regulates transportation. During development of the transportation management plan, the Kanab Field Office "conducted a complete route inventory in 2005 and 2006 to develop a route baseline for use in the planning process." Kanab Field Plan, Appendix 7, at A7-1. The Kanab Field Plan incorporates maps to show which routes are open, closed, or limited for motor vehicle use.

Map 9 shows *areas* that are "open to cross-country motorized vehicle use, closed to such use, and open to motorized vehicle use on designated routes." Barber Decl., ¶ 4 (Dkt. No. 69, Ex. I). Map 10 shows the specific *routes* that are open, closed, or limited for motorized vehicle use. *Id.* The Kanab Field Plan specifies the approved management plan "designat[es] all BLM lands as open, closed, or limited," and "[n]atural and cultural resource protection is . . . accomplished *by limiting motorized travel to the routes designated* in the [approved management plan]." Kanab Field Plan, at 29 (located at http://www.blm.gov/ut/st/en/

fo/kanab/planning/rod_approved_rmp.html) (emphasis added). Because motorized travel is limited to designated routes, if a route is not shown then motorized travel is not permitted on that route.

Hancock, Sand Dunes, and Skutumpah are not listed on Map 10, which is the map that shows the designated routes. Consequently, when Kane County filed its Amended Complaint in November 2008, and a motion to amend on January 5, 2009, the roads had the status of "closed." After Kane County raised this issue, the BLM published additional maps on its website on approximately January 30, 2009. *Id.* ¶ 8. The purported purpose of these additional maps is to show open routes more clearly. The additional maps show Hancock, Sand Dunes, and Skutumpah as open "Class 3 primary roads." *Id.* The "Class 3" designation is a unique term used by the Kanab Field Office to denote major thoroughfares. Deposition of Harry Barber, 49 (Dkt. No. 84, Ex. F). The term does not appear to be from any handbook or regulation. *Id.* at 41-42.

In *The Wilderness Society,* the district court held the following:

> [A] resource management plan, plan revision, or plan amendment constitutes formal designation of off-road vehicle use areas. Public notice of designation or redesignation shall be provided through the publication of the notice in the federal register [per] 43 C.F.R. § 8342.2(b). . . . *And any change to the designation (i.e., plan amendment) must be*

> *made through the formal resource management planning process, which requires public notice and comment.*

560 F. Supp. 2d at 1161-62 (quotations and citation omitted) (emphasis added). The Kanab Field Plan sets forth the planning process for that management plan. It states that modifications to the route system may occur, but such modifications would require prior monitoring and a NEPA analysis. Kanab Field Plan, at 19-20; *see also id.* at 42 ("Plan amendments and revision are accomplished with public input and the appropriate level of environmental analysis.").[4] No evidence has been presented to show the additional maps went through the formal resource management planning process. Hence, even though the roads have remained open factually, an ambiguity exists regarding the legal status of these three roads.

Title V Permits for Cave Lake Roads

The four Cave Lake Roads are designated as "open" under the Kanab Field Plan. Consequently, the United States contends there is no case or controversy because it has not interfered with Kane County's rights-of-way. Kane County asserts the contrary

[4] The Kanab Field Plan states an exception to these requirements if the BLM is merely correcting minor data errors or refining baseline information. Kanab Field Plan, at 43. The court concludes that adding three major thoroughfares to the Plan, without analysis of impact, does not constitute a minor change to data or baseline information.

based on actions taken by the BLM in July 2008. On July 25, 2008, the BLM issued Title V permits to a private entity for three of the Cave Lake Roads (K1070, K1075, and K1087). *See* Def.'s Trial Exs. II, JJ, & KK. In exchange for payment of rental fees to the BLM, the Title V permits granted the private entity a right-of-way over the roads and allowed for development of them. *See id.* ¶¶ 3, 4(e), & 4(h). The permits state they are "not intended to extinguish or limit any R.S. 2477 right-of-way that Kane County may have." *Id.* ¶ 1. Consequently, if a road were found to be an R.S. 2477 right-of-way by a court or the Secretary of the Interior, the permits state the "Title V grant would be superseded thereby and automatically terminate." *Id.* The three permits are in effect until December 31, 2037.

