Examining the applicability of the federal Quiet Title Act to easement litigation - What factors control judicial implementation of the QTA?

Perhaps unknown to most people outside Utah, a significant land rights battle with potentially precedent setting implications substantially played out during 2015, providing a fine learning opportunity for those interested in developing an understanding of the federal Quiet Title Act (QTA) and particularly its relevance to land rights in the public easement context (FN 1). In October of 2015, despite a compelling appeal, which was filed by the Attorney General of Utah, and was supported by some respected allies, the Supreme Court of the United States (SCOTUS) declined to accept and rule upon a case which involves issues that have application to every western state, wherever lonely roads of uncertain origin traverse desolate terrain, thereby tacitly approving a ruling on public land rights issued by the United States Court of Appeals for the Tenth Circuit (COA) in December of 2014. Herein we will review the vital historical developments which set the stage for the controversy documented in Kane County Utah & The State of Utah v United States (772 F3d 1205) a case deeply rooted in the rich legacy of the old west, highlighting the legal hurdles that have been imposed by laws created during the past century, which must be surmounted by those who endeavor to assert land rights that originated during the prior century, and have now lain legally dormant for several decades. As we will observe, this daunting task is not unachievable, yet accomplishing it requires both masterful knowledge of the law as it stands today and an appreciation of the immense value of historic events, many of which form highly relevant legal milestones.

For several years, Utah has actively sought to obtain definitive verification of the legal status of many remote roads, in order to validate and confirm the right of the state and the relevant counties to regard and treat them as typical public roads. Some of these roads have been improved, and some have even been paved, while others are just plain dirt roads, amounting to minimal pathways over otherwise unimproved lands, and many of these cross the exceedingly rugged and incredibly beautiful southern portion of Utah, which remains largely part of the public domain, and is therefore under the jurisdiction of the US Department of the Interior Bureau of Land Management (BLM). Political factors inevitably play a role in such litigation, some appreciate the efforts of Utah and its counties, but are somewhat less appreciative of federal authority, so they strongly support the existence of the land rights that are at issue here. Others however, deem the path embarked upon by claimants such as Utah to be inappropriate, unproductive, improper or unnecessary, and thus throw their support behind the federal position, providing ardent resistance to the state's crusade at every turn. Perhaps primary among this latter group, with respect to this particular region, is the Southern Utah Wilderness Alliance (SUWA) which closely monitors BLM activities, functioning essentially as a watchdog, and this organization, along with some similar groups that are well known at the national level, stepped up to the plate and functioned as the principal opponents of the plaintiffs Kane County and Utah on this matter. Regardless of which side of this stark equation we may be inclined to personally align ourselves with however, as always we must abstain from doing so, and instead evaluate the scenario presented here in a detached and genuinely objective manner, in order to best partake of its educational value.

The title status of literally thousands of relatively minor roads throughout the west, which have been used to some degree by the public for many decades, typically without objection, though often only very sporadically, has never been legally or conclusively determined. Most of these roads would be under county jurisdiction, should they be deemed to legally exist in the form of public right-of-way, but numerous factors ranging from inaction on the part of county officials to poor funding at the county level have prevented them from being properly documented as valid public land rights. Although the law has always provided an opportunity to determine their status, as either public or private, since the early days of the territorial era, countless roads have quite understandably languished in legal limbo, simply because no one is typically inclined to take any action on such matters until some form of urgency arises and presses them to do so. Has the opportunity to take such action never been legally foreclosed, one might

very justifiably ask, but the answer to that question is no, hence legal confrontations such as the one we are about to review here are not only still possible, they can be expected to continue to emerge for at least several more decades, since modern technology has increased the availability of resources to those engaged in the historical research needed to investigate and prove the origin of such land rights. Even after witnesses from the relevant time period are all long dead, which is typically the case today, the historical existence of many roads can still be proven, through documentation such as historic maps, most notably land surveys dating back to the Nineteenth Century, which with the passage of time can become the sole source of crucial objective evidence in such remote locations.

