The Federal Land Rights Series Edition 14 - The Last Riders of the Purple Sage – The enduring significance of historic federal land rights legislation and the powerful role of historical survey evidence

In our country, people acquire land for a wide variety of reasons, and their acquisition decisions are based largely upon their personal motivation and specific goals. Some see land as a profit source and want to rapidly develop it, by creating numerous parcels that are ready for anyone to simply buy and occupy. Others are seeking their own little piece of the American Dream, which for many folks is the opportunity to own a slice of heaven, a place they imagine as a refuge or sanctuary, where they can escape from the world and live in a state as close as possible to "Splendid Isolation". Our law is designed to facilitate a broad range of land use options to the greatest possible extent, but one common denominator, more frequently than any other, proves to be problematic for grantees of real property, and that is the simple fact that everyone needs some form of reliable access to their land. Acquisitions of land which would otherwise be attended with complete satisfaction often result in disappointment, in some cases due to a lack of legal access, but in other cases for the exact opposite reason, due to the presence of unwanted access rights. In our modern society, most people understand this, and prudent buyers, well aware of the significance of legal access, usually take the necessary steps to inform and assure themselves about the presence or absence of access issues prior to acquisition. In some locations however, particularly in the western states where much of the land being acquired even today is still not very far removed from the conditions that were in place during the frontier days, knowledge of our legal legacy becomes a highly important factor in the land acquisition context, which as we will see can haunt, and even devastate, those who have neglected to adequately educate themselves about such matters. But with the arrival of problems comes the opportunity to step forward and serve as a problem solver, which is an often overlooked aspect of the role of the professional land surveyor, provided that he or she has the knowledge required to gather and effectively analyze historical evidence, enabling the surveyor to make a valuable objective evidentiary contribution to the proper resolution of any legal issues involving a locational component.

Until the later decades of the Nineteenth Century, while the western landscape was essentially wide open, in both the physical and the legal sense, land was typically acquired with little thought or concern about legal access, because for the homesteaders and other initial entrants of the public domain there was usually no need to cross any private property to reach the place where they were destined to settle. From the point where the young network of established public roads in frontier states like Iowa and Missouri ended, the westward bound settlers could travel freely, by any route they were inclined to take across the public domain, to reach the land they had just acquired or intended to acquire as a homestead. Following the Civil War, the focus of Congress returned to the subject of national expansion, resulting in a veritable flood of federal laws designed to support and magnify the ever intensifying westward migration. Given this federal emphasis upon populating the western territories as rapidly as possible, its not surprising that many federal laws were very broadly crafted, using language which set forth few if any legal limitations upon the rights that were either pledged or actually bestowed by such federal grants. Among the most infamously ambiguous of these federal granting statutes was the one addressing rights associated with public travel upon the open public domain, which would go on to become known as "RS 2477", having originated in 1866, as a product of congressional

efforts to support private discovery and development of mineral resources (FN 1). The enactment of this federal law quite plainly amounted to nothing more than congressional recognition that the remaining public domain was, out of necessity, already being put to use for travel, to a virtually boundless and essentially uncontrollable extent, along with a formal expression of acquiescent approval on the part of Congress, regarding the public rights flowing from such use of the unacquired lands that had to be crossed to reach the unexplored and resource rich portions of the continent (FN 2).

Once this powerful congressional declaration was in place, any individual who happened to be among the earliest settlers to arrive, and occupy some portion of any given township, could be confident that subsequent settlers, upon occupying the surrounding sections, could not legally disrupt the earlier settler's use of the newcomer's lands for purposes of travel, because any visible routes, which had already been impressed upon the land prior to the subsequent settler's arrival, had become public in character under federal law. As we know today however, given the benefit of hindsight, the creation of a vast network of federally endorsed access rights, utterly devoid of supporting documentation, aside from the law which authorized the formation of those rights, proved to be immensely problematic. Because it was impossible to tell whether or not any given section, or any described portion thereof, bore any RS 2477 right-of-way without visually inspecting the land, untold numbers of later settlers found, to their surprise and chagrin, that their properties were traversed by public roads, often cutting right through the center of their designated lands, significantly reducing their usable acreage. Nonetheless, such was the law, so unless arrangements acceptable to all relevant parties could be made, to eliminate or relocate such an existing road, the latecomer was stuck with property bearing a substantial legal burden, in the form of a public right-of-way, from the outset, even before the patentee ever had a chance to put his or her land to any use. As many latecomers learned the hard way, the public benefits bestowed upon the earliest settlers by RS 2477 had to be borne as a servitude by someone, so late arriving settlers simply had no guarantee that they would find their land unburdened when they first set eyes upon it. As our featured case reveals, even as this article is written, 152 years after its inception and 42 years after its termination as an active law, RS 2477 continues to bedevil ignorant or unwary newcomers.

The following timeline summarizes the relevant events and the evidentiary elements which were presented or were available for judicial review in our featured case, Thomas v Zachry, set in the magnificent Silver State of Nevada, in chronological order. While not every described event is necessarily crucial to the outcome, this summary contains all of the salient factual information which played a material role in the litigation initiated by the plaintiff Thomas. As will be seen, whenever an extensive amount of historical information needs to be reviewed, in order to reach a sound professional decision on any issue, taking the time to carefully organize that information chronologically is always essential, because the sequence in which such events occurred invariably determines the legal significance and the amount of controlling force that each element of evidence will carry in the judicial arena. When addressing any land rights issue, courts always strive to ascertain and to examine the conditions at the time when the alleged or purported rights originated, and the validity of those rights is typically determined in accord with the law as it stood at that point in time, making both diligence and cognizance of the importance of historical context, when assembling evidence, vital to success.

1860 – The Pony Express established a mail route, linking California to the eastern portion of the nation, and a large part of that route passed through the Utah Territory.

1861 – The western part of the Utah Territory became the Nevada Territory and the original Nevada counties were created. Among them was Storey County, which at that point in time, thanks to booming mineral exploration, was the most populous county in the newly created Territory. The Pony Express route, part of which paralleled the Carson River, ran close to the southern boundary of Storey County and incoming miners exploring the southern part of that region began to create trails running northward from that established route.

1864 – As the Civil War ground arduously toward its conclusion, along with West Virginia, Nevada achieved statehood, but the vast majority of the land comprising the remotely situated new state remained unsurveyed public domain, traversed by countless routes of primitive travel, which were destined to come under increasingly frequent use.

1866 – Federal protection of established access rights situated upon the public domain became part of the law of the land at this time, by virtue of the federal grant which would later be codified as RS 2477 (14 Stat 251) and that grant applied to both US territorial areas and those areas which had already become States of the Union but still contained public domain open to settlement and federal disposal. In Nevada, state legislators signaled their acceptance of this federal grant with promptness, mandating that effective March 9th, all roads which the several counties "shall thereafter lawfully cause to be opened are declared to be public highways." (subsequently codified as NRS 403.410).

1890 – The GLO subdivided and platted an area lying just north of the Carson River in Storey County and Lyon County, comprising Township 17 North, Range 22 East, of the Mount Diablo Base and Meridian. In the typical manner, this plat made reference to prior GLO survey work done in 1867, 1868, 1869, 1875 & 1887, while also depicting some limited topography, including several small streams and a portion of the river. In addition, it showed some signs of minimal human habitation, such as a few widely scattered structures along with a network of trails, while also noting the presence of the Overland Telegraph line which traversed the full width of this township, flagging the locations of several springs, and identifying the mineral character of the land.

1891 – Section 8 in this township was among a great many sections located throughout the state that were patented by the US to Nevada at this time.

1903 – Sections 9 and 21 in this township were among a large number of sections patented by the US to the Central Pacific Railroad at this time.

1913 to 1917 - During this period, at the dawn of the age of automotive travel, substantial portions of the old Pony Express route along the Carson River became part of the Lincoln Highway and the Nevada Highway Department was created. The Nevada portion of the Lincoln Highway soon became State Route 2, and was improved under the jurisdiction of NVDOT, before eventually becoming US Highway 50, which represents the primary source of public access to northern Lyon County and southern Storey County today.

1918 to 1964 – Nothing about what transpired in the relevant area during this period is definitively known, no evidence from this period having been judicially cited, but at some point, probably during this period, a cluster of springs situated in Section 8 came to be known as the Sutro Springs, and that name was also at least informally applied to a certain path of travel, which was typically used by the public to reach those springs from the aforementioned interstate highway traversing the Carson River Valley, about 5 miles to the south.