ANALYSIS

I. STANDARD OF REVIEW

"A motion to dismiss for lack of subject matter jurisdiction" under Federal Rule of Civil Procedure 12(b)(1) may take one of two forms." *Rural Water Dist. No. 2 v. City of Glenpool,* 698 F.3d 1270, 1272 n.1 (10th Cir. 2012). One form is a "facial attack" that challenges jurisdiction based solely on the allegations of the complaint. *Id.* (citation omitted). The second form is a "factual attack" which "goes beyond the factual allegations of the complaint and presents evidence in the form of affidavits or otherwise to

challenge the court's jurisdiction." *Id.* (quotations and citation omitted).

Both the United States and SUWA have presented evidence outside of the pleadings. Accordingly, they have made a "factual attack" on subject-matter jurisdiction. Under such circumstances, "a district court may not presume the truthfulness of the complaint's factual allegations." *Id.* (quotations and citation omitted). Instead, the court may review affidavits and other documents "to resolve disputed jurisdictional facts." *Id.* (quotations and citation omitted). Because part of the United States' challenge was made in its Trial Brief one week before trial and SUWA's challenge was made during post-trial briefing, the record before the court is more complete than what is typical for a jurisdictional challenge. *See Aragon v. United States,* 146 F.3d 819, 821 & n.2 (10th Cir. 1998) (resolving a jurisdictional challenge after a four-day bench trial was held on the jurisdictional issue).

II. UNITED STATES' QUIET TITLE ACT CHALLENGE

A. Adverse Claim Requirements

Before the United States may be sued, it must waive its sovereign immunity. The Quiet Title Act provides such a waiver. It states:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property

> in which the United States claims an interest.

28 U.S.C. § 2409a(a) (2012). This provision requires that two elements be met before suit may be brought.

First, the United States must claim an interest in the real property at issue. Each of the roads at issue in this case are subject either to the Monument Management Plan or the Kanab Field Office Management Plan. The federal government has marked on the different plans whether the roads are open, closed, or limited to motor vehicle use. It also has said in briefing that any improvements made to the roads would need to be done in consultation with them, based on the Tenth Circuit's *SUWA* decision. Because the government has stated its interest in these roads and is exercising some oversight of them through the management plans, the first prong of the Quiet Title Act has been met.

Second, title to the property must be disputed. If, however, "the United States disclaims all interest in the real property *or interest therein adverse to the plaintiff* at any time [before trial], . . . the jurisdiction of the district court shall cease." *Id.* § 2409a(e) (emphasis added). The latter provision reinforces that the United States' waiver only applies when the United States claims an adverse interest to the plaintiff. Recently, the Tenth Circuit stated,

> A government's claim of title to land isn't always and inherently inconsistent with . . . ownership of an easement over that land.

> Easements and servient estates can (and usually do) peaceably coexist. To trigger the [Quiet Title Act] . . . there must be some claim, some assertion of an *adverse* interest.

George v. United States, 672 F.3d 942, 947 (10th Cir. 2012) (citations omitted) (emphasis added). Because the United States' ownership of federal land does not create an inherent conflict with Kane County's alleged rights-of-way, Kane County must show something more to sustain a Quiet Title Act.

The United States contends the second prong of the Act has not been met because it has not asserted an adverse interest against Kane County for Hancock, Sand Dunes, Skutumpah, Tenny Creek, Oak Canyon, and the four Cave Lake Roads. Specifically, the United States argues it has not "disputed that Kane County *may* hold R.S. 2477 rights-of-way" in the relevant roads, "nor interfered with the County's putative rights-of-way." Mem. in Supp. of Renewed Mot. to Dismiss, 29 (Dkt. No. 69) (emphasis added). Accordingly, it contends the court lacks jurisdiction because there is no "dispute or conflict in title." It cites to *Alaska v. United States,* 201 F.3d 1154, 1160 (9th Cir. 2000), to support its contention.