As can thus be seen, rather than the usual struggle, pitting public land rights against private land rights, this case poses one form of public land rights against another. Rights established under historical federal policy at the local level, which support both commerce and recreation that is beneficial to the states and their counties, now face stiff opposition, based upon the goal of keeping land isolated and pristine, under the contemporary preservation oriented federal policy. Nonetheless, the principles relevant to the applicability of the QTA which are in play here are not dependent upon the public status of the plaintiffs, the same principles would have been relevant if this had been a QTA case of the more typical variety, in which a private individual, family, group or corporation seeks to achieve resolution of title issues arising in the context of federal land rights. At this juncture, as we prepare to review the factual elements which set the stage for this tilt, and so many others of the same stripe, which have typically played out at the state court level, rather than the federal level, since in the great majority of cases of this kind, no federal land rights were involved, it would seem prudent to acknowledge that the courtroom is not an appropriate forum in which to debate the merits of historical policy pertaining to land rights. When the existence of valuable land rights is at stake, the wisdom or lack of wisdom embodied in past laws and past land use policy is inconsequential, the only objective of litigation involving land rights of federal origin is to ascertain whether or not the purported rights were created by virtue of proper authority, such as was in place at the time of their creation, and if so, whether those rights have been relinquished or lost in some manner or remain legally viable today.

The initial motivating event behind all conflicts of this nature is a federal statute enacted by Congress in 1866, typically known by its historically prevalent name, RS 2477, since it was codified under that number in the Revised Statutes of the United States. RS 2477 deliberately provided sweeping authority to create public roads throughout the west, in the broadest possible terms, basically inviting unlimited use of the public domain for travel every kind, for the obvious purpose of opening the west, in order to facilitate its conquest, which was the paramount national objective under the federal policy of that day, generally known as Manifest Destiny. All of the roads involved in this case were alleged by the plaintiffs to be RS 2477 roads, and as many as 15 of them were in play here, but specifically relevant to perhaps the most interesting one among them is the Pickett Act, enacted in 1910, under the authority of which President Coolidge authorized Public Water Reserve 107 (PWR 107) in 1926. Although PWR 107 appeared 6 decades after RS 2477, it was in fact just another branch of the same federal policy, which remained supportive of all productive land use early in the Twentieth Century, and this would prove to be a vital factor in the present litigation. PWR 107 was an Executive Order which announced that in response to efforts by some settlers to monopolize the very limited water resources available in the west, those quarter sections upon the remaining public domain containing "a spring or water hole" would henceforth be "withdrawn ... and reserved for public use". Judicial determination of the true meaning of this law would determine the fate of the alleged RS 2477 road which traversed a portion of the land embraced by PWR 107 and situated in Kane County, because no such public right-of-way can exist within any federal reservation, thus the dispositive question with respect to that road was simply whether PWR 107 qualified as reserved federal land or not, as we will see.

Passage of the Federal Land Policy and Management Act (FLPMA) in 1976 marked a major milestone in American cultural history, a turning of the tide, toward a focus upon conservation, as opposed to the prior focus upon maximizing productivity. By that date, the national emphasis had shifted away from

conquest, which of course had been thoroughly accomplished, from sea to shining sea, and away from the rampant exploitation of land which accompanied the intense drive to populate the full width of the continent as well, thus federal policy shifted toward protection of our nation's precious natural resources. FLPMA not only put in place new federal guidelines pertaining to land use of many kinds, it also repealed numerous federal land use laws, and RS 2477 was among them. Even after being discarded however, RS 2477 remained potentially useful, because the eradication of the old law meant only that no further RS 2477 rights could accrue or be initiated after 1976, the repeal did nothing to eliminate any existing land rights that had already been physically established through historical land use, whether those rights had been adjudicated or not. So for 110 years a public right-of-way could be created rather easily, practically anywhere upon the open public domain, by virtually anyone acting within the parameters of RS 2477, through public road use alone, and the disputes that occurred during that period over the existence or use of RS 2477 roads typically involved attempts by private parties to terminate such use, upon acquiring some portion of the public domain, rather than any federal efforts to exert control over road use. An intensified focus upon wise use of federal land however, along with the accompanying escalated efforts of the BLM to exercise active stewardship over such lands, which has resulted in the creation of many Wilderness Study Areas, where land use must clearly be restricted to meet specific objectives, was destined to alter long established land use priorities.