1965 – The NW/4 of Section 16 was federally patented to a mining company at this time, but most of Section 16 remains part of the public domain today.

1968 – Section 20 was federally patented to a private party at this time. Certain rights were federally reserved in this patent, but no reference was made to any rights associated with public travel, so this patent provided no indication that any public access easements existed within this section.

1973 – Zachry, who was destined to become the principal adversary of plaintiff Thomas, acquired land situated in the NE/4 of Section 8, and began utilizing that property on a regular basis, although the exact extent of his activities upon the land, and whether or not he resided there at this time, are both unknown.

1976 – Congress produced the Federal Land Policy and Management Act, sweeping legislation, which among many other things, repealed a long list of existing federal statutes pertaining to land rights, most of which had been in place for several decades, including RS 2477. Thus from this date forward no rights of any kind could be established through plain usage of any portion of the remaining public domain for purposes of travel, due to the institution of new protections, which were basically targeted at preserving the original character of all undeveloped federal land still under BLM jurisdiction. Congress finally recognized at this juncture that it was time to set forth long overdue legal verification of the closure of the western frontier, and as a classic example of frontier era legislation, RS 2477 was quite naturally among the casualties of that decision. No rights that were already in existence were undone or impacted however, only the creation of additional public right-of-way on federal land, in locations which had never been put to use for public travel, was thereby precluded. The restrictive federal policies enacted at this time brought widespread consternation all across the west, not surprisingly fostering the development of the ongoing "Sagebrush Rebellion", and the legal implications of those policy changes were poorly understood by a great many parties, leading to outbreaks of controversy which motivated legislators in some western states to take action.

1979 – The Nevada Legislature crafted and adopted NRS 405.191, in response to the need for clarification of exactly what does, or does not, represent a public road. Harkening back to and reinforcing the broad legislative statement made by their predecessors in 1866, regarding the formation of public right-of-way, state legislators confirmed at this time that "any way which exists upon a right-of-way granted by Congress over public lands … accepted by general public use and enjoyment before, on or after July 1, 1979" shall be regarded as public, and may be opened or kept open for public usage by county personnel. This law plainly highlighted the fact that undocumented RS 2477 right-of-way still existed and needed to be documented in Nevada, wherever qualifying public road usage had historically occurred, because "public use alone has been and is sufficient to evidence acceptance of the grant" which was embodied in RS 2477.

Thus Nevada lawmakers sought to encourage or compel Nevada counties to take appropriate steps to identify and properly document all existing public roads comprising RS 2477 right-of-way within their jurisdiction, by giving them a bright green light in this manner. County resources being notoriously limited however, few if any comprehensive documentation efforts of the kind suggested by this statute were evidently undertaken, instead the counties generally opted to simply keep this power to authorize public road usage pocketed, as a trump card, to be pulled out and utilized only when a crisis develops over the use of a particular road.

1986 – Harper acquired land situated in the SW/4 of Section 8, not adjoining the Zachry tract in the NE/4, but about a quarter mile to the west thereof, by virtue of a quitclaim deed from another member of the Harper family. Like Zachry, Harper began to utilize the existing network of trails leading north from Highway 50 toward his tract, crossing both public property and private property in so doing.

1994 – The USGS updated the Flowery Peak Quadrangle, a topographic map showing the entirety of the area which was destined to become the scene of the coming conflict involving Zachry, Harper and others. This updated map showed the existing trail network within the westerly portion of the relevant township, but of course it provided no indication that any public rights might be associated with those routes, since USGS maps, unlike GLO plats, are not created for land rights documentation purposes. The following diagram highlights the key historical routes upon this topographic background.

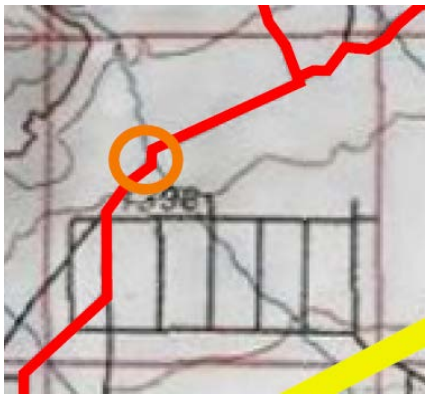
Refer to the diagram on the following page, which provides an overview of the 8 to 10 square mile area containing the Sutro Springs trail network.

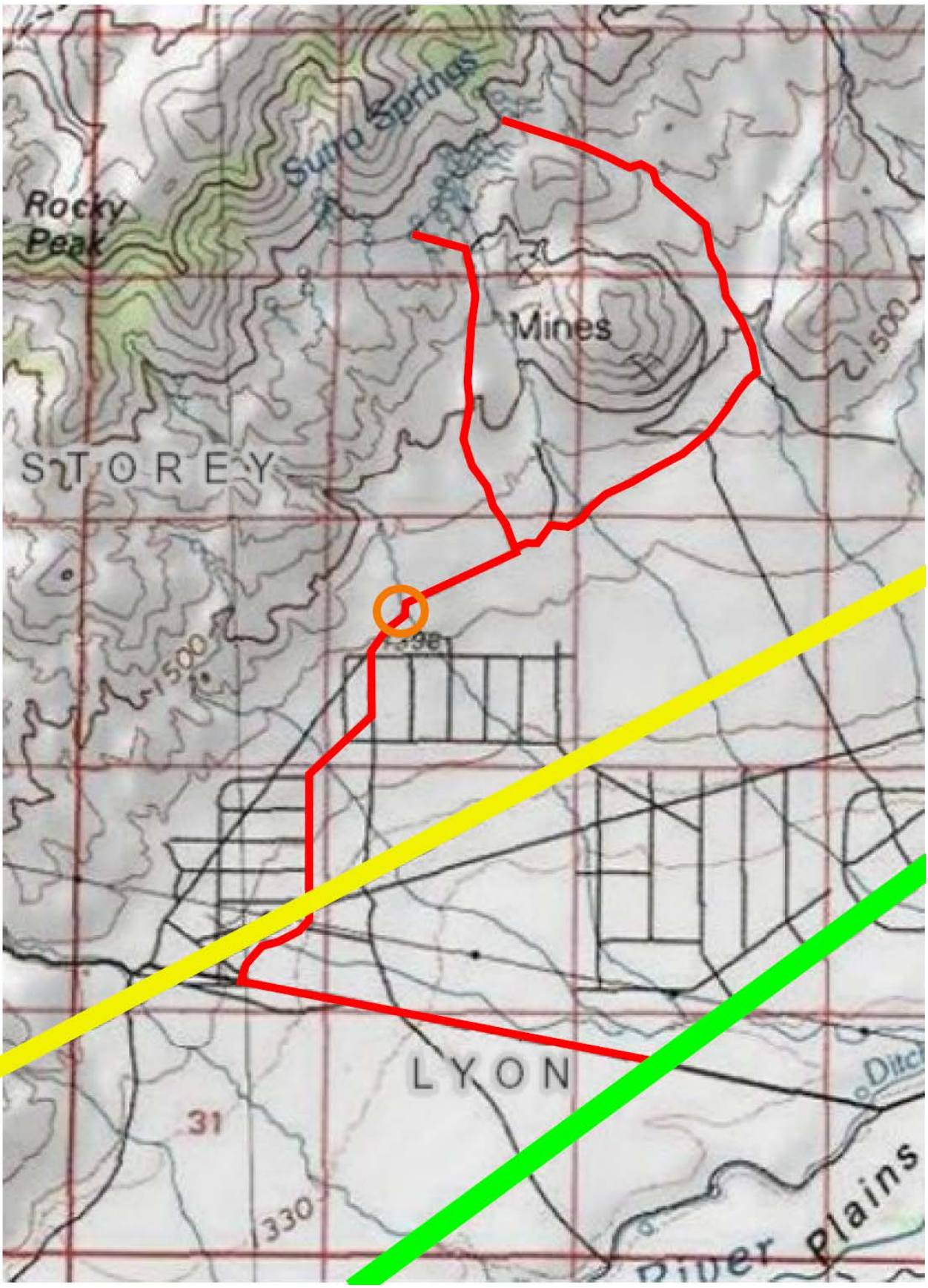
Yellow line = Boundary between Storey County and Lyon County.

Green line = US highway 50.