Alaska involved a challenge to three river beds. If a river bed was navigable on the date that Alaska obtained statehood in 1959, then Alaska owns the riverbed. *Id.* at 1156. If it was not navigable, then the United States owns it. *Id.* For the Black River, the United States had never taken a position as to

whether it was navigable or not. *Id.* at 1164. It also had not disclaimed an interest in it. Therefore, at some future date, it could assert an interest, but in the meantime there was no dispute about Alaska's ownership rights. *Id.* at 1164-65. Because there was no dispute about title, the Court concluded there was no subject matter jurisdiction, at that time, for the Black River. *Id.*

The United States' position about the Black River is distinguishable from its position in this case because the United States has claimed an interest in each of the roads. Having claimed that interest, the portion of the *Alaska* ruling that is relevant is the part pertaining to the other two rivers at issue, namely the Kandik and Nation Rivers. At one point, the United States asserted the rivers were not navigable, which meant it asserted an adverse claim against Alaska because the United States claimed it owned the rivers. An administrative law judge found the opposite. *Id.* at 1158. The United States concluded it was not bound by that decision. *Id.* at 1159.

Subsequently, the State of Alaska sued the United States under the Quiet Title Act to resolve title for the Kandik and Nation Rivers. Without resolution of that cloud on title, the state's "land and water resource management and its ability to provide public information" was impeded. *Id.* The United States moved to dismiss the complaint on the ground that it had not waived sovereign immunity because it was not asserting an adverse claim at the time the complaint was filed. *Id.* Specifically, "[t]he United States

refused to admit or deny the State of Alaska's averment" that the Kandik and Nation Rivers were navigable on the theory that it was a question of law. *Id.*

The Ninth Circuit found the United States had claimed an interest in the rivers. *Id.* at 1160-61. The fact that it had then changed its position before the court did not remove the cloud on title because it did not disclaim title, and therefore, had reserved the right to claim an adverse interest again. *Id.* at 1161. Indeed, the Court noted, "[i]f the state cannot get Quiet Title Act jurisdiction, then the potential claim will lurk over the shoulder of the state officials as they try to implement a coherent management plan for state waterways." Then, any time a "management initiative . . . differed from federal policies, the federal government could revive its claim, and thereby prevent state regulation of the affected river." *Id.* The Court concluded this was not the intent of Congress when it provided legislation to quiet title. In fact, Congress "would have accomplished very little indeed if the United States could obtain a dismissal of any state quiet title suit *by adopting a litigation position of refusing to state whether it asserted a claim or not.*" *Id.* (emphasis added). The court not only finds this analysis persuasive, but directly in line with the United States' actions in this case.

B. Adverse Claims for the Roads at Issue

I. Skutumpah

After the United States found, during an administrative proceeding, that Skutumpah is an R.S. 2477 road, it represented to Judge Stewart and Judge Jenkins in this court that until a court held Skutumpah was an R.S. 2477 road, the United States could impose any type of restriction on Skutumpah it wanted to under its management plan. It further contended *and persuaded the court* that if Kane County wanted to challenge its management plans, it had to bring a Quiet Title Action. Then, when Kane County followed that directive and filed this suit, the United States has the temerity to stand before this judge and contend it is not disputing Kane County's right-of-way, even though it also would not disclaim its interest in the right-of-way, and even though it had regulated that right-of-way under the Monument's Transportation Plan. The United States' position is no more persuasive before this court than it was before the Ninth Circuit in *Alaska* because its actions have left a cloud on title to the Skutumpah road. If the government's argument were accepted, Kane County would never be able to resolve its title issue, which per *Alaska,* runs contrary to the intent of Congress.

Moreover, at the time Kane County filed its claim for Skutumpah, it was enjoined from passing any ordinances, posting any signs, or in any way managing Skutumpah contrary to the Monument's

Transportation Plan as a result of *The Wilderness Society* decision. That decision was in effect until the Tenth Circuit issued an *en banc* decision in 2011 reversing it. Notably, however, the decision was reversed based on prudential standing grounds. The Court did not address the cloud on Kane County's title due to the Monument's Transportation Plan (or the Kanab Field Plan for that matter). The court therefore concludes the United States has disputed title with respect to Skutumpah.

ii. Hancock and Sand Dunes

The United States' actions have also created a cloud on title for Hancock and Sand Dunes. The BLM went through formal proceedings to approve and publish the Kanab Field Plan. Similar to notice provided in the Federal Register, the Kanab Field Plan provided notice about the BLM's position for roads in the area. Hancock and Sand Dunes are not on Map 10 of the Kanab Field Plan.[5] The legal ramifications of this action are that the roads are "closed," even though, as a factual matter, the BLM has taken no step to enforce the closure. Because Kane County does not have to wait until the United States *acts* to close a road, the designation in the Kanab Field Plan

[5] Skutumpah is also not on Map 10 even though a portion of the road falls under the area of the Kanab Field Plan. Therefore, this portion of the court's analysis also applies to Skutumpah.

constituted notice of the adverse claim. *See George,* 672 F.3d at 947.