Thus over the last 4 decades a somewhat unusual situation has existed, in which the relevant law is no longer in effect, yet legitimate and permanent land rights, in the nature of a public easement, which sprang from that law in the distant past, can still be adjudicated and confirmed at any time, regardless of whether the current status of the servient land is public or private. While during this recent period RS 2477 cases involving private land owners have diminished, due primarily to the fact that the public domain is no longer being actively sold off, the potential existence of RS 2477 right-of-way upon the remaining public domain, administered by the BLM, has risen in prominence, which brings us to the specific recent events leading up to the 2014 COA decision in the Kane County case. In 2008, the BLM produced various project maps, showing many roads in remote parts of southern Utah, and the BLM office in Kanab began issuing road use permits to various parties. Kane County officials evidently viewed these developments as a source of concern, and promptly responded by filing an action against the BLM in federal court (FN 2) seeking a decree confirming the county's title to several easements comprising public right-of-way, created under RS 2477, through the channel provided by the QTA. Of course this action soon gained the attention of other interested parties, such as the office of the Attorney General of Utah, which became a participant in the action in 2010, supporting Kane County's position, and the SUWA and their associates, which were not allowed to directly take part in the action, but nonetheless proceeded to very actively support the BLM position. Not surprisingly, the decision of the district court, produced in 2013, pursuant to a 9 day trial that took place in 2011, which decreed that some of the roads in contention qualified as public right-of-way under RS 2477 while others did not, was unsatisfactory to both sides, thus the case came to the COA for review in 2014.

Before proceeding to take note of the results of this appeal, its important to clearly understand the nature of the land rights at issue in this case. RS 2477 roads represent affirmative rights flowing from a deliberate and intentional written dedication, so they are not equivalent to public roads, or any other form of public right-of-way for that matter, which came into existence by means of prescriptive or adverse principles, because in the context of public travel, those principles serve only to secure right-of-way of unwritten origin. Thousands of easements of many varieties, both public and private, have been generated through prescriptive land use in every state, but the use which was made of the roads that developed while the RS 2477 window was open was not adverse use, it was use symbolizing public acceptance of a written grant, thus it legally operated to make that grant, which was limited only by the breadth of the great public domain, applicable to any specific location in which public road use was made. Out of necessity, due to the vast scope of this Congressional grant, no road locations could be specified in the RS 2477 dedication language, but it was the clear intent of Congress that the benefits of that grant would adhere to every road that was carved out, upon open public domain, pursuant to that

dedication. Nevertheless, every dispute of the kind seen here emanates from the fundamental ambiguity of location that was embedded in the RS 2477 granting language, which quite logically is highly analogous to the lack of locational specificity found in the early federal railroad right-of-way grants, the only difference being that the railroads were expressly required by Congress to bring documented specificity of location to their rights, by mapping each railroad right-of-way, while no such documentation requirement was ever seen as necessary to legitimize RS 2477 rights.

The lack of locational specificity in the rudimentary language used by Congress in 1866 resulted in the existence of a distinct granted right of virtually unlimited physical extent, effectively blanketing the public domain with an enormous potential burden, which was envisioned by lawmakers as a great public benefit of course, but which would become highly problematic, due to the absence of any detailed definition of its limits. In reality, there can be little doubt that the legislators who put this simplistic grant in place envisioned the west stretching out beyond comprehension, and presumed that this burden would be utterly microscopic within its vastness, thus they saw no reason to refrain from issuing a blanket grant, even though they realized that upon acceptance it would become legally attached to those portions of the empty public domain across which travel was physically feasible. For these reasons, the only way to tell whether or not any given road qualifies as an RS 2477 right-of-way is through an intensive review of all historical evidence relating to its use and development, and several decades after that grant was officially deemed obsolescent and relegated to history, this obviously presents serious difficulties for those who are now required to engage in evidence gathering. Today, as we reach the 150th anniversary of one of most liberal and inherently ambiguous grants Congress has ever made, we are confronted with an evidentiary problem which calls for tremendous investigative skill, to bring forth truly convincing information, sufficient to satisfy the judicial burden of proof, with regard to the origin and use which has been made of these rustic pathways that harken back to a long bygone day.