Red lines = Routes historically employed by the general public to access the Sutro Springs, also utilized by Zachry and Harper to access their respective properties in Section 8, which include some of the springs.

Orange circle = Site of the land acquired by Thomas, which as can be seen is crossed by a portion of the RS 2477 right-of-way in contention.




Rocky Peak
Suro Springs
Mines
1500
STOREY
1500
LYON
31
330
River Plains

1996 – The N/2 of Section 20 was subdivided and platted by Gold Star Realty, which had acquired that area at an unspecified date, creating 8 irregularly shaped residential lots, each 40 acres or more in size. The S/2 of that section had already been platted at an unspecified date as part of a larger residential subdivision occupying multiple sections, known as "Mark Twain Estates" (MTE). On the MTE plat, several roads were clearly identified as being public, including one labeled "Sutro Springs Road", running northeast from Section 30 into Section 20, and terminating at the northern boundary of the subdivided property, which was the north line of the SW/4 of Section 20. Evidently no controversy had developed over use of that road, extending northward to that particular point, at which the pavement that was put in place when the MTE road network was constructed ended, as no one ever protested the public access rights which were clearly depicted on the MTE plat. However, the Gold Star plat, which was duly approved and recorded at this time, showed Sutro Springs Road ending in a cul-de-sac immediately after crossing into the NW/4 of Section 20, and that plat gave no indication that any road or trail had ever existed north of that point. The only notation appearing upon the Gold Star plat concerning public right-of-way was the text pertaining to the cul-de-sac. That dedication statement tersely confirmed, in a manner hauntingly reminiscent of the minimal language of RS 2477 itself, only that "public access and public utility easements shown hereon are hereby granted", leaving any undocumented rights which might already exist in the platted area unaddressed, and thereby shrouded in ambiguity.

1999 – It appears that some form of controversy arose from an unknown source during the late 1990s over the road use being made by Zachry, because at this time he recorded a copy of the aforementioned 1994 USGS map, bearing a hand written note providing public notice that he had been using certain trails for access purposes since 1973. This document, which did not purport to represent a conveyance, and was therefore filed by county personnel as a "public road" record, bore Zachry's contact information, but it made no reference to RS 2477, it named no one aside from Zachry himself, and it bore no county endorsement or approval, thus exactly what Zachry thought recording this map would accomplish is unclear, as is his motivation for doing so.

2002 – A Record of Survey was completed and filed at this time, showing both the Zachry and Harper properties, along with an extensive Report of Survey focused on monumentation, both prepared by a professional land surveyor who they had employed and duly recorded. However, it appears that this survey work was unrelated to any access issues, since neither the survey nor the accompanying report presented any information regarding access to the subject properties, with one exception. In the vicinity map, showing an overview of about 20 sections surrounding Section 8, some existing trails were labeled simply "access road", without any supporting or explanatory information, and neither document made any reference to any existing easement rights associated with either of these properties, nor did the survey legend suggest that any of the several routes shown on the survey were public roads. On the same day these documents were filed however, Harper recorded a "public road" document which was virtually identical in form to the one completed by Zachry in 1999 and described above, bearing a note stating that Harper had been making use of the relevant trails since 1982.

2003 to 2015 – What transpired during this period is unknown, but apparently the road use made by Zachry and Harper continued, without any meaningful interruptions, suggesting that no one saw fit to challenge the validity of their highly nebulous access rights, although whether

this was due to ignorance, carelessness, intimidation or some other factor is unknown as well. A willing adversary would soon step forward however, seeking to compel the old prospectors to openly proclaim and positively prove the origin and legitimacy of their access rights.

October 2016 – Where Thomas came from is unknown, perhaps she had previously resided elsewhere in Nevada, or perhaps somewhere outside the Silver State, and was a newcomer to Storey County, unfamiliar with local history, when she arrived on the scene and acquired one of the Gold Star lots at this time, by means of a typical grant deed, from the Trustees of the Antares Trust, who had owned that lot for an unspecified length of time. The Thomas lot bore a portion of the aforementioned cul-de-sac, where the paved portion of Sutro Springs Road, which as previously noted had been validated as being public in character 20 years earlier, ended, so she was justifiably confident that legal access to her lot was not an issue. But she evidently either failed to notice that an unimproved path of travel ran northward through the middle of her lot from the cul-de-sac, or perhaps she did notice it, and pondered its meaning, but was advised by someone she trusted that it represented no reason for concern. Whether Thomas or anyone else ever saw Zachry or Harper, or anyone for that matter, actually using the trail crossing the Thomas lot is also unknown, and there is no indication that these parties ever met, or even saw each other, until they faced one another in court (FN 3).

December 2016 – Presumably Thomas had acquired her remote lot, situated as it was on the outskirts of civilization, seeking respite and solitude, so she was understandably upset when, just 2 months after making her acquisition, she learned that her property might not be as private as it had initially appeared to her. She may have seen or heard unknown parties crossing her lot, or she may have noticed fresh tire tracks passing through her yard, or found some other evidence of an unknown presence within her property, but her fears were confirmed when she got a letter from Storey County, informing her that the public right-of-way of Sutro Springs Road did not legally end at the cul-de-sac. Exactly what motivated that letter, which was sent to Thomas by the District Attorney (DA) at this time, is unknown, but the evidence suggests that the DA was acting primarily on behalf of Zachry, because at this time Zachry once again recorded his USGS map of the relevant area, with a more extensive hand written note in the margin, asserting that the full length of Sutro Springs Road, extending northward to Section 8, had been public since 1867.

January to March 2017 – Who was advising Thomas at this time and what motivated her decisions is unknown, but she chose to disregard the letter from the DA, and proceeded to barricade the road, evidently confident that she had the right to prevent anyone from entering her lot. Exactly how she erected this blockage, or what materials she used, are also unknown, but her efforts were apparently effective enough to cause serious access problems for Zachry and Harper, forcing them to demand action on the part of the county.

April 2017 – County personnel were authorized by the County Board to clear the roadway at this time, leading Thomas to turn to a Federal District Judge for support, by instituting a legal action in the federal court system against both the public and private parties who maintained that public rights existed within her platted lot, but the judge declined to restrain the county's proposed action, allowing the contested path of travel to be cleared of any and all obstructions (FN 4).

May 2017 – This controversy was again reviewed by the court at this time, as the judge denied a request from the defendants to expedite the matter by allowing it to proceed directly to trial (FN 5).

June 2017 – Having reviewed the very substantial mass of historical evidence brought forth by the defendants, the court issued a third judicial order at this point, which effectively spelled defeat for Thomas, shattering her illusions about the plat which defined the lot that she had acquired. After informing the plaintiff about the existence and legal effect of the relevant 1979 Nevada statute, the federal judge proceeded to address her misconceptions regarding both the authority of county personnel and the bright line distinction between their technical functions and their legal duties. The task of plat approval, being among their many technical assignments, is entirely separate and distinct from the authority that is statutorily vested in each Nevada county to evaluate and make a definitive determination, subject only to judicial review, upon the legal status and validity of any RS 2477 right-of-way, the court clarified for Thomas, so she had no right to rely upon the county's approval of the 1996 Gold Star plat, showing no continuation of Sutro Springs Road through her lot, as official confirmation that her lot was unburdened by any RS 2477 right-of-way. Even after approving the 1996 plat, which provided no indication that a public road crossed the central portion of the Thomas lot and plainly suggested the contrary, the county remained free to later conclude, when provided with satisfactory evidence, that a public access easement of federal origin, although never explicitly documented and entirely undepicted upon that plat, had in fact existed in that location for decades. In the eyes of the court, the platted cul-de-sac located at the south boundary of the lot acquired by Thomas, which she had clearly viewed as a reliable representation that the public road ended at that point and extended no further northward, bore no such legal meaning, it was nothing more than the point along the existing trail at which the proposed road improvement work was to end, thus the cul-de-sac did not carry the significance which Thomas had imagined, nor was it legally capable of terminating any publicly held access rights even if intended to do so.