While the BLM has published new maps on its website, showing the roads as "open" under a novel Class 3 designation, that does not alter the official document. *See The Wilderness Society,* 560 F. Supp. 2d at 1161-62 (stating "any change to the designation (i.e., plan amendment) must be made through the formal resource management planning process, which requires public notice and comment."). Given the sea change that has occurred regarding R.S. 2477 roads, it would be unwise for a county to rely upon an unofficial (nonbinding) representation that a road will not be closed when an official (binding) document provides notice to the contrary.[6] Indeed, at anytime, the United States can reverse its position and nullify the unofficial maps. The court therefore concludes a disputed title exists for Hancock and Sand Dunes because the unofficial maps do not remove the cloud on title created by the Kanab Field Plan.

iii. Cave Lake Roads

The United States' position on the Cave Lakes roads is equally problematic. The United States did not move to dismiss Kane County's claims for the four Cave Lake roads. Instead, it filed its answer and

[6] The court has been provided no information that shows the United States has now amended the Kanab Field Plan through formal proceedings.

denied they were R.S. 2477 roads and also denied the asserted scope of the roads.[7] For more than three years, the parties litigated this case based on that position taken by the United States. Then, one week before trial, without moving to amend its answer, the United States asserted it had not disputed title for these roads because the roads are "open" under the Kanab Field Plan. The court rejects this contention for the same reasons stated by the Ninth Circuit in *Alaska*.

Moreover, the United States issued Title V permits for three of the Cave Lake roads. The permits state that if a court or the Secretary of the Interior ever holds that Kane County has an R.S. 2477 right-of-way for those roads, the Title V permit would cease. This constitutes an implicit acknowledgment that the scope of the permits directly conflicts with Kane County's asserted rights in the road. Otherwise, there would be no need to terminate the permits upon such a finding. The permits give a private entity the power to manage, develop, and modify the roads, as long as the developer follows the standards for a subdivision road in Kane County. Such a right conflicts with Kane County's ability to manage its alleged rights-of-way and puts the United States in the

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[7] "[A] statement that a party 'is without knowledge or information sufficient to form a belief as to the truth of an averment,' even standing alone, has the effect of a denial." *United States v. Isaac,* No. 91-5830, 1992 U.S. App. LEXIS 16657, at *7 (6th Cir. 1992) (quoting Fed. R. Civ. P. 8(b)(5)).

position of directing what occurs on those roads. Having superimposed such Title V permits over three of the Cave Lake roads, this is further grounds for finding a disputed title for those particular roads.

iv. Tenny Creek and Oak Canyon

Tenny Creek and Oak Canyon stand on a different footing from the other roads. The United States does not deny that it has clouded title with respect to Mill Creek, and consequently, it does not challenge jurisdiction for that road. It nevertheless challenges the court's jurisdiction with respect to Tenny Creek and Oak Canyon because it contends those roads are separate and distinct from Mill Creek. Kane County asserts those branches have always been part of Mill Creek historically. Consequently, by clouding Mill Creek's title, the United States has also clouded title to Tenny Creek and Oak Canyon.

When driving on scenic roads, there is often a branch or spur to pull off the road and park or view an area. Likewise, there are at times emergency ramps on steep mountain roads to aid vehicles that experiencing brake failure or other mechanical problems. Although they may have marker posts, one would not typically say that these branches or spurs constitute separate roads. Such is the nature of Tenny Creek and Oak Canyon.