At the district court level, the overall result was favorable to the plaintiffs, as the evidence pertaining to only 3 of the 15 roads in contention was found to be insufficient, while the other 12 were each deemed to represent a valid RS 2477 right-of-way, and thus an easement held by the county on BLM land. Once the matter reached the COA however, the initial question centered upon QTA jurisdiction, and when addressing that issue the COA saw fit to scrutinize the evidence more rigorously than had the lower court. No ruling, up or down, could be made upon the fate of any of the relevant roads unless QTA jurisdiction was present, so the first order of business was to determine whether or not the QTA was really applicable to all of these roads. The QTA is not limited to settling conflicts over fee title, it has often been used to resolve conflicts involving easements, but not every conflict involving an easement can be properly classified as a title dispute, so the COA had to first find evidence that the disagreement between the plaintiffs and the BLM actually implicated the true title status of each road, before any historical evidence of the origin or the use of that road could become effectual. The BLM plans and maps which had set this controversy in motion indicated that the BLM intended to limit public use of certain roads, but at the same time BLM expressly acknowledged that unadjudicated rights might very well exist upon such roads, which could impact the extent to which BLM might exert control over them, since unauthorized closure of blockage of a public road is typically prohibited. BLM was unwilling to agree or concede however, that any genuine title dispute existed, and instead took the position that proper adjudication is required to verify the existence of an RS 2477 right-of-way in any given location before BLM can be obligated to officially recognize and designate a county road right-of-way as such. In essence, BLM simply maintained that none of the actions it had taken could be properly characterized as a challenge to any RS 2477 rights held by Kane County, so no grounds upon which to invoke the QTA were present.

The BLM was successful in eliminating 6 roads from the litigation by taking the position that no adjudicable title issues had arisen in those locations, as the COA agreed with BLM that the mere presence of ambiguously described land rights is insufficient to present a conflict which is ripe for adjudication under the QTA. The COA took the view that neither mapping roads, nor omitting them

from maps created for project management purposes, equates to taking a definitive position on who holds title to the land underlying those roads, or asserting that such a right-of-way does or does not legally exist, and therein lies an important cautionary lesson. Maps created for a specific purpose cannot be assumed to represent a complete depiction of all land rights that exist in the covered area, and thus should never be relied upon for any unintended purpose. BLM created the relevant plans and maps solely for their own purposes, so in the eyes of the COA the plaintiffs were unjustified in viewing such action on the part of BLM as a threat to their right-of-way. BLM also issued federal permits allowing various parties to use certain roads, but this presented no title dispute either, the COA pointed out, because if an RS 2477 right-of-way legally existed in any given location it was a public easement, and granting a permit allowing people to make the same kind of use which is in fact already authorized under such an easement can do no harm, since mere permits can have no destructive effect upon either fee title or easement title. Had the BLM expressly indicated that the permits they issued represented the sole basis upon which any use of the roads in question could be made, then a different scenario would have been in place, and the plaintiffs would have been justified in taking issue with such an overt denial of their easement title. On the contrary however, the BLM permits properly informed their holders that the roads might well fall within the scope of RS 2477, illustrating that BLM had consciously refrained from asserting that it held any right of sole control over those roads.

Does this position taken by the COA indicate that a judicial effort to reduce or minimize QTA litigation is underway, possibly creating a judicial split with prior decisions made by courts located in other federal Circuits, over what is really required to successfully invoke the QTA (FN 3)? That remains to be determined, but the outcome here on the specific issue of QTA jurisdiction would appear to suggest that a claimant seeking to obtain easement verification or clarification by leveraging the QTA may need to provide evidence that the very existence of the easement in question is at issue, rather than merely pointing to the presence of ancillary issues, pertaining only to the scope or nature of the easement, in order to support use of the QTA. The ultimate answer, which will eventually need to come from SCOTUS to put an end to this growing debate, will be based on only one factor - the real intent of Congress in creating the QTA as a legal mechanism. Did Congress intend the QTA to be available to parties and entities wishing to uncloud or perfect their titles, or was it intended to be stringently limited in the easement context and therefore used only to facilitate determination of the existence or non-existence of an easement? Only when that question is authoritatively answered at the highest level will the proper grounds for use of the QTA be fully clarified. Nonetheless, here the BLM was able to prevent Kane County from making use of the QTA to secure clear title to some of the contested roads by judicial decree, without ever denying that any of them were in fact legitimate RS 2477 roads, because the plaintiffs were unable to prove that the BLM had ever denied the existence of a county right-of-way in any of those locations, since the only actions taken by BLM with regard to those roads were taken with due prudence, and they were all actions which BLM was authorized to take under FLPMA. Even after the elimination of these 6 roads from the litigation however, interesting issues involving the other roads that were in play remained to be addressed and resolved.