The right of plat reliance held by any lot buyer, such as Thomas, the court emphasized, extends only to accurate depiction of all boundaries and any easements that were created by means of the relevant plat, because merely dividing private land does not operate to extinguish any existing public servitudes, either known on unknown, which that land bears. Given the public nature and attributes of an RS 2477 right-of-way, the principle that no private party or entity, such as Gold Star in this instance, has any capacity to unilaterally terminate any public rights, by creating subdivisional boundaries or by any other means, militated strongly against the position taken by Thomas. No one who had any involvement with the creation of the Gold Star plat had any power to destroy any existing public easements simply by ignoring them or neglecting to depict them for any reason, either deliberate or accidental, the court recognized, so contrary to the allegation set forth by Thomas, the plat could not constitute evidence of public abandonment of any easements which had remained in active use at all times, such as the trails driven by Zachry and Harper. Thus Thomas learned that neither the surveyor who created the 1996 plat nor the county personnel who approved it had any reason to concern themselves with any RS 2477 right-of-way, because none of them were authorized to draw any conclusions about that matter, only the DA, who of course played no role whatsoever in the platting of the Gold Star tract, held that authority, so the supposition of Thomas, that she had a right to rely upon her plat as a conclusive RS 2477 evaluation, was plainly misguided. She had made the crucial error of relying solely upon the 1996 plat, perhaps because it provided the most modern and

recent illustration of her lot, or perhaps because it was the only graphic document cited in her deed, failing to realize that she was relying on it for an unintended purpose, never knowing, because she was inadequately advised, that a number of relevant historical maps existed, which she evidently never reviewed, and entirely unaware that those primitive maps actually held far greater value for RS 2477 purposes than did her plat. Upon emerging from the courtroom on this occasion, Thomas seems to have realized that her position was destined for failure, because in the eyes of the law neither the county nor the private defendants had done anything wrong, and a heavy evidentiary burden devolved upon her to prove that they had unjustifiably invaded or damaged her property, which meant that she could prevail only if she could point to some fatal flaw in the RS 2477 analysis that had at last been authoritatively conducted by the DA, 20 years after her plat was recorded (FN 6).

August 2017 – Evidently as a last ditch desperation measure, Thomas sought to convince the judge that the litigation she had commenced legally required the participation of every land owner in the vicinity, including the BLM, which as previously noted still owns land in Section 16 that bears part of the route used by Zachry, given the fact that the trails utilized by both Zachry and Harper cross the lands of multiple parties. Observing that no other land owners had ever seen fit to challenge the historically established rights asserted by the defendants however, the court disagreed, and therefore issued a fourth order at this time, declining her proposal to broaden the scope of the litigation to cover the entire trail network, and thereby keeping the evidentiary burden squarely focused upon Thomas. Apparently heartbroken and no doubt feeling betrayed, just a month later Thomas deeded her lot back to her grantor, the Antares Trust, and presumably left Storey County with deep regret and disappointment, less than a year after her arrival (FN 7).

November 2017 – Pursuant to the departure of Thomas, the subsequent trajectory of the ongoing legal action that she had initiated still had to be judicially determined. Once a defendant is assailed by a plaintiff, through the filing of a land rights action, and the defendant engages in response, the plaintiff no longer has sole control over the ultimate fate of the action itself. The plaintiff is free to abandon the action and simply drop out, as Thomas did, but the defendants, having been provoked to take action in defense of their rights, and having typically invested substantial funds in doing so, are not required to relent and fall silent simply because they no longer have any active opponent to do combat with. The defendants have the option to request that the resolution of the problematic title issues, which were the cause of their appearance in court, should be judicially carried to fruition, even though the party who presented the threat to their rights has elected to leave those issues unresolved. In the eyes of our judiciary, effective resolution of land rights issues of any kind holds fundamental benefits for the community in which those issues have arisen, and full clarification of the rights of all litigants is typically regarded as a matter of high importance, so pursuing such issues to proper resolution is widely recognized by our courts as the most appropriate course of action. In this case, the judge agreed with the defendants that they had a right to obtain a decree quieting title to an RS 2477 right-of-way upon the lot in question, in order to prevent an identical case from being subsequently initiated by others for the same purpose, since such a development would be very likely to result in another unwarranted access interruption, to their detriment. Thus at this point the court and the defendants began to take the additional steps necessary to put out the brushfire which Thomas had started, by taking her incomplete legal action to the finish line, without any further participation on her part (FN 8).

May 2018 – No opposing parties having stepped forward to take on the defendants following the voluntary departure of Thomas from the legal arena, all that remained at this point was for the court to confirm their victory by means of summary judgment against the absent plaintiff, enabling the judge to focus squarely upon the controlling principles of law, leading to the logical outcome (FN 9). Since the portion of the road lying within the former Thomas lot, located in Section 20, was the only area in play, the title status of the other nearby sections, through which the network of local trails passed unprotested, became moot, and the core question to be addressed by the court with respect to the relevant land in Section 20 was an elementary one. Does the factual evidence, viewed in its totality, support a definitive judicial conclusion that the route in contention had already become an RS 2477 right-of-way, as the defendants maintained, by the time Section 20 was removed, by means of a federal patent, from the public domain in 1968? Answering that question in the affirmative, the federal judge reiterated the foundational principles upon which the formation and perpetuation of RS 2477 right-of-way rests, concisely summarized here as follows:

1) Evidence of any form of travel creating a visually perceptible pathway upon typical unrestricted public domain, whether surveyed or unsurveyed, between 1866 and 1976, can produce an RS 2477 right-of-way, by virtue of the 1866 congressional dedication, previously discussed herein, to that effect.

2) Under the law, both state and federal, any offer of dedication requires acceptance, and when no specific act is stipulated as an acceptance requirement, acceptance through actual usage adequately defines the right-of-way location and width, no further activity or documentation having been mandated by the dedicator to support the accomplishment of the intended objective (FN 10).

3) The magnitude or volume of usage is inconsequential, use for access purposes by even one lone miner or homesteader satisfies the spirit of the law, the relevant congressional intent being to insure reliable availability of positive legal access, as an appurtenant benefit bestowed upon entrants of typical federally granted mineral or agricultural land and their successors (FN 11).

4) Every patentee of any federal land bearing an RS 2477 right-of-way takes the property subject to an easement vested in the public, which accrues under the law at the moment the land exits the public domain, and any subsequent obstruction of the physically established path of travel, or even its complete physical obliteration, does no damage to the established public rights embodied therein, which endure and survive any such destructive acts, although never documented (FN 12).

5) Historical maps of any origin can constitute highly valuable and potentially decisive evidence of an RS 2477 right-of-way, if they suggest public acceptance of any depicted route of travel, and authoritative maps created by governmental agencies hold particularly strong evidentiary value in this regard, since they are legally presumed to have been created objectively, for purposes of public reliance (FN 13).

As can readily be seen, under the legal parameters applied by the court, the single most important event in the entire timeline of events was the 1968 patent. Since nothing occurring after the patenting of Section 20 in 1968 could have any adverse impact upon any existing RS 2477 right-of-way, which was effectively cemented in position at that point in time, in accord with both state and federal law, short of a formal abandonment or vacation of those public rights by the public authorities holding jurisdiction over that right-of-way, it was unnecessary for the court to address the validity or meaning of most of the post-1968 events, such as surveys, plats or privately recorded documents, like the cryptic unilateral road declaration statements that were filed by Zachry and Harper. Only the governmental acts that took place after Section 20 had become private land, and was thereby protected from the operation of the 1866 federal statute going forward, held any relevance, and even the 1976 federal legislation repealing RS 2477 was superfluous in this particular scenario, because there was no assertion that the right-of-way had developed after 1976, in fact its origin clearly resided deep in the Nineteenth Century, near the very dawn of the 110 year RS 2477 era (FN 14).

The most critical post-1968 event, the court concluded, was the enactment by the Nevada Legislature of the previously discussed 1979 statute, unequivocally affirming the ongoing existence all RS 2477 right-of-way that had developed in Nevada. That state statute, although it was certainly not absolutely necessary to lend validity to the 1866 federal law, served a highly valuable purpose, just as those who composed its unambiguously forceful language plainly intended, providing a poignant reminder of the ongoing vitality of the RS 2477 concept, by clarifying that it continues to hold distinct relevance in the spectrum of land rights, in the wake of the federal repeal just 3 years earlier. In effect, the 1979 statute officially verified that reports of the death of RS 2477 had been greatly exaggerated, as Mark Twain once lamented upon hearing news of his own demise, and it put the people of Nevada on notice that RS 2477 was still a vital factor in the land rights equation in the Silver State, but of course Thomas, to her chagrin, was among those who were destined to learn the hard way about the consequences of failing to heed the warning thus legislatively set forth. Although Thomas, with the support of an especially skillful legal team, might have been able to convince some judges that she had no obligation to take notice of a 150 year old federal statute which had been repealed for decades, perhaps before she was born, even a highly persuasive attorney would have been hard pressed to successfully argue that as a Nevada citizen Thomas had no duty to take notice of the 1979 Nevada statute and was not bound by its legal implications (FN 15).