Prior to 2005, Tenny Creek and Oak Canyon did not have separate markers on them. Then, as part of a road project, Kane County designated Mill Creek as

K4400, Tenny Creek as K4410, and Oak Canyon as K4405. Declaration of Mark W. Habbeshaw, ¶ 8 (Docket No. 84, Ex. K). Nevertheless, Kane County presented evidence that, historically, these branches have been maintained as part of Mill Creek. Deposition of Vane Campbell, 351-54, 361, 366-67 (Docket No. 84, Ex. E). The evidence presented at trial did not controvert these facts. Instead, it supported that Tenny Creek and Oak Canyon are used as areas to park off of Mill Creek when people go hunting. Trial Tr., at 665-67, 709-10, 1116 (L. Pratt). The branches are also used to turn equipment around when Kane County is maintaining the roads. In particular, Kane County's road maintenance crews have used the parking areas at the private property gates to maneuver its road maintenance equipment. *Id.* at 1115-18. In essence, the branches function as part of Mill Creek rather than as distinct, separate roads.

In *Spirit Lake Tribe v. North Dakota,* 262 F.3d 732, 744 (8th Cir. 2001), the Court addressed whether an adverse claim for one segment of property constituted an adverse claim for the remainder. The Court concluded "[t]he assertion by the United States of its claim to the specific tracts put the state on constructive notice of the United States' claim to the remainder of the riverbed tracts." *Id.* (quotations and citation omitted); *see also Park County Assoc. v. United States,* 626 F.2d 718, 721 n.6 (9th Cir. 1980) (concluding that an adverse claim to one portion of a right-of-way provided constructive notice for the "remainder of the purported right-of-way," especially

since severance of the one portion would have injured the remaining portion). Here, the United States has asserted an adverse claim for part of Mill Creek. The court concludes, this constituted constructive notice of the United States' adverse claim to the remainder of Mill Creek, including its Tenny Creek and Oak Canyon segments. Therefore, the court concludes there is disputed title for those two segments as well.

C. Dispute as to Scope

In addition to the disputes discussed above, it became apparent during the course of this litigation that significant disputes exist as to the scope of each of these roads.[8] In *SUWA,* 425 F.3d at 748, the Tenth Circuit held if a right-of-way holder "undertake[s] any improvements in the road along its right of way, *beyond mere maintenance,* it must advise the federal land management agency of that work in advance." (Emphasis added.) The implication of this holding is that Kane County may conduct maintenance of its roads without first consulting with the BLM, as long as the maintenance occurs within the scope of its right-of-way. The Monument's Transportation Plan is contrary to this holding because it seeks to limit maintenance activities to the road's travel surface, rather than the full width of Kane County's alleged

[8] "Scope" has different meanings. The court's use of the word refers to the width of Kane County's alleged rights-of-way, including both the travel surface and the disturbed area width.

rights-of-way. Ample testimony was presented at trial to show that maintenance activities require an area greater than a road's travel surface.

"Scope" is therefore a crucial component of an R.S. 2477 right-of-way because it sets the parameters in which a right-of-way holder may independently carry out its management activities. The fact that the United States has disputed the scope of Kane County's alleged rights-of-way throughout this litigation shows an additional and ongoing dispute as to title.

III. UNITED STATES' JURISDICTIONAL CHALLENGE

A. Case or Controversy Requirements

The United States also contends the court lacks subject matter jurisdiction for the nine roads discussed above because there is no case or controversy regarding them. "Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." *Lewis v. Continental Bank Corp.,* 494 U.S. 472, 477 (1990) (citation omitted). This means "a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Id.* (citations omitted). If a controversy is subject to "specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts," then a case or controversy exists.

Id. (quotations and citation omitted). It then must continue to exist "through all stages of federal judicial proceedings." *Id.*

The United States contends the standard for a case or controversy is set forth in *Washington County v. United States,* 903 F. Supp. 40 (D. Utah 1995). In that case, Washington County sought to quiet title on the basis that "the United States claims, or may claim, the right to deny Washington County its right to construct and maintain its R.S. 2477 rights-of-way." *Id.* at 41 (quotations and citation omitted). The United States asserted this allegation "fail[ed] to present a definite and concrete controversy." *Id.* (citations omitted). The court agreed. It noted the complaint lacked any assertions "that the United States has interfered with or denied the existence of any rights claimed by Washington County." *Id.* at 42. It then, without further analysis, concluded there was no case or controversy. *Id.*

To the extent the United States contends it must close a road or deny that a road is an R.S. 2477 road before there is a case or controversy, the court rejects that contention. Interference can occur by means other than road closure. A cloud on title affords a sufficient case or controversy under Article III. *United States v. West Virginia,* 295 U.S. 463, 471 (1935) (citation omitted). Moreover, Kane County seeks specific relief, as distinguished from an advisory opinion based on hypothetical facts. Its alleged injury can be redressed through a favorable judicial decision.