Given the high degree of ambiguity, if not outright disparity, which currently exists as to when the QTA can or cannot serve as a judicial tool for title resolution, it may be fairly observed that as conditions stand at the close of 2015 the QTA process leaves claimants interacting with federal land rights, whether public entities or private parties, in a somewhat tenuous and even precarious position. Due to the jurisdictional barrier to entry, QTA claimants cannot take any decisive legal action to protect land rights that are intermingled with federal land interests until an event triggering a legitimate title dispute exists, yet once such an event has occurred, they must take notice of it and act with reasonable promptness, or be forever barred from doing so if they allow 12 years to silently pass. The Mountain States Legal Foundation, on behalf of the plaintiffs, suggested to SCOTUS that the position taken by BLM here subverts the very purpose of the QTA, but to no avail, the High Court evidently saw no urgent need to tackle this issue, at least until subsequent litigation more distinctly extends the diverging judicial lines. Yet the judicial approach taken here, sternly emphasizing the great importance of both the timing of actions and the

passage of time itself, while doing so may or may not fully comport with the Congressional intent which motivated the enactment of the QTA, is not outside the bounds of reason. In fact allowing time, operating in combination with human actions, to play a major role in land rights adjudication is closely aligned with long standing judicial precedent, established under the ancient equitable principles of laches and estoppel, along with the better known concept of adverse possession, all of which are simply legal and equitable devices mandating high vigilance on the part of all those who hold land rights of any kind. Summarizing this aspect of this case, it may be observed with the benefit of hindsight that if these 6 roads were of genuinely high importance to the county, it should have asserted its claim to them earlier, in a manner which would have compelled the BLM to challenge the county's easement rights in court, rather than sleeping upon those rights for decades, and then attempting to rely upon routine BLM activities to open the QTA window.

Having dealt with the question of QTA jurisdiction, the COA next addressed an issue pertaining to just one of the subject roads which potentially required imposition of the QTA bar. The QTA does not create a general or blanket right to bring a title action against the US, if it did so employing it would be greatly simplified, but the frequency with which it could be used would be radically expanded, seriously overburdening our judicial system. The complexity of the QTA which confronts claimants seeking to utilize it lies in the fact that it creates only a fairly narrow window of opportunity, making it essential for claimants to understand the events which open and close the 12 year QTA window. A large number of prior cases, spanning the last 4 decades (FN 4) illustrate the basic parameters and operation of the QTA bar, which when successfully proven has a conclusive effect that was modeled upon, and is comparable to, the legal efficacy of a successfully completed period of adverse possession. Easements do not consist of land itself, they overlay land owned in fee by others, thus the mere presence of an easement is not indicative of a conflict with fee title, a genuine conflict typically appears only when the fee owner disputes or denies the existence of the easement, although conflict can also appear in a locational context of course, even when both sides agree that the subject property is burdened with an easement, if they disagree on its location or size. As we have seen, an event which qualifies as a dispute or conflict between a federal title and a non-federal title operates to open the QTA window, and in that sense such an event can be regarded as beneficial to the QTA claimant. At the same time however, because the QTA contains a 12 year limitation period, such an event can and often does become a net negative for the claimant, since its occurrence also operates to set the date upon which any rights held by the claimant will be statutorily foreclosed, making it impossible for the claimant to legally enforce or utilize those rights thereafter.

As previously indicated, SUWA and its partners, who favor the preservation of land and environmental protection, strongly oppose all assertions of land rights which they see as unjustified intrusions upon land that is worthy of protection, so they stepped forward to support the BLM position, attempting to prevent the plaintiffs from obtaining judicial confirmation that any RS 2477 right-of-way exists in any of the several contested locations. To that end, SUWA proposed that the creation of the Paria-Hackberry Wilderness Study Area (WSA) the formation of which was published in the Federal Register in 1980, constituted an event which triggered the QTA bar, so the 12 year period had expired with regard to one road lying within that area by 1992, legally barring the plaintiffs from setting forth any claim of rights pertaining to that road. The COA disagreed however, and held that the creation of a WSA, being merely a federal land management tool, is not an assertion of absolute or unencumbered federal title within its boundaries, so no existing easement rights relating to any roads passing through that WSA had been foreclosed by the QTA bar. In so doing, the COA clarified that while publication of material in the Federal Register is clearly an acceptable form of official notice of federal actions and decisions pertinent to land rights, sufficient to set the QTA bar off upon its 12 year journey, the published information must present genuinely adverse implications for the land rights of a given claimant, putting him on clear notice of a threat to those rights, in order to trigger the 12 year QTA period. Since the creation of a WSA is not an act that is expressly adverse to any existing title, the COA noted, and does not amount to an assertion of exclusive federal control over the entire area lying within the WSA, BLM had not denigrated or otherwise attacked any rights held by the plaintiffs by publicly declaring the existence of this WSA, so

the QTA window had never been opened by any such action on the part of BLM, and therefore had obviously never closed.