The principal contributory factor, which put Thomas at a great if not hopeless disadvantage, and in the end doomed her efforts to repulse the RS 2477 right-of-way at issue, was the unusually large RS 2477 development window, spanning 102 years, which afflicted Section 20, because that section had remained unpatented until late in the Twentieth Century, placing her property at the wrong end of the RS 2477 continuum. If Section 20 had been patented during the Nineteenth Century, the opponents of Thomas would have faced a far greater evidentiary challenge, as no evidence of any Twentieth Century public travel through that section would have been of any value to them, forcing them to discover, bring forth and rely solely upon evidence of public usage from earlier years, and this elevated level of evidentiary difficulty, associated with lands which were patented at an early date, has discouraged or prevented many others from successfully leveraging RS 2477. Had the land acquired by Thomas been situated in a section that had been patented during a much earlier time period, like Section 8 for example, where the private defendants resided, she easily could have been among the beneficiaries of the

1866 federal statute, just like them, but because she stood in the shoes of a latecomer, specifically the 1968 patentee of Section 20, rather than an early entrant of the public domain, she was stuck with the burden, rather than the benefit, of that venerable congressional largesse (FN 16). Had she more fully understood the law, or had she been more effectively advised about the scenario that she was stepping into in 2016, presumably she would have refrained from launching her ill fated legal action, or perhaps she may have even been wise enough to just bypass the problematic lot in the first place (FN 17).

While the position occupied by Thomas, as we have seen, was plagued with deep difficulties, which were largely beyond her control once she had decided and agreed to accept fee title to her lot in 2016, and the issues which she had overlooked in her haste to complete her acquisition sprang up to haunt her with unusual promptness, her private opponents, although holding no documented rights within her lot, were actually in a very secure position, thanks primarily to one key factor, which was the supportive stance taken in response to their needs by Storey County. Under federal law, private land owners seeking to leverage RS 2477, such as Zachry and Harper, have no legal standing to individually or independently assert any public access rights, so RS 2477 typically holds little if any benefit for them, unless they are able to obtain support for their position from either the county level or the state level, and numerous private litigants in federal courts have looked on as their RS 2477 arguments were judicially shot down due to an absence of such public support. So although Thomas really had no option to exclude Storey County from her legal action, since the county had openly asserted the right to enter her land without her consent, she nonetheless did Zachry and Harper a favor by naming Storey County as a defendant along with them, because without solid and direct county support for their position the private defendants would have been unable to successfully invoke RS 2477 in the federal forum, once again illustrating the overarching importance of the 1979 Nevada statute, authorizing and directing Nevada counties to actively support the enforcement of RS 2477 (FN 18).

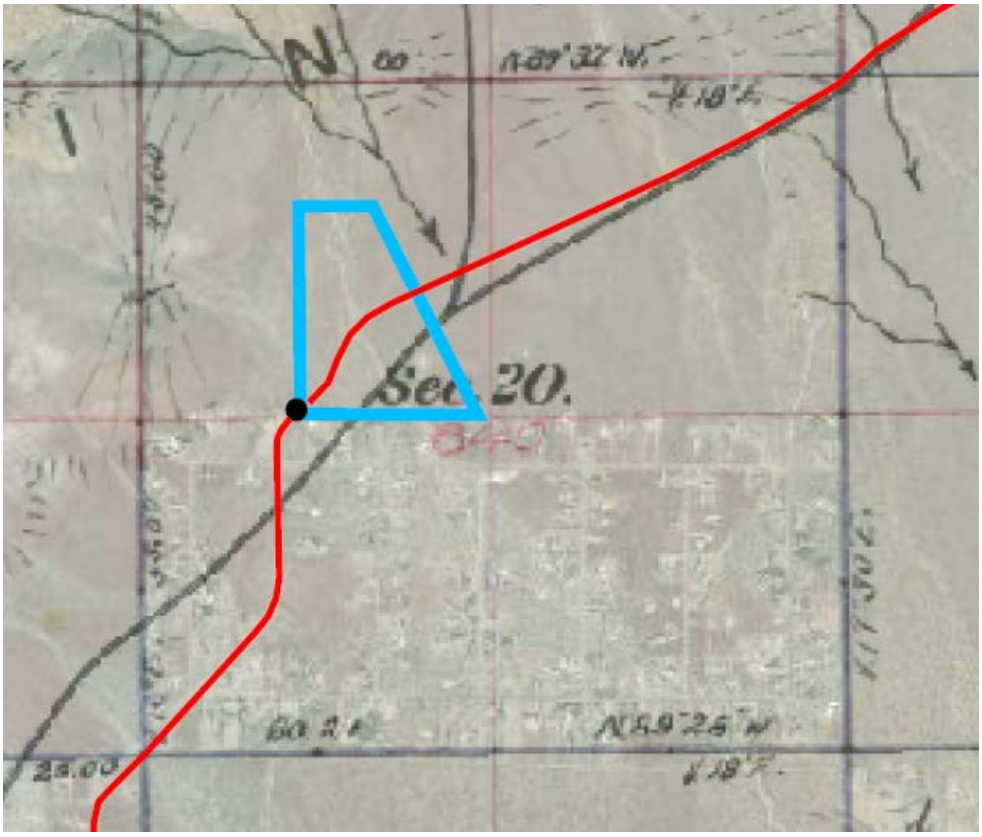
As the outcome of the Thomas case vividly portrays, the power of visible pathways of travel as monuments is not to be underestimated, since both federal and state courts are generally unsympathetic to the plight of those of who had an opportunity to note observable signs of land rights on the ground they intended to acquire, but chose instead to close their eyes, leaving the legal implications of such visible evidence of land use by other parties to be addressed at some later time, and this universal principle has long been judicially applied to boundary issues as well as easement issues. Its quite possible of course, and perhaps even likely, that Thomas was completely innocent of such negligence however, she may never have seen anyone driving through her lot before she bought it, and she may have been given misleading information about the condition of the land by some unknown party or parties as well, thus she may very well have had no real opportunity to foresee or anticipate the title issue that lay at her feet, as she stood in the cul-de-sac at the south line of the Gold Star tract, gazing upon her future lot in 2016. But without regard for any knowledge, or any absence of knowledge, on her part, the old trail, highly obscure though it may well have been, was a monument in the eyes of the court, signifying potential access rights, leading those viewing this scenario from the standpoint of a land surveyor to ask a question, which apparently but not surprisingly, seems never to have occurred to Thomas, since she was not a surveyor. Is a physical monument still a controlling monument when it no longer occupies its original location? The following diagram illustrates the disparity between the historical location of Sutro Springs Road and its contemporary location.

The 1890 GLO township plat cited by the court, which was key to the position taken by the defense, maintaining that Sutro Springs Road represented an authentic perpetuation of a pioneer era route of travel, superimposed upon an aerial photographic background of recent vintage, suggesting that the course of that road has undergone substantial alteration at an unknown time or times, although some portions of the trail network, particularly near the corner of Sections 16, 17, 20 & 21, appear to remain remarkably close to the path of travel that was documented well over a century ago.

Blue figure = The Thomas Lot, platted in 1996.

Black dot at SW corner of Thomas Lot = Location of the cul-de-sac, which Thomas mistook for the end of the public right-of-way known as Sutro Springs Road, since it marked the northern end of the paved roadway when she made her acquisition in 2016.

Red line = The course of the route used to reach the eastern portion of Section 8 during the years immediately prior to the subject litigation.




Sec. 7.
Sec. 8.
Sec. 9.
Sec. 18.
Sec. 17.
Sec. 16.
Sec. 19.
Sec. 20.
Sec. 21.
Sec. 30.
Sec. 29.
Sec. 28.
Hot Springs
Spring
Spring
Spring
Post at Mining Claim
M
I
N
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L

Was the attack made by Thomas upon the RS 2477 status of Sutro Springs Road really a lost cause from the outset, or did she simply fail to discover a legitimate basis upon which to quiet her title, that was right under her nose all the time, because she was unable to perceive the presence of a crucial factor, which the DA had also apparently overlooked, and which only a land surveyor would be likely to notice? If she had just asked a licensed professional land surveyor to map out the path of travel as it existed in 2016, and instructed her surveyor to overlay the historical road location, which was shown with fullness and complete clarity upon the 1890 GLO plat, with the location of the modern roadway known as Sutro Springs Road, she would have held in her hands a powerful weapon, quite likely to prevent her litigation from going into a fatal tailspin, as it did in the absence of any such cogent evidence supporting her position. Whether the DA noted the substantial variations in the road's location and simply chose to disregard them, or was unable to detect them, just as Thomas evidently was, the lack of attention paid by the litigants on both sides to proper authentication of the historical consistency of the road's physical position resulted in an absence of judicial attention to that aspect of the controversy. Because neither side made the notable disparities in the road's location an issue, the court treated the road's altered position as a non-issue, proceeding upon the logical presumption that if anything of that kind was worthy of judicial consideration one of the parties would have brought that matter to light. The magnitude of the apparent variation between the modern and historical routes suggests that an assault by Thomas upon the historical integrity of the contested easement may well have succeeded, had Thomas engaged a land surveyor, focused on the locational component of the controversy, to first scrutinize the historical evidence looking for material irregularities, and then to point out any locational discrepancies emerging from that evidence to the judge, by way of authoritative expert testimony. While no surveyor could have announced either the existence or non-existence of an RS 2477 easement on the Thomas property, a licensed professional surveyor acting as a witness for Thomas certainly could have enlightened the judge regarding the locational deviation of the historical and current road positions, and its quite likely that the court would have been highly appreciative of such testimony (FN 19).

Be that as it may however, even though the evidence very clearly revealed that Thomas had no form of documentary notice that her lot was penetrated by a public road when she made her acquisition, she was nonetheless not wholly without legal notice, the court realized, because the road was in existence and it was visible on the ground to at least some extent at all times, triggering a serious burden on the part of any prospective buyer of the servient land, such as Thomas, to acknowledge the potential legal ramifications of the existence of such a road or trail, anywhere within the boundaries of the proposed acquisition. While Thomas had a lot of superficial reasons to suppose that no public rights of access burdened her lot, beyond the platted cul-de-sac, most notably the absence of any such rights from the 1996 subdivision plat which had created that lot, she was not on solid legal ground, because she had neglected to pick up and duly carry her legal burden of inquiry, and through this episode she learned, like thousands upon thousands of others before her, that such an omission on the part of a grantee is fatal to one's status as an innocent purchaser entitled to legal protection (FN 20). Although this case involved no surveyor liability, because neither side saw fit to obtain any land surveyor support, the presence of RS 2477 rights upon land which is to be subdivided remains a source of potential surveyor liability, in those instances when the subdivider, as the client of a land surveyor, expects the subdivision plat created by the surveyor to address all such issues, or if the surveyor agrees to research such matters or depict locations of potential undocumented land

rights. Before engaging upon any such assignment the professional land surveyor would be well advised to verify the extent and the accuracy of his or her own knowledge, and perhaps also to seek definitive clarification, from a source of proper authority, regarding the duties or obligations of a land surveyor who becomes involved in an RS 2477 scenario. Do you know how the statutes of your state interact with federal law in the RS 2477 context, and does your State Board of Professional Registration believe that you, as a licensed professional, have a responsibility to know the law of your state, with regard to legal issues such as undocumented public access rights, well enough to help protect the land rights of your clients and the public?

Footnotes

1) The operational words of the federal law known as RS 2477, composed by Congress in 1866, consist of a single sentence, which reads:

"The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

Through subsequent judicial evaluation, conducted by both state and federal courts, the phrase "construction of highways" has been recognized as meaning any type of activity establishing a visible path of travel, not limited to grading, blading, gravelling, paving or any other specific type of improvement work, while the sole limitation, expressed by the phrase "reserved for public uses", has been defined as eliminating any area within the boundaries of any federal reservation from the operation of this grant. Despite its immensely broad language however, this grant has never been construed as applying to "public lands" of every kind. Since the law is one of federal origin, courts have consistently applied the phrase "public lands" as if it read "federal public lands", meaning the portion of the unappropriated public domain that remains open to settlement at any given point in time, thereby eliminating any other lands, which are in fact "public" at the state, county or lower levels, from the operation of this law. Any federal law attempting to create land rights of any kind upon non-federal public lands, and thereby legally burdening such non-federal property, would obviously be unconstitutional.

2) For a detailed review of another fascinating RS 2477 scenario, focused upon the extensive and ongoing conflict which has arisen in recent decades between certain western states and the federal government over the true meaning and proper implementation of that law, see the fourth edition of this series of articles, entitled "Examining the applicability of the federal Quiet Title Act to easement litigation - What factors control judicial implementation of the QTA?", which is available in pdf form at no charge from Multibriefs, and can be obtained by means of a typical internet keyword search or directly from the author upon request. That article contains a more comprehensive discussion of the historical context surrounding RS 2477 from a legal perspective, including observations and commentary upon how societal changes over the past century and a half have dramatically altered perceptions, attitudes and policies relating to arcane public laws such as RS 2477.

3) There is no indication that any boundary issues, or any title issues related to boundaries were present, or that any such issues played any role in the litigation launched by Thomas, nor was any surveyor error ever cited or even suggested, so presumably Thomas had accurate knowledge of the location of the boundaries of her property. Although how and when the grantors of Thomas acquired the lot which they sold to her in 2016 is unknown, and how many others had

previously owned that lot is also unknown, no suggestion was ever made that they did not hold clear fee title to the land comprising that platted lot, thus the focal issue was whether or not the fee title acquired by Thomas bore an undocumented easement, composed of public rights founded upon RS 2477.

4) See 2017 US DIST LEXIS 55214 – United States District Court for the District of Nevada – Court Order dated 4/11/17. Why Thomas elected to file her action in federal court rather than in the Nevada judicial system is unknown, RS 2477 cases can be litigated and fully adjudicated at either level, but historically a distinct majority of the recorded disputes over RS 2477 roads have been handled at the state court level. Such conflicts typically require judicial attention at the federal level only when the rights of the litigants cannot be resolved without directly addressing the validity of a federal land rights interest, since issues involving federally held land rights cannot be conclusively resolved at the state court level. Presumably Thomas acted as she did either because she felt that the Nevada judicial system was less likely to take a supportive view of her position, or because she was aware that portions of the trail network crossed BLM land, so she anticipated potential federal involvement in the litigation, which as things turned out never materialized however.

5) See 2017 US DIST LEXIS 75389 – United States District Court for the District of Nevada – Court Order dated 5/17/17. Interestingly, this document indicates that the Fidelity National Law Group engaged on behalf of Thomas at this point, suggesting that she may have had title insurance, and she may have demanded that her insurer step up to the plate and provide legal support for her position, but no subsequent information either confirms or rejects this hypothesis.

6) See 256 F Supp 3d 1114 – United States District Court for the District of Nevada – Court Order dated 6/19/17.

7) See 2017 WL 7036662 – United States District Court for the District of Nevada – Court Order dated 8/10/17. Its noteworthy that although this effort on the part of Thomas to compel BLM to unite with her in court against the defendants failed, she still had the right and the opportunity to tap into the expertise of the BLM cadastral staff on such matters, so she would have been well advised to seek their objective input, with regard to essential historical evidence pertinent to the relevant area, and to probe their knowledge and experience regarding proper professional analysis of such evidence. There is no indication that she ever did so however, she appears to have remained sadly oblivious at all times to the potentially supportive value of land surveyor knowledge and input.

8) See 2017 WL 5986121 – United States District Court for the District of Nevada – Court Order dated 11/30/17. Upon making the determination that the Thomas action would proceed to completion without her, as the defendants desired, the court invited any other interested parties who might see fit to step into her shoes, and to engage in legal battle with the defendants, to do so, but there were evidently no takers. It appears that the aforementioned trustees, who as previously indicated had accepted a reconveyance of fee title to the troubled lot from her just 2 months earlier, were undisturbed by the old trail's presence, and unlike Thomas they were content to hold fee title to that lot regardless of whether it bore a public access easement or not.

9) See 2018 WL 2110602 – United States District Court for the District of Nevada – Final Order dated 5/3/18. Summary judgment is a judicial mechanism which supplants a typical trial, and can be leveraged as a form of judicial economy, whenever a judge determines that the factual evidence before the court fully covers the issues to be decided and no questions of law are presented, making any further investment of judicial time and resources, to achieve legal certainty, clarity and finality, unnecessary. Use of summary judgment is subject to appeal however, and many cases are sent back to lower courts for a full trial, on those occasions when it is determined by an appellate court that summary judgment was not appropriately utilized.

10) The language of RS 2477 clearly represented a dedication, offered by the US as the owner of the public domain, with congressional approval, and when any such offer, authoritatively made, is accepted, it becomes legally conclusive, no passage of time being required to bestow validity upon it. The question of exactly what constitutes legally binding acceptance however, has perpetually troubled our courts throughout our nation's history, and as a consequence the courts of some states have chosen to bypass dedication when analyzing RS 2477 scenarios, in order to eliminate the ambiguity and diversity of judicial opinion surrounding application of the acceptance concept from the RS 2477 equation. During the early years of its existence, RS 2477 seldom gave rise to litigation, but as civilization marched across the prairies and once lonely mountain valleys became densely populated, access rights became a judicial focal point, and as the Nineteenth Century drew to a close, the era of serious controversy involving RS 2477 rights was dawning. Walcott Township of Richland County v Skauge (ND 1897 – 71 NW 544) is among the most influential early RS 2477 decisions, and on that occasion the Supreme Court of North Dakota adopted prescription, rather than dedication, as the best test, in the eyes of the Justices, of the veracity of access rights established through use of the public domain for purposes of travel. Since they were more comfortable leveraging the conclusive security provided by the prescription concept than they were utilizing the more nebulous dedication concept to support RS 2477, they carved out an exception to the hallowed Nullum Tempus concept, announcing that they viewed the 1866 federal law as a formal waiver, issued by Congress for purposes related to RS 2477, of the principle that adverse rights can never accrue upon public domain. As they explained in the course of ruling that the road in question in that case was indeed public, but not pursuant to dedication or acceptance, "we do not think that principle has any applicability … the grant (of 1866) takes the case out of the operation of that principle … use for the period of 20 years being regarded as conclusive … use establishes the highway … nor is it material … whether the use is with consent or over objections … when use for over 20 years is shown, both original establishment and dedication become mere legal fictions". Thus 3 decades after its enactment RS 2477 was becoming judicially problematic, but our courts were responding by putting in place alternative grounds, upon which to uphold public rights that were founded upon RS 2477, in the face of increasingly frequent legal challenges.

11) Just 2 years after the Walcott case emerged from North Dakota, as discussed in FN 10, the Supreme Court of Washington adopted a highly comparable view of the operation of RS 2477, construing that statute as a federally authorized exception to the long acknowledged prohibition preventing the formation of land rights of any kind by adverse means upon unpatented lands. In Smith v Mitchell (WA 1899 – 58 P 667) the Washington Justices went a bit farther however, and made it clear that in their eyes the 1866 law represented a federal bestowal of private access rights, along with public rights, cognizant that Congress clearly envisioned that no once freely accessible tract or parcel should ever later become landlocked, as a result of any subsequent grants that might be federally made, in the course of placing the remaining

public domain in private hands, through the ongoing execution of the federal patenting process. Smith was a typical entryman, who used an old road of unknown origin to access his homestead for several years, until Mitchell acquired an adjoining tract bearing part of that road and blocked it, in the belief that Smith had no right to use it, since it was not documented as either a public right-of-way or a private access easement. Rejecting the suggestion that use of a road by just one individual, such as Smith, could produce no rights under RS 2477, the Court verified that the Mitchell tract bore an RS 2477 right-of-way, which the newcomer was legally bound to leave intact and open for use by Smith at all times. Courts in most other western states have also confirmed that road use by a lone individual satisfies the RS 2477 mandate, often resulting in a public roadway which essentially benefits only a single ranch or other household, and federal courts have repeatedly acknowledged the validity of the many state level rulings to that effect. In addition, on this occasion the Washington Justices deemed it appropriate to quote nationally renowned Justice Cooley of Michigan, who had extolled the virtues of RS 2477 in an earlier case, describing that federal statute as one which had "facilitated the settlement of the country and ... increased the value of the public lands", while declaring that rights embedded in routes of travel which were established in accord with RS 2477 were judicially viewed with favor, even when entirely undocumented, on that basis.

12) As in the 2 cases cited in FN 10 & FN 11, the case of Wallowa County v Wade (OR 1903 – 72 P 793) was precipitated by the blockage of a road by the defendant, who just like the defendants in those prior scenarios, chose to take the position that his land bore no public easements, because no specific burdens upon his land were mentioned in any documentation in his chain of title. Like countless other western grantees, both before and after him, including Thomas well over a century later, Wade assumed that his property was essentially virgin ground, free of any legally binding access rights that could be enforced by others, despite plainly visible indications to the contrary, along with his own knowledge of historical usage. Specifically, Wade insisted that the road at issue had never become public because it had never been properly described, making the county road establishment process legally defective and ineffectual, with respect to this particular route. Not surprisingly, the Court treated his position with open disdain, informing him that the issue he had raised was unworthy of judicial examination, before going on to explain how and why the road in contention was indeed public in character, coming as it did within the broad parameters of RS 2477. Citing prior RS 2477 cases from California, Kansas, Michigan, Nebraska, South Dakota and Wisconsin, along with the Washington case previously discussed herein, and pointing out that the road in question had been in existence for over 20 years, the Supreme Court of Oregon adopted the view that properly documented dedication of the route was unnecessary, because it was there before any of the relevant lands were patented, thus the patentees, such as Wade, had all taken title to their tracts, in the several sections through which the road passed, with notice that those lands were both served and burdened by an RS 2477 right-of-way. Any action that had been taken by state or county officials, either to document the public status of the old road or to define its location, whether legally sufficient or not, were superfluous, the Court observed, being unnecessary to validate the road's public status. Because the road was physically apparent to all those who arrived after it was put to use, there was no need for any documentation explicitly declaring that road's public status, each patentee of the lands crossed by the road had acquired his or her property subject to the public easement provided by RS 2477, whether they were aware of the existence of that federal statute or not.

13) The federal judge handling the Thomas litigation took notice of a post-RS 2477 era case that played out at the state level, in which the Supreme Court of Nevada was required to evaluate evidence produced by a plaintiff who turned to RS 2477, in an effort to justify his travels through lands that were held in fee by the defendant. The case of Anderson v Richards (NV 1980 – 608 P2d 1096) was set in Washoe County, not far from Storey County, but in that case the county was not an active participant, so the plaintiff Richards was compelled to produce particularly strong evidence in support of his position, with little if any direct aid from any public officers. Richards however, presumably with guidance or assistance from one or more unspecified land rights professionals, potentially including a land surveyor, proved to be up to the task at hand, and was therefore able to prevail upon the strength of the historical evidence that he had assembled. The Court found the evidence brought forth by Richards in the form of maps to be especially convincing, noting that "nearly every map … showed a roadway from Nevada State Highway 28 to the south boundary of Richards property … first known as the trail to Carson … and later as Tunnel Creek Road". This represents just one classic example of the great many occasions upon which historical maps have paved a path to victory for an RS 2477 claimant, powerfully illustrating the immense value of unique land surveyor knowledge, which enables surveyors to successfully probe arcane records that seem confusing or nonsensical to others, and are therefore typically difficult for non-surveyors to effectively navigate. The Court cited maps from 1862 through 1867, showing the road in contention, which Richards had wisely extracted from historical sources, and was quite impressed by the fact that most of the maps he presented for judicial review were duly authenticated GLO plats, which being of federal origin bore a powerful legal presumption of correctness, making such evidence virtually impossible for his opponent to successfully challenge. As can readily be seen, the map evidence that doomed the position taken by Anderson was practically identical, both in nature and in legal effect, to that which was leveraged against Thomas by her opponents, with equally potent results, making it clear that Thomas minimized her own chances of success by failing to obtain the assistance of a land surveyor, leaving her without essential evidentiary support.

14) The Supreme Court of the United States (SCOTUS) has never squarely addressed the specific legal standards that are applicable to RS 2477 litigation during the post-RS 2477 era, which began in 1976 as previously noted herein. The most prominent RS 2477 case ever to reach the High Court was Central Pacific Railway (CPR) v Alameda County (284 US 463 - 1932) which was adjudicated at a time when the repeal of RS 2477 was still far in the future. In that case, CPR asserted that it had no obligation to regard a certain road, which was situated partially within a certain railroad right-of-way, as a public road, because CPR had obtained that right-of-way by means of an 1862 federal grant, which obviously predated the 1866 federal statute that was relied upon by the county as the basis for the public status of the road in question. The 1866 law, CPR maintained, could not have had the effect of creating a public access easement upon the land comprising the railroad right-of-way, because after 1862 the land within that right-of-way was railroad property and was no longer part of the public domain. Noting however, that the evidence revealed that the road at issue was in existence as early as 1859, SCOTUS rejected the CPR position and confirmed that the contested road was a public right-of-way under county jurisdiction, forming a legal burden upon the railroad right-of-way, so it could not be closed by CPR. In so ruling, SCOTUS explained that the enactment of RS 2477 in 1866 signified federal recognition of the validity of all routes of travel which had formed upon the open public domain prior to that date, thereby informing CPR that even though RS 2477 did not yet exist in 1862, the land rights federally bestowed upon the railroad at that date were

nonetheless subject to a public access easement, because the road in contention was already there in 1862. The 1862 federal railroad grant, SCOTUS clarified, was not intended to legally obliterate or destroy any existing land rights, so the subsequent congressional confirmation of the public status of all such roads, in 1866, did not represent federal infringement of land rights obtained by any railroad in 1862. Expressing high reverence for the historical value and significance of the rights of access which were formally validated in 1866, SCOTUS concluded by stating "we cannot close our eyes to the fact that long before the Act of 1866 highways in large number had been laid out … across public lands … these roads … were necessary … they facilitated communication between settlements already existing and encouraged the making of new ones … a moral obligation to protect them against destruction or impairment follows … the Act of 1866 … was a voluntary recognition and confirmation of pre-existing rights … with the acquiescence and encouragement of the federal government."

15) Regarding the development of state statutes pertaining to RS 2477 right-of-way and their potential impact, its noteworthy that the various western states have, not surprisingly, taken widely divergent positions, which are not in unison and stand in stark contrast to one another, given the highly ambiguous nature of the 1866 congressional mandate and the intense socio-political conflict over western land use that has come to be associated therewith. As an example, while Colorado is among the states in which RS 2477 has been successfully utilized with a high degree of frequency, in the absence of any state statute restricting its application, Wyoming has taken a very different approach to the resolution of access issues, essentially banning RS 2477. In Sprague v Stead (CO 1914 – 139 P 544) RS 2477 was heartily embraced by the Supreme Court of Colorado, citing the 1903 Oregon case discussed in FN 12 among others, and several subsequent RS 2477 cases set in the Centennial State have perpetuated the public right of reliance upon the ongoing availability of historical routes of travel, even in places where the evidence indicates that the route in question has varied in location over past decades. Just a few years later, the Supreme Court of Wyoming also acknowledged the validity of RS 2477 in Hatch v Black (WY 1917 & 1918 – 165 P 518 & 171 P 267) and the Court cited the 1914 Colorado case noted above in so doing, but in that instance the vanquished litigants, who owned the land crossed by the road at issue, were politically well connected and were capable of exerting strong influence over Wyoming lawmakers. After the Court refused for a second time, upon rehearing the matter in 1918, to award victory to the Black family, they evidently opted to bring their clout to bear upon the Wyoming Legislature in 1919, resulting in the amendment of an 1895 Wyoming statute, to read "It shall be the duty of the several Boards of County Commissioners … to determine what if any roads … not heretofore officially established and recorded, are necessary or important for public use … no other roads shall be highways unless and until lawfully established as such by official authority." This judicially motivated statutory revision effectively rendered the ruling of the Court in the Hatch case moot, and the Court has verified in subsequent cases that RS 2477 has been incapable of supporting the public status of any undocumented right-of-way in Wyoming since 1919.

16) As noted in the timeline, Section 8 in this particular township was federally patented in 1891 to Nevada, not to any private party or entity, so it remained public property until it was eventually sold by the state. Yet that federal patent conclusively ended the exposure of the land within that section to the congressionally imposed RS 2477 servitude in 1891, just as effectively as a federal patent to any individual, because RS 2477 rights could accrue only upon federal public domain, so once any section became state land it was fully shielded from any legal burden generated by RS 2477, just as if it had been acquired by John Doe, despite still being public land

at the state level, unless of course any such land was already impressed with an RS 2477 road or trail before becoming state property. Exactly when Section 8 became private land is unknown, but if it was sold to a private party or entity by Nevada during the 1890s, who then began using the local trails to access that section from the south, which is quite possible, the route later utilized by Zachry and Harper may have become an undocumented public right-of-way, awaiting only formal recognition, prior to 1900.

17) Because Thomas evidently did not insist upon a warranty deed when she acquired her platted lot in 2016, she was not well positioned to recover her losses by legally attacking her grantors for liability purposes, so the fact that she apparently decided not to file any accusations against her grantors, based on the problematic status of the title which she acquired from them, seems quite understandable and logical. In addition, the fact that her grantors evidently agreed to take the burdened lot back from her in 2017, presumably after refunding some unspecified amount of money to her, suggests that she and her grantors wisely arrived at an amicable solution to the troublesome situation that had arisen from the presence of the previously unrecognized public easement cutting through the middle of this otherwise unremarkable platted lot.

18) While Zachry and Harper would clearly have been in a decidedly weaker position if the DA had elected to take no action on this matter, or had the DA expressly declined to collaborate with them for any reason, since in that event they would have had no realistic chance of securing judicial confirmation of a public right-of-way within the Thomas lot, they would not have been entirely defenseless. Since the evidence plainly indicated that they, and potentially several others, had been using the local trail network for decades, with some unspecified degree of consistency or regularity, after Section 20 became private land, if the legal avenue presented by RS 2477 had been unavailable to them they would have been compelled to attempt to leverage post-1968 road use, rather than pre-1968 road use, in order to secure a private access easement on the familiar basis of adverse usage, under the well known principles of prescription. Of course we will never know whether they would have succeeded or failed under such circumstances however, because the support of the county made it unnecessary for them to bring that legal alternative into play, as RS 2477 enabled the activities of their predecessors and the general public, long before the old timers were even born, to put the public access rights which they sought to confirm legally in place.

19) When the course of Sutro Springs Road was altered, and who was responsible for its alteration, are both unknown, but viewed from a logical perspective the evidence suggests that the southerly portions of that road, lying closer to Highway 50, were deliberately relocated as part of the MTE subdivision design process, when the various tracts through which the road passed were converted into typical residential lots. Due to the remoteness and ruggedness however, of the lands traversed by the northerly portions of the historical trail network, specifically the land in Sections 8, 9, 16, 17 and 21, those portions of the original routes used to reach the springs during the pioneer era appear unlikely to have been subjected to any such intentional alteration, and thus may still serve to authentically perpetuate the footsteps of early settlers, making RS 2477 genuinely applicable, from a locational standpoint, to those nearby areas, which as previously indicated were outside the scope of the Thomas litigation.

20) For a comparable story, outlining the difficulties and tribulations encountered by a California man who became embroiled in a similar legal battle of more monumental proportions, also resulting from a controversy over rights of access, see the Eleventh Edition of this series of articles, entitled "Mr. Grill meets modern bureaucracy - The importance of understanding the legal implications of federal law pertaining to access rights", which is available in pdf form at no charge from Multibriefs, and can be obtained by means of a typical internet keyword search or directly from the author upon request. Although Thomas, like Grill, experienced severe disappointment and defeat in the arena of land rights, due to a lack of sufficient knowledge of the law relating to access issues, Thomas is worthy of at least some affirmative acknowledgement for having the wisdom and grace to accept her loss and move on, having learned a potent lesson, unlike Grill, who became engulfed in a cycle of defeat and wound up investing a large portion of his adult life pursuing futile litigation.

(The author, Brian Portwood, is a licensed professional land surveyor, a federal employee, and the author of the Land Surveyor's Guide to the Supreme Court series of books, as well as this series of articles, devoted to supporting advanced professional education for all those engaged in the land rights industry.)

Build your own library of outstanding federal case law - the Portwood articles presented here in News & Views represent an ideal starting point for those who may wish to explore federal case law more broadly on their own. A zip file containing the entire Federal Land Rights Series is available free of charge in pdf form upon request from the author, who can be reached at bportwood@mindspring.com.