The court therefore concludes a case or controversy exists for each of the nine roads.

IV. SUWA'S JURISDICTIONAL CHALLENGE

A. Quiet Title Act's Statute of Limitations

SUWA challenges subject matter jurisdiction based on the Quiet Title Act's statute of limitations. The Act's statute of limitations provision states:

> Any civil action under this section, *except for an action brought by a State,* shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

Id. § 2409a(g) (emphasis added). Because the statute of limitations does not apply against the State of Utah, SUWA's challenge cannot defeat subject matter jurisdiction for the State. Rather, its challenge can only apply to Kane County.

As stated above, to file a claim under the Quiet Title Act, the United States must have asserted an interest adverse to the plaintiff. Consequently, when the Act states the statute of limitations begins to run as soon as the plaintiff knew or should have known the United States claimed an interest in the property, it necessarily means that interest must be adverse. *See George,* 672 F.3d at 946 (stating the Quiet Title Act "is triggered by the government's claim . . . of

some interest *adverse* to the plaintiff or her predecessor") (emphasis added, alteration omitted). To the extent SUWA contends the claimed interest does not have to be adverse to trigger the statute of limitations, the court rejects that contention.

Finally, when assessing whether a plaintiff knew or should have known about an adverse claim, courts have applied a "reasonableness" standard. Under that standard, "'[k]nowledge of the claim's full contours is not required. All that is necessary is a reasonable awareness that the Government claims some interest adverse to the plaintiff's.'" *Cheyenne Arapaho Tribes of Okla. v. United States,* 558 F.3d 592, 595 (D.C. Cir. 2009) (quoting *Knapp v. United States,* 636 F.2d 279, 283 (10th Cir. 1980)) (other citation omitted).

B. 1991 Minutes of Board of Commissioners

SUWA contends the statute of limitations started to run in 1991 when the BLM's Area Manager informed Kane County about the necessary procedures to establish an R.S. 2477 road. According to SUWA, this was a warning that the BLM did not recognize Kane County's R.S. 2477 rights-of-way. The court disagrees.

On December 7, 1988, the Secretary of the Interior issued a memorandum stating "it is necessary in the proper management of Federal land to be able to recognize with some certainty the existence, or lack thereof, of public highway grants obtained under R.S. 2477." Memorandum re Departmental

Implementation of *SUWA*, 2 (Dkt. No. 69, Ex. A) (citing 1988 Hodel Policy Memorandum). Consequently, the Secretary "directed Interior land managing agencies to develop internal procedures for administratively recognizing those highways." *Id.*

This policy was in effect at the time Mr. Smith met with the Kane County Commissioners and informed them about the needed procedures to administratively recognize R.S. 2477 rights-of-way. The statement was not a declaration of adverse interest and is in keeping with the assertion that "[a] government's claim of title to land isn't always and inherently inconsistent with . . . ownership of an easement over that land." *George,* 672 F.3d at 947.

Moreover, the minutes are abbreviated and fail to reflect the full discussion that took place during that meeting. What is clear, though, is that Mr. Smith did not just discuss procedures with Kane County. He also expressed that he was "glad" the County was working on some of the roads because the work was essential. This expression conflicts with SUWA's assertion that the United States was claiming an interest adverse to Kane County. Furthermore, subsequent meeting minutes reflect that Kane County continued to make decisions about management and maintenance of its claimed roads following the meeting. This too shows the United States had not asserted management authority over Kane County's claimed rights-of-way. The court therefore concludes the minutes are insufficient to show the United States claimed an adverse interest in 1991.

C. Publications in the Federal Register of Wilderness Study Areas

SUWA's next challenge applies only to Swallow Park/Park Wash and North Swag roads. It asserts that when the BLM designated the Paria-Hackberry area as a wilderness study area, and published that decision in the Federal Register in 1980, the statute of limitations was triggered because the designation meant the BLM claimed there were no public roads in the area.