Another point which was relevant here, since Utah participated in this case as a plaintiff alongside Kane County, is the applicability of the QTA bar to the states themselves, as opposed to lesser entities such as counties, corporations or individuals. While it is well understood that states can utilize the QTA, just as can all other non-federal parties, certain QTA requirements pertaining to states are different, as a result of Congressional recognition of the sovereign status of each state. In recognition of the gravity of the matters that are typically addressed in QTA cases which involve rights held by states, the law was revised in 1986, just 14 years after its inception, to indicate that a clearer and stronger form of notice is required to make the QTA pertinent to claims made by a state, than that which is required to trigger the accrual of the QTA bar against the rights of John Doe, typical citizen. The QTA 12 year bar begins to run against an individual from the moment he or she either knows, or had any opportunity to know, that their land rights were adversely impacted in some way by any federal activity or presence, amounting to a relatively low or even minimal standard of notice. The revised QTA language however (FN 5) mandates a higher level of respect for the rights of states, and thus requires that notice must be provided to a state by means of either direct communication or physical notice occurring through open land use. In other words, an individual or other typical claimant, such as Kane County in this case, must take notice on their own volition, while a state must be given notice, served up in a more explicit form, in order to set the QTA bar in motion toward its destination, 12 years down the road from the point of notice. This provision cuts both ways however, since it also means that some truly substantial form of notice must be present to introduce QTA jurisdiction when the claimant is a state, and in this case the COA decision that no jurisdictional event had occurred in certain locations proved to be detrimental to Utah, preventing RS 2477 title from conclusively attaching to some of the relevant roads. Determining exactly what comprises a sufficient form of notice is obviously crucial to the outcome of every QTA case, mirroring adverse possession cases at the state court level, and it will be interesting to observe how this theme develops in future QTA cases.

Next the COA addressed the portion of this controversy which involves federal withdrawals and reservations of land from the otherwise open public domain, during the period when homesteading was still in effect and settlers were acquiring rights by means of land use, under the federal laws which governed the formation of land rights during the settlement era. Those federal acts and decisions which effectively burdened otherwise unrestricted public domain in some respect operated as withdrawals, the COA explained, because they limited the extent of the rights which could be acquired in the subject property in some manner, while typically leaving the relevant land subject to private acquisition, though it was thereby encumbered in some way, often bearing rights in the nature of a servitude. A federal reservation, the COA concluded, represents an especially intensive form of withdrawal, devoting land to a particular public purpose in fee, thereby making it unavailable for private acquisition, the site of a fort or other national defense installation representing perhaps the most common example thereof. The distinction between a federal withdrawal and a federal reservation was critical to the outcome here, because RS 2477 was inoperative within any federal reservation, but it was operative upon lands which were merely withdrawn, and as previously described, one of the contested roads passed through federal lands upon which a "Public Water Reserve" (PWR 107) had been formally created, by means of proper federal authority, in 1926. The size and location of the relevant area, to which PWR 107 was applicable, was not mentioned by the COA, and whether or not the road in question existed prior to 1926 is also unknown, but these factors were irrelevant to the issue at hand, because if PWR 107 could be properly classified as a federal reservation no RS 2477 right-of-way could extend across any portions of that road lying within the boundaries of such an area.

Observant of the spirit of the law, pursuant to which PWR 107 was created, the COA decided that while PWR 107 was clearly a type of federal withdrawal, it was not a federal reservation of land in fee, despite the presence of the term "reserve" in its official label. The COA ruling on this issue was entirely

appropriate, since it honors and adheres to historical federal policy, which was consistently targeted at accommodating the needs and supporting the efforts of all legitimate settlers, and in this instance the evidence revealed that PWR 107 was clearly intended only to insure the availability of a precious resource, not to prevent the relevant lands from ever being patented into private ownership. Thus the COA determined that no prohibition existed upon the creation of RS 2477 roads within any area that is subject to a federal withdrawal, or subject to a federal reservation which was limited to water rights, such as PWR 107, and since this decision was contrary to the position taken on this issue by the district court, the COA reversed this aspect of the lower court decree. In essence, the COA found that the language of the Executive Order classifying PWR 107 as a "reserve" was a plain misnomer, which cannot be given the perverse legal effect of preventing public access to the water which it was created to preserve for use by all of the settlers of the relevant vicinity and their successors. Its also noteworthy that the COA recognized that the intended legal effect of PWR 107 could not be controlled by any subsequent federal acts, such as FLPMA, highlighting the fact that when analyzing the meaning and intent of any federal legislative act only the conditions and policies which were in place at the moment of its enactment are relevant. In so ruling, the COA expressly rejected the suggestion that RS 2477 had no application to any PWR 107 areas because access to those areas could be obtained by some other means, and as a consequence the plaintiffs prevailed with respect to the particular road that crossed lands to which PWR 107 applied (FN 6).