"Congress has instructed that . . . publishing a regulation in the Federal Register must be considered sufficient to give notice of its contents to a person subject to or affected by it." *George,* 672 F.3d at 944 (citing 44 U.S.C. § 1507 (2012)) (quotations, alterations, and other citations omitted). Thus, publication in the Federal Register is sufficient notice to trigger the statute of limitations, but only on the issue addressed by that notice.

In *Park County,* one portion of a road traveled through a national forest. The national forest was established in September 1902. Later, when a Primitive Area was established in April 1932, a portion of the road traveled through that area. In 1962, the Forest Service posted a sign on the north end of the Primitive Area that stated, "Entering Absaroka Primitive Area Motor Vehicles Prohibited Gallatin National Forests." *Park County Assoc.,* 626 F.2d at 720. The Forest Service also placed a rock barrier in front of the sign. *Id.* at 721. The trial court concluded the

statute of limitations started on that date because that is when an adverse claim to the right-of-way arose. *Id.*

Just as classifying an area as a national forest or primitive area was insufficient to trigger the statute of limitations in *Park County,* so too is the classification of a region as a wilderness study area. After the United States published notice about the Paria-Hackberry area in 1980, no effort was made by the United States to block road access. This is not surprising because the "wilderness study area" designation does not have the effect of nullifying R.S. 2477 rights-of-way. Indeed, when the inventory was done for the Paria-Hackberry area, no effort was made to determine whether the Swallow Park/Park Wash and North Swag roads were public ways because what constitutes a road under the Wilderness Act is not necessarily coterminous with the definition of a road under R.S. 2477.

Moreover, a nationwide BLM instruction memorandum directed that wilderness study areas be modified to accommodate R.S. 2477 rights-of-way when the boundary of a wilderness study area infringed upon that right-of-way. These facts show that while notice was published in the Federal Register about the Paria-Hackberry wilderness study area, that notice was not meant to inform rights-of-way holders that the United States was claiming an adverse interest. Instead, the United States, through its instruction memoranda, intended to work with R.S. 2447 rights-of-way holders.

Finally, the present Kanab Field Plan demonstrates that SUWA misstates the effect of a "wilderness study area" designation on motor vehicle use. The Kanab Field Plan designates areas and ways open to motor vehicle use within the Moquith Mountain and Parunuweap Canyon wilderness study areas. Kanab Field Plan, at 18; *see also id.* at 29 (discussing 1,000 acres open to off-highway vehicles within the Moquith Mountain wilderness study area); *id.* at 108 (stating "[u]se of the existing routes in the WSAs ('way' when located within WSAs) could continue as long as the use of these routes does not impair wilderness suitability" and Congress does not change designation to "wilderness"). The Plan also notes that some of the ways "are highly popular with many local residents and hunters who have traditionally enjoyed outings along those routes." *Id.* at 18. Because the designation of a "wilderness study area" does not preclude motor vehicle usage in that area, the 1980 Federal Register publication did not provide notice to Kane County that the United States was challenging its R.S. 2477 rights. The court therefore concludes the publication did not trigger the statute of limitations.

D. 1996 Trespass Action

On October 18, 1996, the United States filed suit against Kane County for trespass. After consolidation

with other cases,[9] the suit asserted claims involving Skutumpah, Swallow Park/Park Wash, and North Swag roads, but did not seek to controvert their status as R.S. 2477 rights-of-way. SUWA contends the suit was sufficient to trigger the Quiet Title Act's statute of limitations. Assuming without deciding that it did, the statute of limitations does not bar the present case.

Kane County filed an amended complaint, adding Skutumpah, Swallow Park/Park Wash, and North Swag to this case in November 2008.[10] It filed its motion for leave to amend, however, on September 24, 2008, and attached the proposed amended complaint to its motion. (*See* Dkt. No. 15, Ex. 1.)

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[9] Of the consolidated cases, the earliest filed complaint was October 2, 1996. *See S. Utah Wilderness Alliance v. BLM* (Case No. 2:96-cv-836); *United States v. Kane County* (Case No. 2:96-cv-884); *United States v. Garfield County* (Case No. 2:96-cv-885).