As to 3 of the roads that were in play in this case, the width of the public easement that was assigned by the lower court to those roads, upon which the plaintiffs prevailed in securing title to an RS 2477 right-of-way, also became an issue. The BLM expressed concern that the judicially decreed width assigned to each road was excessive, and thus improperly introduced an opportunity for road widening to be conducted by the plaintiffs in certain locations, potentially damaging previously unused portions of the natural landscape. Holding that the width of any RS 2477 right-of-way adjudicated after 1976, the date upon which RS 2477 was repealed as previously noted herein, must be governed solely by road use which took place prior to 1976, the COA agreed with the BLM on this point, requiring the lower court to revisit the width issue. In so doing, the COA indicated, it will be necessary to closely note the historical evidence of the physical width of the roadway in each location, and to disregard any widening which has taken place since 1976, since only evidence of road use that occurred while the 110 year RS 2477 window was open can play into any judicial width determination. Whether this issue proves to be one that can be readily settled between the parties without further adjudication, or proves to be a matter of serious further contention, remains to be seen at this time, thus prudence dictates that this aspect of the case be reserved for potential future discussion, once it has reached finality, as it may become necessary for the COA to provide further guidance on this issue during a possible future appeal. Nonetheless, at this point in time Kane County appears to have obtained clear title to easements covering 3 of the relevant roads, by virtue of this judicial decree, and is therefore free to maintain those roads in the regular fashion, to the extent of their historical width, without hindrance from the BLM or others. It may be noted as well that the BLM, to its credit, has never indicated any intention to interfere with any such land rights held by the county or the state, once those rights have been judicially deemed to be legitimate.

At this point, subsequent to the aforementioned decision of SCOTUS in October 2015, allowing all aspects of this COA ruling to stand, both the plaintiffs and SUWA have issued press releases essentially declaring victory, or at least putting some form of positive spin on the outcome, but objectively speaking who really won and who really lost here? In one sense it can be fairly argued that SUWA won, because Utah and Kane County were able to obtain easement verification covering only a small fraction of the roads which they sought, and their ability to establish clear title to any additional roads in the relevant region appears to be judicially blocked, as long as BLM maintains its present position, thereby keeping the path of adjudication presented by the QTA unavailable. On the other hand, it may also be fairly suggested that the plaintiffs won, because under this ruling BLM can take no actual steps to prevent or hinder ongoing use of any of the roads without triggering a genuine title dispute, since doing so would give the plaintiffs the opportunity they seek, to proceed under authentic QTA jurisdiction, which they

lack until such time as BLM takes some distinctly restrictive action, openly opposing or flatly denying the existence of RS 2477 rights in any of the relevant locations. Moreover, since the QTA period cannot commence to run until some valid grounds for legal action exists, the rights of an RS 2477 claimant, whether that claimant is a public entity such as the plaintiffs or a private party, cannot be regarded as foreclosed based upon mere ambiguity, making it incumbent upon the US to act in some manner which clearly challenges the title of the claimant, in order to set the stage for the foreclosure of the claimant's rights 12 years later. Can it be seriously suggested that such a state of protracted, if not perpetual, title limbo is one which the lawmakers who designed the QTA envisioned or sought to put in place?

There can be no doubt that 150 years ago Congress believed the undefined right-of-way grant of 1866 to be highly necessary and fully appropriate to meet the national needs of that era, and it was intended to produce great national benefit, which it most certainly did, by facilitating the opening of the magnificent western portion of our continent. Indeed, Congress may well have had no real alternative at that time, yet it was required to take some kind of action in furtherance of the national interest of that day, so questioning the wisdom of the original grant that promulgated RS 2477 and many other such laws and rules, which were enacted at the federal level during a long bygone era, is clearly an exercise in futility. Over the many decades that have passed since that time however, we have learned that the concept of making a grant without properly defining and documenting the specific location to which it applies is always highly problematic, since doing so invites potentially endless controversy, and places the heavy burden of determining the validity of all such land rights, case by case, through costly, arduous and often acrimonious litigation, upon future generations. As it stands today, the QTA bears some resemblance to a Trojan Horse, since it provides a mechanism for the termination of land rights, nestled within an outwardly beneficent shell, but if controversy continues to arise over RS 2477 roads all across the west, then perhaps the concluding episode in this historic drama, centered upon the legacy of that noble but arcane pioneer era statute, will at last motivate the Supreme Court of the United States to bring full clarity to the federal Quiet Title Act.

Footnotes

1) For a basic review of the most elementary components and the core purpose of the QTA, see the prior article in this series: "Examining the applicability of the federal Quiet Title Act to easement litigation - Does every issue generated by the presence of an easement constitute a title issue?", which was published by Multibriefs for NSPS News & Views in September 2015 and can be readily obtained through the web in pdf form by means of a keyword search.

2) This case was tried in the United States District Court for the District of Utah (the lower court for purposes of this appeal). That court actually produced 2 decisions in 2013, one being filed as 934 F. Supp. 2d 1344, and the other being identified as 2:08-CV-00315. These 2 decisions both pertained to the same subject matter and the relevant issues stemming from them were thus addressed together in a unified manner by the COA.

3) Here the COA for the Tenth Circuit formally adopted the position that actions which "merely produce some ambiguity ... are insufficient to constitute a disputed title" (see page 10 of the published decision) stipulating that a genuine dispute over title must be shown before the QTA becomes applicable. The COA for the Ninth Circuit has applied a more relaxed standard in some similar cases however, requiring only the presence of a "cloud on title" to bring the QTA into play. The plaintiffs and their associates, and some judicial commentators as well, have identified this as a "judicial split" between these courts, over whether the true standard for QTA jurisdiction should be the "cloud" standard or the "dispute" standard, but as of 2015 SCOTUS has decided that it is either inappropriate or unnecessary for SCOTUS to directly address this particular question at this time. Whether or not the BLM actions outlined here even suffice to raise a title cloud is highly questionable, and whether or not it is even possible to cloud a title for which no locative documentation exists, is yet another interesting question that was left unanswered

here.

4) For those seeking to gain greater insight or develop a higher level of expertise on the QTA, the following cases, which are cited by the COA on pages 17 & 18 of the COA Kane County opinion, and all of which are freely available from various web sources, provide good examples of various QTA scenarios in the easement context, and references to other informative QTA cases will be encountered in the course of reading these decisions: Knapp v United States (1980 - 636 F2d 279 - set in Wyoming); Michel v United States (1995 - 65 F3d 130 - set in Washington); McFarland v Norton (2005 - 425 F3d 724 - set in Montana); Rio Grande Silvery Minnow v Bureau of Reclamation (2010 - 599 F3d 1165 - set in New Mexico); George v United States (2012 - 672 F3d 942 - also set in New Mexico).

5) The full text of the QTA appears in Title 28 USC 2409a, entitled "Real property quiet title actions" (originally Public Law 92-562, documented as 86 Stat 1176, but see Public Law 99-598, documented as 100 Stat 3351 for the 1986 revision) available for free from various web sources. As the law has stood since the 1986 revision, subsection 2409a (g) introduces the basic 12 year period of limitation that applies to most claimants, while 2409a (i) makes that same time period applicable to states which elect to act as claimants, and 2409a (k) defines the elevated standard of notice that applies only when the claimant is a state. The 1986 revision, better defining the relevance of the QTA to the states in this manner, was motivated by the landmark case of Block v North Dakota (1983 - 461 US 273) in which SCOTUS ruled that the closure of the 12 year QTA window, as it was originally outlined in 1972, impacted land rights held by states, as well as those of all others, despite the sovereign status of the states, because Congress neglected to include any specific protections supporting the rights of the states when composing the original QTA language.

6) For those who may wish to learn more about what legally constitutes a federal reservation, these highly prominent recent cases, all of which involve riparian issues, are informative on that issue among others: Utah Division of State Lands v United States (1987 - 482 US 193); United States v State of Alaska (1997 - 521 US 1); State of Idaho v United States (2001 - 533 US 262); State of Alaska v United States (2005 - 545 US 75); State of Utah Division of Forestry, Fire & State Lands v United States (2008 - 528 F3d 712). In addition, general information on the nature of federal withdrawals can be found at http://www.blm.gov/or/landsrealty/lowinfo.php.

(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, devoted to advanced professional education focused upon effective conceptualization of the nexus and interaction between title and boundary law.)