[10] Although the United States' motion to dismiss seeks to dismiss Kane County's February 2009 complaint, for statute of limitations purposes, the court looks to when the claims for the relevant roads were first asserted based on the relation back doctrine. *See Seaboard A.L. Railway v. Renn,* 241 U.S. 290, 293 (1916) (stating "[i]f the amendment merely expanded or amplified what was alleged in support of the cause of action already asserted, it related back to the commencement of the action and was not affected by the intervening lapse of time."); *see also Scarborough v. Principi,* 541 U.S. 401, 417-18, 421 (2004) (citing *Seaboard A.L. Railway* with approval and noting that the relation back doctrine existed well before "the Federal Rules became effective," which rules apply to the Government in the same manner as they apply to private parties).

> A number of courts have addressed the situation where the petition for leave to amend the complaint has been filed prior to expiration of the statute of limitations, while the entry of the court order and the filing of the amended complaint have occurred after the limitations period has expired. In such cases, the amended complaint is deemed filed within the limitations period.

Mayes v. AT & T Info. Sys., Inc., 867 F.2d 1172, 1173 (8th Cir. 1989) (citing cases from various state and federal jurisdictions).

The logic for this stems from the fact that when a plaintiff must seek leave to amend its complaint, "the plaintiff has no way of controlling or even predicting the time at which any permission to amend will be granted, and thus no ability to control the date on which the amended complaint itself may be filed." *Nett v. Bellucci,* 774 N.E.2d 130, 136 (Mass. 2002). Given the caseload of this court, it may be months before a motion is heard. Requiring plaintiffs to factor in this time would arbitrarily shorten the length of the statute of limitation. *Id.* Moreover, were plaintiffs required to file a parallel lawsuit to ensure their claims were preserved, this would be a waste of "scarce judicial resources and impose pointless litigation costs." *Id.* Accordingly, the court adopts this reasoning and concludes that Kane County filed its claims within twelve years of the 1996 trespass action.

It does bear noting, however, that when the United States filed its trespass action, it did not intend to challenge or address Kane County's alleged R.S. 2477 rights-of-way. Only when the court ordered them to undertake an analysis about the status of the roads, did it address the issue. Moreover, it was not until December 1999 that the United States found Kane County had no R.S. 2477 rights in Swallow Park/Park Wash, North Swag, and the trespass sections of Skutumpah. Therefore, one could well-argue that the statute of limitations did not begin to run until December 1999. Regardless of whether the statute of limitations was triggered in October 1996 or December 1999, though, Kane County filed its claims within the requisite twelve year period.

E. United States' Determination About the Statute of Limitations

Another factor of note is that when the United States initially filed its Answer in this case, it asserted a statute of limitations defense. After conducting discovery on the issue, however, the United States concluded that none of its actions was sufficient to show an adverse claim against Kane County. Hearing Tr., 16-17 (Jan. 26, 2012). It therefore stipulated that the statute of limitations had not run. *Id.* Given that the United States is the very entity that was involved in these matters, and not SUWA, it is in a better position to determine if the United States asserted an adverse claim against Kane County.

CONCLUSION

For the reasons stated above, the court concludes that the United States has asserted adverse claims under the Quiet Title Act, and thereby waived its sovereign immunity. The court further concludes a case or controversy exists in this case, and that the statute of limitations had not run when Kane County asserted its claims. Accordingly, the court concludes it has subject matter jurisdiction over each of the roads at issue in this case.

DATED this 20th day of March, 2013.

BY THE COURT:

/s/ Clark Waddoups
Clark Waddoups
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KANE COUNTY, UTAH, a Utah political subdivision, Plaintiff-Appellant/ Cross-Appellee, and THE STATE OF UTAH, Intervenor Plaintiff-Appellant/Cross-Appellee, v. UNITED STATES OF AMERICA, Defendant-Appellee/ Cross-Appellant. ---------- SIERRA CLUB, et al., Amici Curiae.	Nos. 13-4108, 13-4109 & 13-4110

ORDER

(Filed Feb. 17, 2015)

Before **KELLY**, **BACHARACH**, and **PHILLIPS**, Circuit Judges.

Appellant/Cross-Appellee Kane County and The State of Utah's requests for panel rehearing are denied.

The petitions, which included requests for en banc review, were transmitted to all of the judges of the court who are in regular active service and are not recused. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the requests for en banc review are likewise denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk