United States Court of Appeals, Federal Circuit.

Hugh MARTIN, Sandra Knox–Martin, Kirkland Jones, Theron Maloy, Sherilyn Maloy, Plaintiffs-Appellants

v.

UNITED STATES, Defendant-Appellee

2017-2224

Decided: July 11, 2018

Appeal from the United States Court of Federal Claims in No. 1:16-cv-01159-PEC, Judge Patricia E. Campbell–Smith.

Attorneys and Law Firms

A. Blair Dunn, Western Agriculture, Resource and Business Advocates, LLP, Albuquerque, NM, argued for plaintiffs-appellants. Also represented by Dori Ellen Richards; Marshall Ray, Law Offices of Marshall J. Ray, LLC, Albuquerque, NM.

Erika Kranz, Environment and Natural Resources Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by Jeffrey Wood, Eric Grant, Elizabeth Ann Peterson.

Before O'Malley, Mayer, and Reyna, Circuit Judges.

Opinion

Mayer, Circuit Judge.

Hugh Martin, Sandra Knox–Martin, Kirkland Jones, Theron Maloy, and Sherilyn Maloy (collectively, "the Inholders") appeal the judgment of the United States Court of Federal Claims dismissing their claim alleging a Fifth Amendment taking as unripe. *See*

Martin v. United States, 131 Fed.Cl. 648 (2017) ("*Federal Claims Decision*"). We affirm.

Background

The Inholders own patented mining and homestead claims inside the boundaries of the Santa Fe National Forest. *See id.* at 650. In 2011, the Las Conchas Fire caused widespread destruction of vegetation within the forest. J.A. 66. Forest Roads 89 and 268, the roads which the Inholders historically had used to access their inheld properties, were severely damaged by flooding that occurred in the wake of the fire. J.A. 33, 66.

In September 2011, the United States Forest Service ("Forest Service") notified the Inholders that "significant flooding events" had rendered Forest Roads 89 and 268 "impassible." J.A. 66. Acknowledging that the Inholders and other private landowners might wish to reach their inheld properties, the Forest Service stated that it would provide them with some "limited access" that would entail "a combination of driving and hiking over specific routes and under specific weather conditions." J.A. 66. In April 2012, the Forest Service sent the Inholders a letter informing them "of the results of an assessment of roads affected by ... [the] devastating Las Conchas Fire." J.A. 86. The agency stated that "due to the magnitude of damage by the fire and subsequent flooding, public safety would be highly threatened by use of [Forest Roads 89 and 268]." J.A. 86. It further stated that it had decided to "close these two roads to public access for the foreseeable future," explaining that because of the continuing instability of the terrain within Bland and Cochiti Canyons "[a]ny road reconstruction improvements made in the next few years [would] likely be destroyed

by future flooding." J.A. 86. According to the agency, moreover, "even if reconstructing these roads were a viable option," it could not justify "expend[ing] public funds rebuilding roads for which there is no general public need." J.A. 86.

Although the Forest Service determined that Forest Roads 89 and 268 would "not be open to the public," it stated that it would "continue to work with" the Inholders and other private property owners to ensure that they had "adequate and reasonable access" to their inheld properties. J.A. 86. The Forest Service suggested that the Inholders work "collectively" with their "neighbors" to reconstruct the damaged roads, and stated that it would be willing to "facilitate the creation of a formal road association, which would then be granted a recordable private road easement." J.A. 86. The agency identified "two options" for establishing vehicular access to the Inholders' properties: (1) "[a] new (reconstructed) road over [the] existing alignment"; or (2) "[a] new road over a new alignment." J.A. 86.

The Inholders, through counsel, subsequently sent a letter to the United States Department of Agriculture ("USDA"), asserting that they held statutorily-granted easements over Forest Roads 89 and 268 and that they intended "to utilize and repair" those roads "in the very near future." J.A. 34 (internal quotation marks omitted). The USDA responded by informing the Inholders that it did "not agree" that they held any statutorily-granted easements, asserting that under the Act of July 26, 1866, ch. 262, § 8, 14 stat. 251, 253 (codified at 43 U.S.C. § 932) ("Revised Statute 2477"), *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2743, 2793 ("FLPMA"), private citizens were not granted any "title interest in public roads." J.A. 34.

Although the agency acknowledged that the Inholders had a right to access their inheld properties, it stated that this right was "subject to reasonable regulations." J.A. 34. It further stated that the "Inholders must comply with the rules and regulations applicable to ingress and egress across national forest system lands" and "that anyone using national forest lands in an unauthorized manner may be subject to criminal and civil penalties under federal law." J.A. 34. The USDA advised the Inholders to "work with the Forest Service to reconstruct road access." J.A. 34.

The Inholders then filed suit in the Court of Federal Claims, asserting that the Forest Service had effected a compensable taking of their "statutorily vested real property right-of-way easements." J.A. 5. They alleged that the Forest Service had "refus[ed] to recognize" their easements and had "deprived [them] of all meaningful access to their private property" by requiring them "to follow prohibitively expensive procedures in order to obtain special use permits" for road reconstruction. J.A. 5. According to the Inholders, the government had "physically seized [their] real property interest[s] under threat of civil and criminal prosecution." J.A. 6.

On May 19, 2017, the Court of Federal Claims granted the government's motion to dismiss the Inholders' complaint for lack of jurisdiction. *See* *Federal Claims Decision*, 131 Fed.Cl. at 651–53. The court determined that the Inholders had not adequately pled a physical takings claim, noting that they had not alleged facts suggesting that the government, "or any third party, ha[d] physically occupied the property at issue." *Id.* at 652. In the court's view, moreover, any claim for a regulatory taking was not ripe for review because the Inholders had not yet applied for a permit to reconstruct Forest Roads 89 and 268. *Id.* at 652–53.

The court stated that it did not need to determine whether the Inholders possess "a vested property right in the easements they allege are coextensive with [Forest Roads 89 and 268]," because even assuming that they hold such a property right, "a claim for a regulatory taking is not ripe until a permit is both sought and denied." *Id.* at 653.

The Inholders then appealed to this court. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

Discussion

A. Standard of Review

We review *de novo* a determination that a takings claim is not ripe for review. *See McGuire v. United States*, 707 F.3d 1351, 1357 (Fed. Cir. 2013); *Morris v. United States*, 392 F.3d 1372, 1375 (Fed. Cir. 2004). The Court of Federal Claims is without jurisdiction to consider takings claims that are not ripe. *Estate of Hage v. United States*, 687 F.3d 1281, 1285 (Fed. Cir. 2012); *Morris*, 392 F.3d at 1375.

B. Fifth Amendment Takings

The Takings Clause of the Fifth Amendment provides that "private property" may not "be taken for public use, without just compensation." U.S. CONST. amend. V. "The principle reflected in the Clause goes back at least 800 years to Magna Carta." *Horne v. USDA*, —— U.S. ——, 135 S.Ct. 2419, 2426, 192 L.Ed.2d 388 (2015). Prior to *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922) ("*Pennsylvania Coal*"), the general view was that the Takings Clause extended only to the "direct appropriation of property, or the functional equivalent of a practical ouster of the owner's possession, like the permanent flooding of property." *Murr v. Wisconsin*, —– U.S. ——, 137 S.Ct. 1933, 1942, 198 L.Ed.2d 497 (2017)

(citations and internal quotation marks omitted); *see* *United States v. Gen. Motors Corp.*, 323 U.S. 373, 375–79, 65 S.Ct. 357, 89 L.Ed. 311 (1945) (concluding that the government's occupation of a private warehouse effected a taking). In *Pennsylvania Coal*, however, the Supreme Court clarified that the Takings Clause also covered so-called "regulatory takings," stating that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. at 415, 43 S.Ct. 158. Specifically, "with certain qualifications ... a regulation which denies all economically beneficial or productive use of land will require compensation under the Takings Clause." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001) (citations and internal quotation marks omitted). Furthermore, "[w]here a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Id.*

In addition, a viable takings claim can arise in the "special context of land-use exactions." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). Such claims typically involve situations in which a governmental body demands that an applicant surrender a portion of his or her property as a condition of obtaining a land-use permit. *See, e.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 378–92, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 827–32, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). To "protect[ ] against the misuse of the power of land-use regulation," *Koontz v. St. Johns*

River Water Mgmt. Dist., 570 U.S. 595, 599, 133 S.Ct. 2586, 186 L.Ed.2d 697 (2013), the Supreme Court has determined that a unit of government may "condition approval of a permit on the dedication of property to the public" only if "there is a nexus and rough proportionality between the property that the government demands and the social costs of the applicant's proposal," *id.* at 605–06, 133 S.Ct. 2586 (citations and internal quotation marks omitted); *see Dolan*, 512 U.S. at 391, 114 S.Ct. 2309.

C. Revised Statute 2477

Revised Statute 2477, which stated that "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted," 43 U.S.C. § 932, has spawned some of the "more contentious land use issues in the West." *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 740 (10th Cir. 2005) ("*SUWA*"); *see also Wilderness Soc'y v. Kane Cty.*, 581 F.3d 1198, 1205 (10th Cir. 2009), *vacated on other grounds*, 632 F.3d 1162 (10th Cir. 2011) (en banc) (noting that "[t]here are thousands of miles of claimed [Revised Statute] 2477 rights of way across federal lands in the western United States"). Rights of way created under the statute "were an integral part of the congressional pro-development lands policy" and could be established with "no administrative formalities: no entry, no application, no license, no patent, and no deed on the federal side." *SUWA*, 425 F.3d at 741. The statute remained in effect from 1866 to 1976, when it was repealed by the FLPMA, § 706(a), 90 Stat. at 2793, and "most of the transportation routes of the West were established under its authority," *SUWA*, 425 F.3d at 740.

The Inholders assert that they hold Revised Statute 2477 "vested private easements for ingress and egress" to their patented mining and homestead claims within the Santa Fe National Forest. They contend that their vested easements run along Forest Roads 89 and 268 and "exist in addition to the public easements vested in the [S]tate of New Mexico and Sandoval County." According to the Inholders, the Court of Federal Claims erred in dismissing their takings claim as unripe. They complain that "the United States ... has chosen to treat [Forest Roads 89 and 268] as its sole property," and has prohibited them from repairing those roads unless they "take on the enormous costs" of obtaining a special use permit. They further assert that "the United States has already taken [their] property without just compensation" by requiring them to "surrender" their vested Revised Statute 2477 easements in exchange for a permit that would enable them to repair Forest Roads 89 and 268 and "allow them the full historical use of their patented mining properties."

The government disagrees. It contends that the Inholders do not hold valid Revised Statute 2477 easements, asserting that while the statute "authorized rights-of-way for the construction of *public* roads across unreserved federal lands," it "did not confer any property rights on *private parties*." In the government's view, moreover, even assuming that the Inholders have "a cognizable private property interest in [easements] along [Forest Roads 89 and 268]," any such easements "would still be subject to reasonable Forest Service regulations." According to the government, the Inholders' "claim of a regulatory taking due to the imposition of a special-use authorization requirement is not ripe for judicial review" because they have not yet applied for a special

use permit that would allow them to engage in road reconstruction and repair.

D. The Alleged Regulatory Taking

"We turn first to ripeness, which is a 'threshold consideration[ ]' that we must resolve before addressing the merits." *McGuire*, 707 F.3d at 1357 (quoting *Palazzolo*, 533 U.S. at 618, 121 S.Ct. 2448) (alteration in original). The ripeness doctrine is designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), *overruled on other grounds by* *Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977); *see* *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807–08, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003). A claim for relief is not ripe for judicial review when it rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985) (citations and internal quotation marks omitted).

Even assuming *arguendo* that the Inholders possess valid Revised Statute 2477 easements, their claim that Forest Service permitting requirements work a compensable regulatory taking is not ripe for review. As a general rule, "the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985) ("*Riverside Bayview*"). Importantly, moreover, "a takings claim challenging the application of land-use regulations is not ripe unless 'the government entity charged with implementing the

regulations has reached a final decision regarding the application of the regulations to the property at issue.' " *Palazzolo*, 533 U.S. at 618, 121 S.Ct. 2448 (quoting *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985)); *see Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1351–52 (Fed. Cir. 2002). "It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property." *MacDonald, Sommer & Frates v. Yolo Cty.*, 477 U.S. 340, 348, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986). Simply put, a reviewing court lacks an adequate predicate to determine whether a regulatory taking has occurred unless it knows, with a reasonable degree of certainty, what strictures the government will ultimately place on a permit applicant's property. *See Riverside Bayview*, 474 U.S. at 127, 106 S.Ct. 455 ("[T]he very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired.").

There is no indication in the record that the Inholders have applied for a special use permit—or have otherwise sought authorization—to reconstruct Forest Roads 89 and 268. *See Federal Claims Decision*, 131 Fed.Cl. at 653 (noting that the Inholders "do not allege ... that they have applied for [a] special use permit or paid any fees"). Because they have not yet availed themselves of Forest Service permitting procedures, their regulatory takings claim is unripe for adjudication. *See McGuire*, 707 F.3d at 1360 (concluding that a regulatory takings claim was unripe where a landowner had not "submitted a written permit application or plans to reconstruct [a] bridge" leading to his property); *Morris*, 392 F.3d at 1375–77 (concluding

that a regulatory takings claim was unripe where the landowners had not yet applied for a permit that would have allowed them to harvest redwood trees on their property); *Burlington N. R.R. Co. v. United States*, 752 F.2d 627, 630 (Fed. Cir. 1985) (concluding that any takings claim was "premature" since the property owner had not yet sought a mining permit). Although the Inholders allege that obtaining a special use permit will be prohibitively expensive, a claim based on the "novel theory that a compensable taking can arise from the cost of complying with a valid regulatory process" is premature until the final cost of compliance with permitting requirements has been determined. *Morris*, 392 F.3d at 1377. "[R]ipeness is peculiarly a question of timing." *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 140, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974). Until there has been a final decision on whether—and under what conditions—the Inholders will be granted permission to reconstruct Forest Roads 89 and 268, any claim for a regulatory taking remains "abstract and conjectural." *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999); *see MacDonald*, 477 U.S. at 348, 106 S.Ct. 2561 ("A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes.").

This is not a case in which a landowner's failure to seek a permit can be excused as futile. *See Palazzolo*, 533 U.S. at 622, 121 S.Ct. 2448 (explaining that the "[r]ipeness doctrine does not require a landowner to submit applications for their own sake"); *Anaheim Gardens v. United States*, 444 F.3d 1309, 1315 (Fed. Cir. 2006) (stating that "[a] claimant can show its claim was ripe with sufficient evidence of the futility of further pursuit of a permit through the administrative process"). To the contrary, the Forest Service has specifically acknowledged that the Inholders have a

right to access their inheld properties, J.A. 34, and has expressed a willingness to "continue to work with [them] to ensure that [they] continue to have adequate and reasonable access to [their] propert[ies]," J.A. 86. In this regard, the agency has suggested that the Inholders and other private landowners "collectively work together to reconstruct [Forest Roads 89 and 268]," and has stated that it will "facilitate the creation of a formal road association" and grant that association "a recordable private road easement," either over the "existing alignment ... [or] over a new alignment." J.A. 86.

E. The Unconstitutional Conditions Doctrine

The "well-settled doctrine of 'unconstitutional conditions,' " *Dolan*, 512 U.S. at 385, 114 S.Ct. 2309, prohibits the government from "deny[ing] a benefit to a person on a basis that infringes his constitutionally protected" rights, *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 59, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (citations and internal quotation marks omitted); *see Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) (explaining that the unconstitutional conditions doctrine prevents a governmental body from using conditions to achieve results which it "could not command directly" (citations and internal quotation marks omitted)). In the land-use context, "a special application of this doctrine ... protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits." *Koontz*, 570 U.S. at 604, 133 S.Ct. 2586 (citations and internal quotation marks omitted). In *Nollan*, for example, the Supreme Court held that a state agency could not, without paying just

compensation, require the owners of beachfront property to grant a public easement over their property as a condition for obtaining a building permit. 483 U.S. at 831–42, 107 S.Ct. 3141; *see also* *Dolan*, 512 U.S. at 379–80, 394–95, 114 S.Ct. 2309 (concluding that a taking occurred when a city required a landowner to dedicate a portion of her real property to a greenway that would include a bike and pedestrian path for public use).

Because of the typically broad powers wielded by permitting officials, landowners who seek governmental authorization to develop their properties "are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits." *Koontz*, 570 U.S. at 605, 133 S.Ct. 2586. "Extortionate demands" made by permitting authorities can "frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them." *Id.*; *see* *Dolan*, 512 U.S. at 396, 114 S.Ct. 2309.

The Inholders insist that their takings claim has ripened because the government has conditioned the grant of a permit to reconstruct Forest Roads 89 and 268 on the "surrender" of their alleged Revised Statute 2477 easements. This argument is unavailing. In a letter dated March 19, 2015, the USDA stated that it did "not agree" that the Inholders hold valid easements pursuant to Revised Statute 2477, J.A. 33, asserting that the statute did not grant easements to "private citizens," J.A. 34. In addition, although the agency urged the Inholders to continue to "work with the Forest Service to reconstruct road access," it cautioned them that "anyone using national forest lands in an unauthorized manner may be subject to criminal and civil penalties under federal law." J.A. 34.

Contrary to the Inholders' assertions, the record contains no evidence suggesting that the government has conditioned the grant of a special use permit on the relinquishment of their alleged property rights. While the government disputes that the Inholders hold valid Revised Statute 2477 easements, it has not asserted that they must cede their claim of ownership in exchange for a permit allowing them to repair and reconstruct Forest Roads 89 and 268. To the contrary, at oral argument counsel for the government specifically stated that the Inholders would not waive any ownership rights in Revised Statute 2477 easements by availing themselves of Forest Service special use permitting procedures. *See* Oral Arg. at 14:39–15:55, http://oralarguments.cafc.uscourts.gov.mp3/2017-2224.mp3.

F. Quiet Title Action

"[S]ince passage of the Tucker Act in 1887," parties asserting "title to land claimed by the United States" have had the right to "sue in the Court of Claims and attempt to make out a constitutional claim for just compensation." *Block v. N. Dakota ex rel. Bd. of Univ. & School Lands*, 461 U.S. 273, 280–81, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983). In 1972, however, Congress created another procedure for adjudicating real property disputes with the government. *See id.* at 282–83, 103 S.Ct. 1811. The Quiet Title Act, 28 U.S.C. § 2409a, provides a limited waiver of sovereign immunity for actions to quiet title against the United States. *See United States v. Mottaz*, 476 U.S. 834, 849, 106 S.Ct. 2224, 90 L.Ed.2d 841 (1986) ("Prior to the passage of the Quiet Title Act, adverse claimants had resorted to the Tucker Act to circumvent the Government's immunity

from quiet title suits. Rather than seeking a declaration that they owned the property at issue, such claimants would concede that the Government possessed title and then would seek compensation for the Government's having taken the property from them."). It "authorizes ... a particular type of action, known as a quiet title suit: a suit by a plaintiff asserting a 'right, title, or interest' in real property that conflicts with a 'right, title, or interest' the United States claims." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 215, 132 S.Ct. 2199, 183 L.Ed.2d 211 (2012) (quoting 28 U.S.C. § 2409a(d)).

Because we conclude that the Inholders' claim alleging a Fifth Amendment taking is not ripe for adjudication, we express no view on whether they hold valid Revised Statute 2477 easements. We note, however, that a suit brought pursuant to the Quiet Title Act, 28 U.S.C. § 2409a, may provide an alternative mechanism for adjudication of their ownership rights in such easements.*

Conclusion

Accordingly, the judgment of the United States Court of Federal Claims is affirmed.

AFFIRMED

Footnotes

*The Quiet Title Act requires a plaintiff to "set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States." 28 U.S.C. § 2409a(d). Courts have consulted both state and federal law in determining whether valid Revised Statute 2477 property rights have vested. *See*, *e.g.*,

Alaska Dep't of Nat. Res. v. United States, 816 F.3d 580, 583–84 (9th Cir. 2016) ("[Revised Statute] 2477 is unusual, as land-grant statutes go, because of its self-executing nature. No formal document memorializing the grant of a right-of-way needed to be executed by a federal official. Nor did a State, as the recipient of the grant, need to take any formal steps to accept the federal government's grant of a right-of-way. Acceptance of a grant is determined by state law." (citations omitted)); *San Juan Cty. v. United States*, 754 F.3d 787, 791 (10th Cir. 2014) ("The question of whether a [Revised Statute] 2477 right-of-way has been accepted is a question of federal law. However, to the extent that state law provides convenient and appropriate principles for [implementing] congressional intent, federal law borrows from it to determin[e] what is required for acceptance of a right of way." (citations and internal quotation marks omitted) (alterations in original)).

United States Court of Federal Claims.
Hugh MARTIN, Sandra Knox, Kirkland Jones, and Theron and Sherilyn Maloy, Plaintiffs,
v.
The UNITED STATES, Defendant.

No. 16–1159 L
(E–Filed May 19, 2017)

A. Blair Dunn, Albuquerque, NM, for plaintiffs.

Tyler L. Burgess, Trial Attorney, United States Department of Justice, with whom were John C. Cruden, Assistant Attorney General, Washington, DC, for defendant.

Fifth Amendment Takings Claim; Motion to Dismiss Under RCFC 12(b)(1); Subject Matter Jurisdiction

OPINION

CAMPBELL–SMITH, Judge

Before the court is defendant's motion to dismiss plaintiffs' complaint pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Rules for the United State Court of Federal Claims (RCFC). See ECF No. 11. Defendant argues that the complaint should be dismissed for lack of subject matter jurisdiction because plaintiffs' claim for a regulatory taking is not ripe. See id. at 20. Defendant also asserts that the complaint should be dismissed for failure to state a claim upon which relief may be granted because plaintiffs' do not hold a compensable property interest in the property at issue. See id. at 23. For the following reasons, the court finds

that plaintiffs have alleged a regulatory taking, and that the claim is not yet ripe. As such, defendant's motion to dismiss under RCFC 12(b)(1) is granted.

I. Background

Plaintiffs in this case are individuals who own properties, of various descriptions, within the boundaries of Santa Fe National Forest. See ECF No. 1 at 2–9 (identifying the properties owned by each plaintiff). In addition to the properties owned by each plaintiff, the plaintiffs collectively assert ownership rights in what they term "statutorily vested real property right-of-way easements." Id. at 1. The easements provide access to plaintiffs' properties over government land, and allegedly "exist concurrently and in the same space as [Sandoval] County Roads 268 and 89." Id. at 12.

In June 2011, the Las Conchas Fire, burned portions of the Santa Fe National Forest. Id. at 13. The fire created flood conditions, and sections of County Roads 268 and 89 were damaged in subsequent flooding. See id. Sandoval County authorities began repairing Road 268, but the United States Forest Service demanded that the work stop and prevented the county from beginning work on Road 89, absent compliance with what plaintiffs contend are "cost-prohibitive and unmanageable procedures dictated by the Forest Service." Id. at 13.

In a letter to plaintiffs, Forest Supervisor Maria T. Garcia announced her decision to close the roads. Specifically, she stated: "Our assessment showed that due to the magnitude of damage by the fire and subsequent flooding, public safety would be highly threatened by use of the roads." Id. In the same letter, Ms. Garcia outlined two options for plaintiffs.

> The following two options are available to you as landowners so that you may establish future vehicular access to your property:
>
> 1. A new (reconstructed) road over existing alignment. You and your neighbors can collectively work together to reconstruct the old road over more or less the same alignment. We can facilitate the creation of a formal road association, which would then be granted a recordable private road easement which would ensure legal and physical access to your private land.
> 2. A new road over a new alignment. You and your neighbors could work together to establish a formal road association (as above) and build a road over a new route which we would help you choose. Unfortunately, given the topography of these canyons, new road alignments will be challenging to locate. A private road easement would be granted to the newly formed road association in the same manner as above.

Id. at 14. When plaintiffs stated their intention "to continue use, repair and reconstruction" of the alleged private easement, an attorney with the United States Department of Agriculture informed plaintiffs that the agency does not agree with plaintiffs' claim to "possess a vested easement," and cautioned plaintiffs that unauthorized use of the roads "may be subject to criminal and civil penalties under federal law." Id.

Plaintiffs' characterize the basis of their claim for relief as follows:

> Defendants' [sic] actions constitute a taking of Plaintiff's [sic] property for which compensation

> is due within the meaning of the Fifth Amendment to the United States Constitution because absent compliance with the demanded special use permit and associated fees and related costs, Defendant would completely deprive Plaintiff [sic] access to their private property.

Id. at 15. Plaintiffs do not allege in the complaint that they have paid any fees or applied for a permit. In fact, in their response to defendant's motion to dismiss, plaintiffs confirm that they have not done so. See ECF No. 12 at 13.

II. Legal Standards

Defendant seeks dismissal of plaintiffs' complaint on the basis of both lack of jurisdiction under RCFC 12(b)(1), and failure to state a claim upon which relief, pursuant to RCFC 12(b)(6) may be granted. See ECF No. 11. Because the court has determined that it lacks subject matter jurisdiction over this case at the present time, however, there is no need to analyze the sufficiency of plaintiffs' claim.

Plaintiff bears the burden of establishing this court's subject matter jurisdiction by a preponderance of the evidence. See Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 748 (Fed. Cir. 1988). This court has jurisdiction to hear "any claim against the United States founded ... upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States." 28 U.S.C. § 1491(a). Here, plaintiffs assert a claim for just compensation for an alleged taking pursuant to the Fifth Amendment to the Constitution of the United States. See ECF No. 1 at 1.

Even if a claim meets this description, however, it must also be ripe in order for the court to exercise its authority. See Morris v. United States, 392 F.3d 1372, 1375 (Fed. Cir. 2004) (stating that the Court of Federal Claims "does not have jurisdiction over claims that are not ripe") (citing Howard W. Heck & Assocs., Inc. v. United States, 134 F.3d 1468 (Fed. Cir. 1998). "Ripeness is a justiciability doctrine that 'prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements ...' " Shinnecock Indian Nation v. United States, 782 F.3d 1345, 1348 (Fed. Cir. 2015) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), abrogated on other grounds by Califano v. Sanders, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977)).

If the court determines that it lacks subject matter jurisdiction, it must dismiss the complaint. RCFC 12(h)(3).

III. Analysis

As an initial matter, plaintiffs do not explicitly state in the complaint whether they mean to allege a physical or a regulatory taking. See generally ECF No. 1. See also ECF No. 11 at 20 (defendant observing this fact in its memorandum in support of the instant motion to dismiss). In their response to defendant's motion to dismiss, plaintiffs claim that the facts of this case satisfy the requirements for both takings theories. See ECF No. 12 at 12 ("This case presents to this Court the rare case where the United States has satisfied both the tests for a physical and a regulatory taking.").

The Federal Circuit has explained:

> A physical taking of land occurs when the government itself occupies the property or "requires the landowner to submit to physical occupation of its land," Yee v. City of Escondido, 503 U.S. 519, 527, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992), whether by the government or a third party, see Preseault v. United States, 100 F.3d 1525, 1551 (Fed. Cir. 1996) (en banc).

Forest Properties, Inc. v. United States, 177 F.3d 1360, 1364 (Fed. Cir. 1999). In the case of a regulatory taking, the court continued, "the government prevents the landowner from making a particular use of the property that otherwise would be permissible." See id. (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992)).

In this case, plaintiffs have not alleged facts that suggest defendant, or any third party, has physically occupied the property at issue. The only allegations of the complaint that suggest physical access has been impeded involve the damage done to the roads by the forest fire and subsequent flooding. See ECF No. 1 at 13. Rather, plaintiffs describe their claim, in several passages of the complaint, as centered on the issue of defendant's allegedly improper requirement that plaintiffs apply for a permit before repairing the roads at issue. See id. at 1–2 ("Plaintiffs allege that the Defendants [sic] in and through their agencies and employees, by denying and refusing to recognize the statutorily vested real property right-of-way easements of Plaintiffs, by attempting to extract special use permits, permit fees, and by requiring Plaintiffs to follow prohibitively expensive procedures in order to obtain special use permits, have deprived Plaintiffs of all meaningful access to their private property..."); id. at 15 ("The procedures the United States Forest Services

[sic] is requiring to repair the roads in question, including environmental impact assessments, are cost prohibitive and unreasonable, especially given that Plaintiffs have an easement and the United States Forest Service is not permitted to deprive Plaintiffs of reasonable access to their Properties."); id. ("Defendants' [sic] actions constitute a taking of Plaintiff's [sic] property for which compensation is due within the meaning of the Fifth Amendment to the United States Constitution because absent compliance with the demanded special use permit and associated fees and related costs, Defendant would completely deprive Plaintiff access to their private property."); id. at 16 ("Defendants [sic] have taken Plaintiff's [sic] private property by extracting a permit and fees for the use of Plaintiff's [sic] own vested easement property right, all in violation of the Fifth Amendment of the United States Constitution ...").

In their response to defendant's motion to dismiss, plaintiffs claim that defendant has "physically seized plaintiffs' real property interest under threat of civil and criminal prosecution," and that defendant has "physically deprived them of the use and enjoyment, include the commercial mining value" of their land. See ECF No. 12 at 10. These assertions of physical invasion, however, do not accurately reflect any allegations in the complaint. As such, the court finds that plaintiffs' complaint is properly evaluated as alleging a regulatory taking. See, e.g., Forest Properties, 177 F.3d at 1364 (holding that the denial of a permit preventing plaintiff from making certain use of its property is "a classic example of a regulatory taking").

According to the Supreme Court, the fact that defendant seeks to impose a permit requirement on plaintiffs' use of the property, is not, in and of itself, a taking.

> [T]he mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking. The reasons are obvious. A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126–27, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985) (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n., 452 U.S. 264, 293–297, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981)). See also Estate of Hage v. United States, 687 F.3d 1281, 1288 (Fed. Cir. 2012) (stating that the "mere existence of a requirement for a special use permit" does not constitute a regulatory taking).

Relevant precedent clearly establishes that a claim for a regulatory taking is not ripe until a permit is both sought and denied. See Howard W. Heck & Assocs., Inc. v. United States, 134 F.3d 1468, 1471 (Fed. Cir. 1998) (holding that plaintiff's regulatory takings claim was not ripe for consideration when the permit application was removed from active status because it was incomplete, but no final decision on the application had been made). See also Estate of Hage, 687 F.3d at 1286 ("A regulatory takings claim 'is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.'

") (quoting Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985)).

The court does not, in this opinion, make a determination as to whether plaintiffs have a vested property right in the easements they allege are coextensive with County Roads 268 and 89. But even assuming plaintiffs' characterization of their interest is correct, defendant's regulatory taking claim is not ripe. Plaintiffs do not allege in the complaint that they have applied for the special use permit or paid any fees. See generally ECF No. 1. And, in their response to defendant's motion to dismiss, plaintiffs confirm that they have not done so. See ECF No. 12 at 13 (noting that plaintiffs have refused to seek a special use permit).

IV. Conclusion

For the foregoing reasons, defendant's motion to dismiss plaintiffs' complaint for lack of jurisdiction, ECF No. 11, is **GRANTED**. The clerk's office is directed to **ENTER** judgment dismissing plaintiffs' complaint without prejudice.

IT IS SO ORDERED.

In the United States Court of Federal Claims
No. 16-1159 L

HUGH MARTIN, SANDRA KNOX, KIRKLAND JONES, and THERON AND SHERILYN MALOY,
Plaintiffs,
v.
THE UNITED STATES, Defendant.

JUDGMENT

Pursuant to the court's Opinion, filed May 19, 2017, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiffs' complaint is dismissed without prejudice for lack of jurisdiction.

Lisa L. Reyes Acting Clerk of Court
By: s/ Anthony Curry Deputy Clerk

May 22, 2017

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

Receipt number 9998-3535689
ORIGINAL
IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FILED 9/19/2016

Case No. 16-1159L

HUGH MARTIN, SANDRA KNOX,
KIRKLAND JONES, and
THERON AND SHERILYN MALOY,
Plaintiffs,

TOM VILSACK, Secretary, U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, DC 20250,

TOM TIDWELL, Chief
Forest Service
U.S. Department of Agriculture
Sidney R. Yates Federal Building
201 14th Street, SW
Washington, DC 20024,
Defendants.

COMPLAINT FOR FOR JUST COMPENSATION UNDER 28 U.S.C. § 1491

COME NOW Plaintiffs Hugh Martin, Sandra Knox, Kirkland Jones, and Theron and Sherilyn Maloy for Just Compensation resulting from the taking of property within the meaning of the just compensation clause of the Fifth Amendment to the Constitution of the United States for which compensation is due and

owing pursuant to 28 U.S.C. § 1491. Plaintiffs allege that the Defendants in and through their agencies and employees, by denying and refusing to recognize the statutorily vested real property right-of-way easements of Plaintiffs, by attempting to extract special use permits, permit fees, and by requiring Plaintiffs to follow prohibitively expensive procedures in order to obtain special use permits, have deprived Plaintiffs of all meaningful access to their private property, which is situated within the Santa Fe National Forest, and have taken property from Plaintiffs within the meaning of the Fifth Amendment of the United States Constitution and the Tucker Act, 28 U.S.C. § 1491.

PARTIES AND PROPERTIES

1. Plaintiffs Hugh Martin and Sandra Knox are the owners of patented fee simple real property along with the accompanying, statutorily vested, real property right-of-way easement to access the same that is situated within the boundaries of the Santa Fe National Forest in Sandoval County, New Mexico. The specific properties owned in fee simple by Plaintiffs Martin and Knox (collectively identified herein as the "Martin/Knox Properties", as relevant to this Complaint include multiple mining claims and are identified as follows:

a. The "Pino Lode" as shown on Resurvey of MS 1059, Monte Cristo Group, Cochiti Mining District T18N, R4E N.M.P.M. Sandoval County, New Mexico, filed in the Office of the Clerk of Sandoval County New Mexico on December 18, 2003, in Book 406, page 210215 (Vol. 3 Folio 2375-B);

b. The "Mogul Lode," U.S. Patent No. 30546, dated February 1, 1899, covering former mining claims Mogul, designated by the Surveyor General as Mineral Survey No. 1009A, and Miners Union, designated by the Surveyor General as Mineral Survey No. 1009B; in Section 25, Township 18 North, Range 4 East, N.M.P.M., located in Sandoval County, New Mexico; said parcel being further described as follows: A parcel of land known as Mogul Lode, Mineral Survey No. 1009A, located inside the NW ¼ of Section 25 and a portion of the NE ¼ of Section 26, T. 18 N., R. 4 E., NMPM, Sandoval County, New Mexico and being more particularly described as follows: Beginning at Corner No. 1, identical with Corner No. 2 of the Miner's Union Lode, from which USLM No. 1 bears S. 28 deg. 59'10" E, a distance of 4000.88 ft. thence S. 89 deg. 03'03" W., a distance of 571.75 ft. to Corner No. 2 (from which the ¼ sec. cor. of secs. 25 and 26 bears S. 26 deg. 13'01" E. a distance of 270.43 ft.), thence N. 0 deg. 21'20" W., a distance of 1481.79 ft. to Corner No. 3, thence S. 89 deg. 52'39" E., a distance of 571.36 ft. to Corner No. 4, identical with Corner No. 3 of the Miners Union Lode, thence S. 0 deg. 22'13" E., a distance of 1471.10 ft. to Corner No. 1 identical with Corner No. 2 of Miners Union, the place and point of beginning.

c. The "Crown Point Lode," U.S. Patent No. 29267; covering former mining claim Crown Point, designated by the Surveyor General as Mineral Survey No. 943; in Section 25, Township 18 North, Range 4 East, N.M.P.M., located in Sandoval County, New Mexico, said parcel being

further described as follows: A parcel of land known as Crown Point Lode, Mineral Survey No. 943, located inside Section 25, T. 18 N., R. 4 E., NMPM, Sandoval County, New Mexico and being more particularly described as follows: Beginning at Corner No. 1, whence USLM No. 1 Cochiti Mining District Bears S. 7 deg. 37'11" E, a distance of 3688.04 ft. thence N. 80 deg. 16'04" E., a distance of 497.52 ft. to Corner No. 2, thence N. 3 deg. 59'37" E., a distance of 1505.04 ft. to Corner No. 3, thence S. 80 deg. 33'50" W., a distance of 549.11 ft. to Corner No. 4, thence S. 2 deg. 03'04" W., a distance of 1496.13 ft. to Corner No. 1, the place and point of beginning.

d. The "Avondale Lode," U.S. Patent No. 35527; covering former mining claim Avondale, designated by the Surveyor General as Mineral Survey No. 1074; in Section 31, Township 18 North, Range 5 East, N.M.P.M., located in Sandoval County, New Mexico, said parcel being further described as follows: A parcel or tract of land known as the Avondale Lode, Mineral Survey No. 1074, located within the W1/2 W1/2 NE1/4 and the E1/2 E1/2 NE1/4 of fractional section 31, T. 18 N., R.S.E., NMPM, Sandoval County, State of New Mexico and being more particularly described as follows: Beginning at Corner 1, when USLM No. 1 Cochiti Mining District, bears N 80 deg. 54'18" W., a distance of 5334.47 ft., thence N. 15 deg. 04'44" E., a distance of 1422.36 ft. to Corner 2, thence S. 83 deg. 00' 44" E., a distance of 559.52 ft. to Corner 3, thence S. 17 deg. 19'29" W., a distance of 1248.66 ft. to Corner 4, thence N. 83 deg. 19'23" W., a distance

of 503.37 ft. to Corner 1 the place and point of beginning; and

e. The Monte Cristo Lode as shown on Resurvey of MS 1059, Monte Cristo Group Cochiti Mining District T18N, R4E, Section 36, N.M.P.M. Sandoval County, New Mexico, filed in the office of the County Clerk of Sandoval County, New Mexico on December 18, 2003, in Book 406, Page 210215 (Vol. 3, Folio 2375-B).

f. The Carena Lode (M.S. 1036), Monster Lode (M.S. 1093), Sunny South Lode (M.S. 1033), Monte Carlo (M.S. 1176) and No Name Lode (M.S. 1016) as shown in Cochiti Mining District T18N, R4E, Section 36, N.M.P.M. Sandoval County, New Mexico, filed in the office of the County Clerk of Sandoval County, New Mexico under Parcel # 1-000000-306-701, Account R068148.

2. The Martin/Knox property is situated within an area known as Bland Canyon and is surrounded by the Santa Fe National Forest.

3.The Martin/Knox Property is surrounded on all sides by United States Forest land. The Property historically has been accessed by way of Sandoval County Road 268. Defendants identify this road as Forest Road 268, although this is a long-standing county road. A portion of County Road 268 crosses United States Forest lands. Before County Road 268 became a designated county road, and indeed, before New Mexico gained statehood, the same road served as a point of access to these properties by virtue of the Act of 1866 which came to be known as RS 2477:

> Sec. 8. "And be it further enacted, that the right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Mining Act of July 26, 1866, § 8, 14 Stat. 253, formerly § 2477 of the Revised Statutes and later 43 U.S.C. § 932

4. County Road 268 is the only reasonable means of accessing the Martin/Knox Property.

5. Plaintiff Kirkland Jones is the owner of patented fee simple real property along with the accompanying, statutorily vested, real property right-of-way easement to access the same that is situated within the boundaries of the Santa Fe National Forest in Sandoval County, New Mexico. The specific properties owned in fee simple by Plaintiff Jones (collectively identified herein as the "Jones Properties", as relevant to this Complaint include multiple mining claims and are identified as follows:

> a. Denver Girl Lode, Uncle Joe Lode and Red Cloud Lode in Bland Canyon; Albermarle Lode, Ontario Lode, Huron Lode and Pamilco Lode in Colle Canyon; Iron King Lode, North Star Lode, Lone Star Lode, Dry Monopole Lode and Free Trade Lode in Bland Canyon; located as shown in Cochiti Mining District, T18N, R4E, Section36, N.M.P.M. Sandoval County, New Mexico, filed in the office of the County Clerk of Sandoval County, New Mexico; said parcels being further described in the appurtenant patents, surveys, deeds and records.

6. The Jones property is situated within an area known as Bland Canyon and is surrounded by the Santa Fe National Forest.

7. The Jones Property is surrounded on all sides by United States Forest land. The Property historically has been accessed by way of Sandoval County Road 268. Defendants identify this road as Forest Road 268, although this is a long-standing county road. A portion of County Road 268 crosses United States Forest lands. Before County Road 268 became a designated county road, and indeed, before New Mexico gained statehood, the same road served as a point of access to these properties by virtue of the Act of 1866 which came to be known as RS 2477:

> Sec. 8. "And be it further enacted, that the right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Mining Act of July 26, 1866, § 8, 14 Stat. 253, formerly § 2477 of the Revised Statutes and later 43 U.S.C. § 932

8. County Road 268 is the only reasonable means of accessing the Jones Property.

9. Plaintiffs Theron and Sherilyn Maloy are the owners of patented fee simple real property along with the accompanying, statutorily vested, real property right-of-way easement to access the same that is situated within the boundaries of the Santa Fe National Forest in Sandoval County, New Mexico. The specific properties owned in fee simple by Plaintiffs Theron and Sherilyn Maloy (collectively identified herein as the "Maloy Properties", as relevant to this Complaint are identified as follows:

a. Lot numbered Twenty-One (21) of PINE CREEK MEADOWS, a subdivision of the Northerly Portion of Homestead Entry Survey No. 19, within Sections 17 & 20, Township 18 North, Range 5 East, N.M.P.M., Sandoval County, New Mexico, as shown and designated on the plat of said subdivision filed in the Office of the County Clerk of Sandoval County, New Mexico on October 15th, 1965 in Volume 2, page 15.

b. Lot numbered Twenty-Two (22) of PINE CREEK MEADOWS, a subdivision of the Northerly Portion of Homestead Entry Survey No. 139, within Sections 17 & 20, Township 18 North, Range 5 East, N.M.P.M., Sandoval County, New Mexico, as shown and designated on the plat of said subdivision filed in the Office of the County Clerk of Sandoval County, New Mexico on October 15th, 1965 in Volume 2, page 15.

c. A certain parcel of land situated in Section 9, Township 17 North Range 5 East, New Mexico Principal Meridian, Sandoval County, New Mexico, and being identified as a northerly portion of the Pine Tree Lode in Cochiti Mining District, as the same is shown and designated on the Plat of the Claim of Alice Benham, known as the A. B. Group, comprising the A.B., Cicero, Ross, U.S. Mineral Surveyor, on July 24, 1919, and signed by the U.S. Surveyor General for New Mexico, on September 18, 1919, and being more particularly described by a metes and bounds survey as follows:

Beginning at the most southerly corner of the parcel herein described, whence the One Quarter Corner common to Section 8 and 9, Township 17 North, Range 5 East, N.M.P.M., Sandoval County, New Mexico, bears N.85 deg. 48' 40" W., 4,293.10 feet distant; thence N.29 deg. 07' W., 131.43 feet distant to the most westerly corner of the parcel of land herein described; thence N.43 deg. 23' E., 545.04 feet distant to the most northerly corner of the parcel of land herein described; thence S.73 deg. 12' E., 140.17 feet distant to the most easterly comer of the parcel of land herein described; thence S.43 deg. 23' W., 647.29 feet distant to the Point of Beginning of this survey, and containing 1.715 acres, more or less.

Together with an easement thirty feet in width (being fifteen feet on each side along the common boundary lines of Lots "A" and "B" of Map showing portions of Subdivision of Cicero and Demosthenes Claims, and a portion of Pine Tree Claim, Sandoval County, New Mexico, prepared by D.T. Morrison, October, 1961.

10. The Maloy Property historically has been accessed by way of County Road 89. County Road 89, like 268, has existed for over 100 years. This road also serves as access by virtue of RS 2477, vesting the owners of the Maloy Property with an easement across said Road. County Road 89 is the only reasonable means of accessing the Malloy Property.

11. Defendant Tom Vilsack is the Secretary of Agriculture, and has ultimate responsibility for ensuring that agencies, such as the United States Forest Service, within the U.S. Department of

Agriculture ("USDA") comply with the mandates of Congress such as the Act of 1866, the General Mining Law of 1872, the 1897 Organic Act, the 1976 Federal Land Policy and Management Act, along with requirements of the United States Constitution.

12. Defendant Tom Tidwell is the Chief of the United States Forest Service ("USFS"), an agency within USDA, and is responsible for carrying out the scope and purpose of the United States Forest Service as created and directed by Congress. Chief Tidwell has ultimate responsibility for ensuring that the USFS complies with the mandates of Congress and the United States Constitution.

JURISDICTION

13. This Court has jurisdiction of this case under 28 U.S.C. § 1491 (the Tucker Act) as a "claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department . . . ."

GENERAL ALLEGATIONS

14. Plaintiffs first allege that they are successor holders of right-of way easements that constitute real property rights first created and existing as derived from the Act of 1866 or as came to be later known, RS 2477:

> Sec. 8. "And be it further enacted, that the right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Mining Act of July 26, 1866, § 8, 14 Stat. 253, formerly § 2477 of the Revised Statutes and later 43 U.S.C. § 932.

15. County Roads 268 and 89 have existed for over one hundred years, and appear on maps dating back to at least 1912. See Exhibit A. Upon information and belief, Sandoval County has maintained County Road 268 and County Road 89, including the portions that cross the Santa Fe National Forest, for an undetermined number of years.

16. All of the Properties at issue in this matter, including the mining claims, have historically been accessible by County Roads 268 and 89. Such access predates the formation of the United States Forest Service.

17. In addition, through the General Mining Act of 1872, Congress recognized rights of ingress and egress to the mining claims and homesteads set forth in this case.

18. Since the granting of these right of way easements by the laws of 1866 and 1872 to individual or business engaged in mining or homesteading upon the lands of the United States pursuant to these laws, nothing has revoked those statutory grants and in fact the law with respect to the USFS affirms quite the opposite. The Organic Act of 1897, 30 Stat. 34-36; codified U.S.C. vol. 16, sec. 551, which among other things sets out how the reservation of National Forest Lands such as the Santa Fe National Forest (which was established July 1, 1915, Executive Order 2160) is and was to occur included the provision that with regard to mineral lands and homesteads located within the forests that such claims and entry for mining or homesteading were to occur pursuant to the existing mining laws of the United States such as the General Mining Act of 1872:

And any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained.

19. Further guidance and support for the utilization of mining laws and the access and ingress rights-of-way easements for miners and homesteaders on Forest Service lands was found in the RULES AND REGULATIONS GOVERNING FOREST RESERVES, Established Under Section 24 of the Act of March 3, 1891, 26 STATS., 1095 which stated:

LOCATION AND ENTRY OF MINERAL LANDS.

The law provides that "any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry", notwithstanding the reservation. This makes mineral lands in the forest reserves subject to location and entry under the general mining laws in the usual manner.

It is further provided, that
Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads and

> *other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of the Interior. Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: Provided. That such persons comply with the rules and regulations covering such forest reservations.*

20. Plaintiffs accordingly own easements that exist concurrently and in the same space as County Roads 268 and 89. These easements constitute private property owned by the Plaintiffs. The designation of National Forest Land surrounding the Properties does not abrogate these easements.

21. In June 2011, the Las Conchas Fire, one of the largest forest fires in New Mexico history, ignited in the Santa Fe National Forest. Among other things, the Las Conchas Fire created flood conditions. Subsequent flooding then destroyed segments of County Roads 268 and 89. The affected portions of these roads crossed United States Forest land. The destruction of these roads rendered the Properties at issue in this lawsuit inaccessible to vehicle traffic.

22. In the months following the fire, Sandoval County began to perform repair work on County Road 268, including an approximately two-mile portion crossing United States Forest land. After the County completed the approximately two-mile segment, the United States Forest Service demanded that the work stop. The

United States Forest Service has also prevented any attempt to repair County Road 89 except according to cost-prohibitive and unmanageable procedures dictated by the Forest Service.

23. On or around April 13, 2012 Forest Supervisor Maria T. Garcia then sent a letter to Plaintiffs stating:

> This letter is to inform you of the results of an assessment of roads affected by last year's devastating Las Conchas Fire and my decision regarding Forest Road #268 and Forest Road #89, which provide access into Bland and Cochiti Canyons. After much consideration, I have concluded I must close these two roads to public access for the foreseeable future. Specifically, the roads will be closed to conventional motorized travel beyond the points described in my September 23, 2011, letter (enclosed). Our assessment showed that due to the magnitude of damage by the fire and subsequent flooding, public safety would be highly threatened by use of the roads. Flooding has completely eliminated the roads over much of their length. Consequently, Forest Roads #268 and #89 can no longer be considered viable forest transportation system roads.

Exhibit B.

24. The Letter from Maria T. Garcia went on to state:

> The following two options are available to you as landowners so that you may establish future vehicular access to your property:

> 1. A new (reconstructed) road over existing alignment. You and your neighbors can collectively work together to reconstruct the old road over more or less the same alignment. We can facilitate the creation of a formal road association, which would then be granted a recordable private road easement which would ensure legal and physical access to your private land.
> 2. A new road over a new alignment. You and your neighbors could work together to establish a formal road association (as above) and build a road over a new route which we would help you choose. Unfortunately, given the topography of these canyons, new road alignments will be challenging to locate. A private road easement would be granted to the newly formed road association in the same manner as above.

Exhibit B.

25. Counsel for Plaintiffs corresponded with Supervisor Garcia asserting that Plaintiffs intended to continue use, repair and reconstruction of their private easement for their access to their private property, but ultimately they were rebuffed to the point that a letter from USDA Attorney Dawn Dickman dated March 19, 2015 went so far as to threaten criminal prosecution for the uses of their private property easement stating:

> Finally, we note that your letter asserts "it is the intention of the landowners to utilize and repair the road associated with this vested easement in the very near future." As stated above, we do not agree your clients possess a vested easement and we caution that anyone using national forest

> lands in an unauthorized manner may be subject to criminal and civil penalties under federal law.

Exhibit C.

26. The procedures the United States Forest Services is requiring to repair the roads in question, including environmental impact assessments, are cost prohibitive and unreasonable, especially given that Plaintiffs have an easement and the United States Forest Service is not permitted to deprive Plaintiffs of reasonable access to their Properties.

27. Defendants know that they are violating Plaintiff's longstanding rights, as evidenced by their internal communications acknowledging their obligations with respect to Plaintiffs.

28. Plaintiffs have been involved in exchanges of communications with Defendants and with their elected leaders, but have been unable to regain basic access to their Properties.

29. Paragraphs 1-15 are incorporated herein by reference as though fully set forth herein.

30. Assuming the actions alleged in paragraphs 1-27 to be lawfully taken, Defendants' actions constitute a taking of Plaintiff's property for which compensation is due within the meaning of the Fifth Amendment to the United States Constitution because absent compliance with the demanded special use permit and associated fees and related costs, Defendant would completely deprive Plaintiff access to their private property. Depriving Plaintiffs access along their vested real property easement to their fee simple real property

mine unless the submit to the NEPA process, obtain a special use permit and pay the associated fees is a taking that requires just compensation. See Koontz v. St. Johns River Water Management District, 568 U.S. ___ ,133 S.Ct. 2586 (2013).

31. To summarize, Defendants have taken Plaintiff's private property by extracting a permit and fees for the use of Plaintiff's own vested easement property right, all in violation of the Fifth Amendment to the United States Constitution which provides, in part: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. Amend. V.

WHEREFORE, Plaintiff requests:

1. This court declare, adjudge, and decree under the Declaratory Judgment Act, 28 U.S.C. § 2201 and 15 U.S.C. §§ 701, 702 and 704 that Defendants' interference with Plaintiff's vested rights under the Act of July 26, 1866, 14 Stat. 253 and the 1872 Mining Act, United States Revised Statutes Chp. 6, Title 32, 30 U.S. Code § 33, in refusing to allow Plaintiff to utilize its statutorily granted right-of-way easement to access is private property is arbitrary, capricious, an abuse of discretion and/or unlawful.

2. This court declare, adjudge, and decree under the Declaratory Judgment Act, 28 U.S.C. § 2201 and 15 U.S. C. §§ 701, 702 and 704, and the Quiet Title Act, 28 U.S.C. § 2409a, that Plaintiff holds the previously described vested rights in property as against Defendants under the Act of July 26, 1866, 14 Stat. 253, and the 1872 Mining Act, United States Revised Statutes Chp. 6, Title 32, 30 U.S. Code § 33, as conveyed in the Plaintiff's Patents or Deeds.

3. That this court preliminarily and/or permanently enjoin the Defendants, their agents, employees, successors, and all persons acting in concert or participating with them under their direction, from interfering with Plaintiff's vested rights under the Act of July 26, 1866, 14 Stat. 253, and the1872 Mining Act, United States Revised Statutes Chp. 6, Title 32, 30 U.S. Code § 33.

4. This court declare, adjudge, and decree under the Declaratory Judgment Act, 28 U.S.C. § 2201 that Defendants' extraction of permit and fees from Plaintiff in order to access its private property and to utilize its vested easement is a taking of Plaintiff's private property in violation of the 5th Amendment to the United States Constitution.

5. This court declare, adjudge, and decree under the Tucker Act, 28 U.S.C. § 1491 that Defendants' extraction of permit and fees from Plaintiff in order to access its private property and to utilize its vested easement is a taking of Plaintiff's private property in violation of the 5th Amendment to the United States Constitution and that Defendant be order to provide full and just compensation for the taking of Plaintiffs' vested easements and the private property served by those easements.

6. Grant such other relief as this Court deems appropriate, including the award of attorneys' fees, litigation expenses and costs against Defendants as provided by applicable law.

Dated this 18th day of September 2014.

Respectfully submitted,

Western Agriculture, Resource and Business Advocates, LLP

/s/ A. Blair Dunn
A. Blair Dunn, Esq.
Counsel for Plaintiffs
1005 Marquette Ave NW Albuquerque, NM 87102
T: (505)750-3060
F: (505)226-8500
abdunn@ablairdunn-esq.com

EXHIBIT A

[Printers Note: maps located at https://drive.google.com/file/d/11GZzzrLsaCBQqB-RBKbbJRyhVaIcMi-w/view?usp=sharing]

EXHIBIT B

United States Forest Santa Fe National Forest Supervisor's Office Department of Service 11 Forest Lane Agriculture Santa Fe, New Mexico 87508

PH 505-438-5300 FAX 505-438-5391

File Code: 7730 Date: April 13, 2012

«Name» CERTIFIED MAIL – RETURN «Address1» RECEIPT REQUESTED «City», «State» «Zip» NUMBER: «CCR»

Dear «Name»:

This letter is to inform you of the results of an assessment of roads affected by last year's devastating Las Conchas Fire and my decision regarding Forest Road #268 and Forest Road #89, which provide access into Bland and Cochiti Canyons. After much consideration, I have concluded I must close these two roads to public access for the foreseeable future. Specifically, the roads will be closed to conventional motorized travel beyond the points described in my September 23, 2011, letter (enclosed). Our assessment showed that due to the magnitude of damage by the fire and subsequent flooding, public safety would be highly threatened by use of the roads. Flooding has completely eliminated the roads over much of their length. Consequently, Forest Roads #268 and #89 can no longer be considered viable forest transportation system roads.

Additionally, last summer's extreme fire behavior left the upper canyons especially vulnerable, which will

likely result in repeated flooding events and unstable conditions over the next several years. Any road reconstruction improvements made in the next few years will likely be destroyed by future flooding. Unfortunately, even if reconstructing these roads were a viable option, it cannot be done by the Forest Service. I cannot expend public funds rebuilding roads for which there is no general public need. In these instances, the roads' primary beneficiaries are the owners of private inholdings at the end of each road.

As you know, since the fire I have authorized access into both canyons for private landowners by a combination of methods, as described in my letter of September 23, 2011, to landowners. Although Forest Roads #268 and #89 will not be open to the public, the Forest Service will continue to work with you to ensure that you continue to have adequate and reasonable access to your property.

The following two options are available to you as landowners so that you may establish future vehicular access to your property:

1. A new (reconstructed) road over existing alignment. You and your neighbors can collectively work together to reconstruct the old road over more or less the same alignment. We can facilitate the creation of a formal road association, which would then be granted a recordable private road easement which would ensure legal and physical access to your private land.
2. A new road over a new alignment. You and your neighbors could work together to establish a formal road association (as above) and build a

road over a new route which we would help you choose. Unfortunately, given the topography of these canyons, new road alignments will be challenging to locate. A private road easement would be granted to the newly formed road association in the same manner as above.

«Name»

I would not recommend that either of these approaches be attempted until the watershed condition heals sufficiently so that flooding is no longer a predictable threat. Until a permanent method of future access is established, access may still be achieved as described in my September 23, 2011, letter.

I realize that the decision to close Forest Road #268 and #89 to conventional motorized access has implications for you. I can only offer my sincerest condolences and my promise to you that I will commit whatever resources I have at my disposal to address the transition from access via open system road to private easement. If you have further questions, please feel free to call either Roger Norton (505-438-5385) or Mike Frazier (505-438-5350).

We have searched Sandoval County land ownership records and our own records to create as comprehensive a mailing list as we can generate. I am enclosing the list of land owners this letter is being mailed to. If you know of a landowner in the area historically served by these roads that is not on the list, please contact Roger Norton at the number above or at rnorton@fs.fed.us.

Sincerely,

/s/ Joseph S. Norrell, Acting Deputy (for)
MARIA T. GARCIA
Forest Supervisor

Enclosures: Letter dated 09/23/2011
Mailing List

EXHIBIT C

U.S. Department of Agriculture
Office of the General Counsel
P. O. Box 586
Albuquerque, NM 87103
Mountain Region
Fax: (505) 248-6013

March 19, 2015

Mr. A. Blair Dunn
Western Agriculture, Resource and Business Advocates, LLP
6605 Uptown Blvd. NE, Ste 280 Albuquerque, NM 87110

Re: Forest Roads #268 and #89, Santa Fe National Forest

Dear Mr. Dunn,

This letter represents the U.S. Department of Agriculture's response to your letter dated January 26, 2015 regarding the two above-referenced forest roads. You state that your clients rely on these particular roads for access to their patented mining claims near Bland and Cochiti Canyons. More specifically, you assert these roads constitute a "vested ROW easement, held both by [your clients] privately and by the public as a county road." The Department of Agriculture does not agree with your position regarding these roads.

You state that your clients possess a "statutorily granted easement" over these two roads. However, the statutes cited in your letter do not contain language

granting an easement to private citizens. Furthermore, we are not aware of any court interpreting the referenced statutes to convey an easement by implication, nor would we expect a court to say as much given "the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and if there are doubts they are resolved for the Government, not against it." U.S. v. Union Pac. R. Co., 353 US 112, 116 (1957); Albrecht v. U.S., 831 F.2d 196, 198 (10th Cir. 1987)("In a public grant nothing passes by implication, and unless the grant is explicit with regard to property conveyed, a construction will be adopted which favors the sovereign."); see also e.g., U.S. v. Jenks, 129 F.3d 1348, 1354 (10th Cir. 1997) (holding land patents granted under the Homestead Act of 1862, which contains language similar to the Mining Act of 1866, did not include an implied easement for access).

We do not understand what is meant by your statement that the alleged right of away is "not an easement created by public use." According to your letter, your clients' claim stems from R.S. 2477 (Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253, codified at 43 U.S.C. § 932, repealed 1976), which by definition granted right-of-ways only for public roads created by public use. Fairhurst Family Association v. USFS, 172 F.Supp.2d 1328, 1332(D. Colo. 2001)(holding the term "highway" found in R.S. 2477 means "public road," and refusing to find a "statutory rightof-way" separate from a public road). Evidence of public use is an essential element to establishing the existence of a R.S. 2477 highway. Southern Utah Wilderness Alliance v. BLM, 147 F.Supp.2d 1130, 1138-1145 (D. Utah 2001). As we have explained previously, courts have repeatedly and consistently held that private citizens do not hold a title

interest in public roads under R.S. 2477. E.g., SW Four Wheel Drive Ass'n v. BLM, 363 F.3d 1069, 1071 (10th Cir. 2004); Fairhurst, 172 F.Supp.2d at 1332; Peper v. USDA, 2006 WL 2583119, 1 (D.Colo. 2006)). There is nothing unusual or unique about this situation to indicate it should be treated any different from previously unsuccessful claims by inholders regarding R.S. 2477 roads.

Finally, we note that your letter asserts "it is the intention of the landowners to utilize and repair the road associated with this vested easement in the very near future." As stated above, we do not agree your clients possess a vested easement and we caution that anyone using national forest lands in an unauthorized manner may be subject to criminal and civil penalties under federal law.

As inholders, your clients have a right to access their property, but such right is subject to reasonable regulations. U.S. v. Jenks, 22 F.3d 1513, 1516 (10th Cir. 1994). Inholders must comply with the rules and regulations applicable to ingress and egress across national forest system lands. Id. The Santa Fe National Forest has worked to ensure that reasonable access rights for landowners in this area have been preserved, despite the safety based decision to close these two roads. Alternatives have been identified in letters sent to landowners on September 23, 2011, and April 13, 2012. It is suggested that the landowners work with the Forest Service to reconstruct road access as was described in those letters.

Please feel free to contact me by email or phone at (505) 248-6006 with questions or to discuss these issues further.

Sincerely,
Dawn M. Dickman
USDA Office of the General Counsel

ORIGINAL

In The United States Court of Federal Claims

Cover Sheet

Plaintiff(s) or Petitioner(s)
Hugh Martin, Sandra Knox, Kirkland Jones, Theron and Sherilyn Maloy

See Attachment A

If this is a multi-plaintiff case, pursuant to RCFC 20(a), please attach an alphabetized, numbered list of all plaintiffs.

Name of the attorney of record (See RCFC 83.1(c)): A. Blair Dunn, Esq.

Firm Name: Western Agriculture, Resource and Business Advocates, LLp

Contact information for pro se plaintiff/petitioner or attorney of record:

Post Office Box: 16-1159 T

Street Address: 1005 Marquette Ave NW

City-State-ZIP: Albuquerque, NM 87102
Telephone: 505-750-3060

E-mail Address: abdunn@ablairdunn-esq.com

Is the attorney of record admitted to the Court of Federal Claims Bar?: Yes

Does the attorney of record have a Court of Federal Claims ECF account?: Yes

If not admitted to the court or enrolled in the court's ECF system, please call (202) 357-6402 for admission papers and/or enrollment instructions.

Nature of Suit Code: 512

Select only one (three digit) nature-of-suit code from the attached sheet. If number 213 is used, please identify partnership or partnership group. If numbers 118, 134, 226, 312, 356, or 528 are used, please explain.

Agency Identification Code: AGR

See attached sheet for three-digit codes.

Amount Claimed: $10,000,000.00+

Use estimate if specific amount is not pleaded.

Disclosure Statement: Is a RCFC 7.1 Disclosure Statement required?:No
If yes, please note that two copies are necessary.

Bid Protest: Indicate approximate dollar amount of procurement at issue:

Is plaintiff a small business?

Vaccine Case: Date of Vaccination: _____

Related Cases: Is this case directly related to any pending or previous case?

If yes, you are required to file a separate notice of directly related case(s). See RCFC 40.2.
18_

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HUGH MARTIN, SANDRA KNOX,
KIRKLAND JONES, and
THERON AND SHERILYN MALOY,
Plaintiffs,

TOM VILSACK, Secretary, U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, DC 20250,

TOM TIDWELL, Chief
Forest Service
U.S. Department of Agriculture
Sidney R. Yates Federal Building
201 14th Street, SW
Washington, DC 20024,
Defendants.

COVERSHEET ATACHMENT A

Kirkland Jones, Plaintiff
Hugh Martin and Sandra Knox, Plaintiff
Theron and Sherilyn Maloy, Plaintiff

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HUGH MARTIN and SANDRA KNOX MARTIN, KIRKLAND JONES, and THERON and SHERILYN MALOY,	)	*Electronically filed Jan. 17, 2017*
	)	No. 16-1159 L
Plaintiffs,	)	
	)	Hon. Patricia E.
v.	)	Campbell-Smith
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

UNITED STATES' MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

JOHN C. CRUDEN
Assistant Attorney General
United States Department of Justice Environment & Natural Resources Division

TYLER L. BURGESS
Trial Attorney
Natural Resources Section PO Box 7611
Washington, DC 20044-7611
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Email: tyler.burgess@usdoj.gov

Counsel of Record for the United States

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

EXHIBIT LIST

Exhibit	Description
1	U.S. Forest Service Briefing Paper, Las Conchas Fire—Access to Private Land In Bland and Cochiti Canyons dated February 16, 2012.
2	Letter from the U.S. Forest Service to Private Landowners in Bland and Cochiti Canyons (with attachments) dated September 23, 2011.
3	Undated letter from Kirkland Jones to the U.S. Forest Service received on or about March 19, 2013.
4	Letter from U.S. Forest Service to Kirkland Jones dated March 28, 2013.
5	U.S. Forest Service, Santa Fe National Forest Las Conchas Fire Restrictions, Order Number 10-363, dated December 29, 2011.
6	Letter from U.S. Forest Service to property owners and mailing list dated April 13, 2012 (Ex. B to Complaint, ECF No. 1-2).
7	Email string between Plaintiffs' counsel and the U.S. Department of Agriculture, Office of General Counsel dated May 3, 2016.

MOTION TO DISMISS

This case is about vehicular access to Plaintiffs' properties where two Forest Roads were destroyed in the 2011 Las Conchas fire and subsequent flooding events. Plaintiffs Hugh Martin and Sandra Knox Martin, Kirkland Jones, and Theron and Sherilyn Maloy claim that the United States Forest Service ("Forest Service") denied all meaningful access to their inholding properties located within the boundary of the Santa Fe National Forest in Sandoval County, New Mexico, resulting in a taking. Plaintiffs' Complaint should be dismissed pursuant to Rule 12(b) of the Rules of the United States Court of Federal Claims ("RCFC") on at least one of the following alternative grounds: (1) to the extent Plaintiffs allege a regulatory taking resulting from the Forest Service's special use permit requirements, Plaintiffs' claim is not ripe; and (2) Plaintiffs' Complaint fails to state a claim upon which relief can be granted because they lack a compensable property interest in Forest Roads 268 or 89.

A memorandum in support of this motion follows below.

MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION TO DISMISS

I. QUESTIONS PRESENTED

I. To the extent Plaintiffs' claim can be construed as a regulatory taking, whether their claim that the Forest Service's special use permit requirements effected a compensable taking is ripe where Plaintiffs have not applied for a permit and, therefore, have failed to obtain a final decision from the Forest Service.

II. Whether Plaintiffs have stated a claim upon which relief can be granted for a taking of their property when they have not demonstrated that they have a compensable property interest in Forest Roads 268 or 89.

II. INTRODUCTION

Plaintiffs Hugh Martin and Sandra Knox Martin, Kirkland Jones, and Theron and Sherilyn Maloy (collectively "Plaintiffs") own certain real property located within the boundary of the Santa Fe National Forest in Sandoval County, New Mexico. Forest Roads 268 and 89 have historically provided vehicular access to Plaintiffs' properties. In 2011, the Las Conchas fire burned through Bland and Cochiti Canyons. The fire and subsequent flooding in the area destroyed portions of Forest Roads 268 and 89, which forced the Forest Service to close the roads due to safety concerns. Regardless of whether the Forest Service administratively opens or closes these roads, both roads would need substantial reconstruction before being safe for vehicular traffic.

The Forest Service has determined that it will not rebuild the roads, at least for the foreseeable future, because it would not be in the public's interest to do so. The Forest Service has, however, consistently made it known to Plaintiffs (and other inholding property owners) that they may seek authorization for a special use permit or easement for access to reconstruct the roads. Despite having never sought that authorization, Plaintiffs now contend that the Forest Service has taken their property by (1) requiring Plaintiffs to seek a permit to reconstruct the roads; and (2) denying the existence of easements across Forest Roads 268 and 89. Neither theory should succeed.

First, Plaintiffs' claim that the Forest Service's actions to enforce its special use permit requirements amount to a regulatory taking of their property interests is not ripe because Plaintiffs have not yet sought—nor been denied—authorization to reconstruct the roads. Second, Plaintiffs lack a compensable property interest in Forest Roads 268 or 89 because R.S. 2477 does not permit a private party to assert an interest in a public road.

At bottom, the Forest Service is obligated to *allow* reasonable access to private inholdings, but the agency is not required to *construct* that access. Notably, Plaintiffs never state they are prepared to incur the cost and undertake the efforts to reconstruct the roads themselves and would have done so if not for the Forest Service requiring a permit. Plaintiffs cannot demonstrate that the Forest Service has denied them access to their inholding properties or effectuated a taking of their property interests under any of the theories they advance in their Complaint. Consequently, Plaintiffs' Complaint should be dismissed pursuant to Rule 12(b) of the Rules of the United States Court of Federal Claims ("RCFC").

III. STATUTORY BACKGROUND

A. Reasonable Access to Private Inholdings

Private landowners who own property situated within the boundary of National Forest System lands, known as "inholdings,"—whether the property originated as a homestead or mineral claim—are entitled to reasonable access to their properties. Until Congress passed the Federal Land Policy and Management Act of 1976 ("FLPMA"), Pub. L. No. 94-579, 90 Stat. 2781 (Oct. 21, 1976), individuals could acquire rights-of-way over unreserved federal land under any of a "tangled array of laws." *United States v. Jenks*, 22 F.3d 1513, 1515 (10th Cir. 1994). Below is a brief discussion of laws potentially relevant to Plaintiffs' claims.

Early in this country's history, Congress enacted a myriad of laws, including the Homestead Act of 1862, "granting public land to private individuals to promote the settlement of the western portion of the United States." *Id.*; *see also* Act of May 20, 1862, ch. 75, 12 Stat. 392 (codified at 43 U.S.C. §§ 161–284) (repealed 1976); Act of June 11, 1906 ch. 3074, §§ 1-2 ("Forest Homestead Act"), 34 Stat. 233-34 (June 11, 1906) (codified as amended at 16 U.S.C. §§ 506, 507) (repealed by Pub. L. 87-869, § 4, 76 Stat. 1157 (Oct. 23, 1962)) (allowing individuals to settle on land primarily suited for agriculture located within the National Forests). While the Homestead Act contained no specific provision allowing for access to the granted lands, "it was presumed that 'an implied license' to use public lands would provide settlers with unimpeded access to their property." *Jenks*, 22 F.3d at 1515 (citing *Buford v. Houtz*, 133 U.S. 320, 326 (1890)).

In 1866, Congress provided for public access across unreserved public domain by granting rights-of-way for the construction of highways. Act of July 26, 1866, § 8, ch. 262, 14 Stat. 251, 253, codified at 43 U.S.C. § 932 ("[T]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."), repealed by FLPMA §706(a), 90 Stat. 2743, 2793. The provision of the 1866 Act governing public highways, commonly known as "R.S. 2477" roads, provides that a State or county may assert an interest in certain rights-of-way existing before the 1866 Act was repealed in 1976. *See N. New Mexicans Protecting Land Water & Rights v. United States*, 161 F. Supp. 3d 1020, 1044 (D.N.M. 2016); *Sw. Four Wheel Drive Ass'n v. BLM*, 363 F.3d 1069, 1071 (10th Cir. 2004); *Kinscherff v. United States*, 586 F.2d 159, 160-61 (10th Cir. 1978) (per curiam).

The 1872 Mining Act, Act of May 10, 1872, 17 Stat. 91 (codified as amended at 30 U.S.C. §§ 22-54), made public lands available to American citizens "for the purpose of mining valuable mineral deposits...." *United States v. Coleman*, 390 U.S. 599, 602 (1968); *Cameron v. United States*, 252 U.S. 450, 460 (1920); 30 U.S.C. § 22. The 1872 Mining Act states that locators of certain mineral claims "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations," "so long as they comply with the laws of the United States." 30 U.S.C. § 26; *see also* 36 C.F.R. § 228.12; *Silbrico Corp. v. Ortiz*, 878 F.2d 333, 335 (10th Cir. 1989).

In 1897, Congress passed the Forest Service Organic Administration Act, ch. 2, 30 Stat. 34, 34-36 (1897) (codified at 16 U.S.C. §§ 473–482, 551) ("Organic Act"), which established the National Forest System and provides the statutory basis for management of forest reserves. The Organic Act "ensured access over

national forest land to 'actual settlers' and 'protect[ed] whatever rights and licenses with regard to the public domain existed prior to the reservation.'" *Jenks*, 22 F.3d at 1515 (citing *Mont. Wilderness Ass'n v. U. S. Forest Serv.*, 496 F. Supp. 880, 888 (D. Mont. 1980), *aff'd in part by* 655 F.2d 951 (9th Cir. 1981)); 16 U.S.C. § 478).

In 1976, Congress passed FLPMA, which "repealed over thirty statutes granting rights- of-way across federal lands and vested the Secretaries of Agriculture and Interior with authority 'to grant, issue, or renew rights of way over [Forest Service and public lands] for... roads, trails [and] highways.'" *Jenks*, 22 F.3d at 1516 (citing 43 U.S.C. § 1761(a)). R.S. 2477 was included among the statutes repealed by FLPMA, but FLPMA preserved valid R.S. 2477 rights-of-way existing as of the date FLPMA was passed. Pub. L. No. 94-579, §§ 701(a), 706(a), 90 Stat. 2743, 2786, 2793 (1976) (codified at 43 U.S.C. §§ 1761-71)); *see also S. Utah Wilderness All. v. BLM*, 425 F.3d 735, 741 (10th Cir. 2005) ("In 1976... Congress abandoned its prior approach to public lands and instituted a preference for retention of the lands in federal ownership, with an increased emphasis on conservation and preservation."). While FLPMA repealed R.S. 2477, it did not alter landowners' rights to access to their inholdings subject to reasonable regulation. *Jenks*, 22 F.3d at 1516; see also 43 U.S.C. §1761(a).

With the passage of the Alaska National Interest Lands Conservation Act of 1980 ("ANILCA"), 94 Stat. 2371 (codified at 16 U.S.C. § 3101 *et seq.*), Congress clarified the Forest Service's obligation to provide access to inholdings. *Jenks*, 22 F.3d at 1516; 16 U.S.C. § 3210(a)[1]; 36 C.F.R. § 251.110; *cf. Jenks*, 22 F.3d at 1516 n.3 ("Section 3210(a) of ANILCA applies to all National Forest System land, not just those in Alaska."). Under ANILCA, the Forest Service can determine what level

of access is adequate to allow the owner reasonable use and enjoyment of their property. *See Adams v. United States*, 255 F.3d 787, 795 (9th Cir. 2001) ("ANILCA commands that the [plaintiffs] be provided access to secure their reasonable use and enjoyment of their property.... However, the [plaintiffs'] exercise of their right of access is not absolute."); *id.* ("[Plaintiffs'] access rights are subject to reasonable regulation pursuant to the relevant statutes."). The Forest Service's ANILCA regulations require landowners to apply for a special use permit to access their inholdings. 36 C.F.R. § 251.112(a).

With respect to common law access rights not governed by ANILCA, the Forest Service regulates access under provisions of the Organic Act that allow the Forest Service to "adopt reasonable rules and regulations which do not impermissibly encroach upon the right[s]" of those who exercise possessory rights on Forest Service land. *United States v. Weiss*, 642 F.2d 296, 299 (9th Cir. 1981); *see also* 36 C.F.R. § 228.12 (preserving right of "access in connection with operations" under the mining laws, 30 U.S.C. § 21-54). Ultimately, given the right of access provided under ANILCA, the courts need not reach alternative theories of rights of access for inholders because the ANILCA regulations are consistent with any patent or common law rights Plaintiffs could assert. *See Jenks*, 22 F.3d at 1518 ("We therefore hold that, regardless of Defendant's patent or common law rights, he must apply for a special use permit as provided for in 36 C.F.R. §251.112(a).").

The Forest Service is entitled to "substantial latitude" in determining how to implement its ANILCA mandates. *Jenks*, 22 F.3d at 1518; *see also Mountain States Legal Found. v. Espy*, 833 F. Supp. 808, 820 (D. Idaho. 1993) (noting the Forest Service has broad

discretion to determine what constitutes adequate access). As such, the Forest Service promulgated its ANILCA regulations requiring (among other things) inholders to obtain a special use permit to gain access to their properties. *See* 36 C.F.R. § 251.110. Courts have found the Forest Service's special use permit process "a reasonable method of implementing ANILCA's statutory mandate to provide access to inholders while assisting the Forest Service in the management and preservation of forest lands," and that the procedures are "not inconsistent with... patent or common law rights." *Jenks*, 22 F.3d at 1518.

The Forest Service's ANILCA regulations define "adequate access" as "a route and method of access to non-Federal land that provides for reasonable use and enjoyment of the non- Federal land consistent with similarly situated non-Federal land and that minimizes damage or disturbance to National Forest System lands and resources." 36 C.F.R. § 251.111. The regulations further clarify that the "authorizing officer shall determine what constitutes reasonable use and enjoyment of the lands based on contemporaneous uses made of similarly situated lands in the area and any other relevant criteria." 36 C.F.R. § 251.114(a).

In sum, whether an inholders' property interests derive from homesteading laws or the mining laws, in order to obtain access or reconstruct a road on National Forest System land, property owners are required to seek authorization from the Forest Service. *See* 36 C.F.R. § 251.110 (ANILCA regulations); 36 C.F.R. § 251.50 (special use regulations).

B. Fifth Amendment Just Compensation Clause

A claim under the Fifth Amendment's Just Compensation Clause has two primary elements that

the courts must adjudicate before awarding compensation. First, plaintiff must possess a compensable property interest at the time the United States is alleged to have taken that interest. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015, 1027-30 (1992); *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1212-13 (Fed. Cir. 2005); *M & J Coal Co. v. United States*, 47 F.3d. 1148, 1153-54 (Fed. Cir. 1995).

Second, the Court must determine that the United States actually took a compensable property interest, by either an action authorized by federal law or a natural consequence of such authority. *M & J Coal Co.*, 47 F.3d at 1153-54; *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1351 n.7 (Fed. Cir. 2004); *Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1352 (Fed. Cir. 2001). Where the United States permanently occupies real property, that occupation by itself is a *per se* taking, provided plaintiff has a property right to be free of the occupation. *Palazzolo v. Rhode Island*, 533 U.S. 606, 616-18 (2001); *Lucas*, 505 U.S. at 1015, 1027-30. Similarly, where the effect of government regulation completely destroys the economically viable or beneficial use of a compensable property interest in land, this complete destruction by itself also is a *per se* taking. *Id.*

IV. FACTUAL BACKGROUND

Plaintiffs Hugh Martin and Sandra Knox Martin (collectively "the Martins") and Kirkland Jones own certain real property in Bland Canyon, which has historically been accessed by Forest Service Road ("FR") 268. *See* Complaint for Just Compensation Under 28 U.S.C. § 1491 ¶¶ 1-8, ECF No. 1 ("Complaint" or "Compl."[2]; Ex. 1; *see also* ECF No. 10. The Martins allege that they own mining claims known as the Pino

Lode, the Mogul Lode, the Crown Point Lode, the Avondale Lode, the Monte Cristo Lode, and the Carena Lode. Compl. ¶¶ 1(a)-(f). Mr. Jones alleges that he owns the Denver Girl Lode mining claim. *Id.* ¶ 5(a).

Plaintiffs Theron and Sherilyn Maloy (collectively "the Maloys") own certain real property in Cochiti Canyon, which has historically been accessed by FR 89. Compl. ¶¶ 9-10; Ex.1. The Maloys allege that they own land in the Pine Creek Meadows subdivision, as well as "the northerly portion of the Pine Tree Lode" mining claim. Compl. ¶ 9(c).

Beginning on June 26, 2011, the Las Conchas fire burned in the Jemez Mountains region of northwest New Mexico, including portions of the Santa Fe National Forest, as well as numerous private inholdings. Ex. 1; Compl. ¶ 21. "[M]any homes and other improvements were destroyed." Ex. 1. Subsequent heavy rains lead to significant flooding in the burned area, which "heavily damaged" FR 89 and 268. Ex. 2 at 1; Compl. ¶ 21.

"After the fire, [the Forest Service] assessed the condition of roads accessing private lands for hazards like falling trees, flooding, debris flows and rock fall." Ex. 1. On August 25, 2011, Forest Service personnel conducted a reconnaissance of the burned area by helicopter and observed that "[a] few short segments of FR 89 were still intact" and that "FR 268 had more remaining segments, but so much of [FR 268 was] damaged that it too [was] impassable." Ex. 2 at 1. In its letter of September 23, 2011, the Forest Service noted that "flooding events since August 25 [] have compounded the damage," and that virtually the entire length of FR 89 had been destroyed. *Id.*; Compl. ¶ 21 ("The destruction of these roads rendered the [p]roperties at issue in this lawsuit inaccessible to vehicle traffic."). The Forest Service "cut trees posing

imminent threats, cleared road surfaces and repaired drainage," in the burned area. Ex. 1.

"Beginning in August [2011, the Forest Service] authorized private landowners to access their private land along certain roads [] cleared of imminent hazards." *Id.* However, due to the extent of the damage to FR 89 and FR 268, the Forest Service "did not authorize motorized access over the damaged portions." *Id.* Instead, private landowners were "authorized to enter by hiking, either from a safe parking spot on [FR 89 or FR 268] or via Trail 113." *Id.*; Ex. 2 at 1-2.

On September 23, 2011, the Forest Service notified private landowners that it would authorize limited access to the affected properties through "some combination of vehicle and hiking." Ex. 2 at 1. The Forest Service proposed certain access routes and explained the process for obtaining a waiver to access the area. *Id.* at 1-2. On March 19, 2013, Mr. Jones requested information regarding accessing his property, Ex. 3, and the Forest Service responded on March 28, 2013, explaining the process by which Mr. Jones could gain access to his property. Ex. 4. No permit fees were requested of Mr. Jones. *Id.*

On December 29, 2011, the Forest Service issued an Order restricting activities within the Las Conchas fire area, including FR 89 and FR 268. Ex. 5. The Forest Service determined that "[t]hese roads will not be reconstructed in the foreseeable future, because repeated flooding events will continue until the watersheds recover." Ex. 1. On April 13, 2012, the Forest Service notified the affected landowners, including Plaintiffs, that it would continue to close FR 89 and FR 268 "to public access for the foreseeable future." Ex. 6; *see also* Compl. ¶¶ 23-24; ECF No. 1-2 (Ex. B to Compl.). The Forest Service again explained

that affected landowners would "continue to have adequate and reasonable access to [their] property." Ex. 6. The Forest Service explained the available options for affected landowners to "establish future vehicular access to [their] property," as follows:

> 1. A new (reconstructed) road over existing alignment. You and your neighbors can collectively work together to reconstruct the old road over more or less the same alignment. We can facilitate the creation of a formal road association, which would then be granted a recordable private road easement which would ensure legal and physical access to your private land.
> 2. A new road over a new alignment. You and your neighbors could work together to establish a formal road association (as above) and build a road over a new route which we would help you choose. Unfortunately, given the topography of these canyons, new road alignments will be challenging to locate. A private road easement would be granted to the newly formed road association in the same manner as above.

Id. at 1. The Forest Service has no record of an application by Plaintiffs seeking authorization to reconstruct FR 268 or 89. *See* Ex. 7 ("To date [the Forest Service] ha[s] no record of any landowner along these roads contacting the [agency] to begin the process of obtaining such authorization."). Plaintiffs have not alleged that they have sought a permit for access or followed either option outlined by the Forest Service to

re-establish vehicular access to their properties. *See generally* Compl.

V. STANDARDS OF REVIEW

A. Standard of Review Under RCFC 12(b)(1)

Rule 12(b)(1) provides for dismissal of a claim if a court lacks subject matter jurisdiction over that claim. Jurisdiction is a threshold matter, which the Court must resolve before proceeding to evaluate the merits of a claim. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). The party invoking the Court's jurisdiction bears the burden of establishing that jurisdiction exists at all stages of the case. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1353 (Fed. Cir. 2006), *aff'd*, 552 U.S. 130 (2008).

In deciding a Rule 12(b)(1) motion, a court is not limited to the allegations in the Complaint, but may consider material outside of the pleadings in its effort to determine whether the court has jurisdiction in the case. *See Crusan v. United States*, 86 Fed. Cl. 415, 417-18 (2009), *aff'd*, 374 F. App'x 18 (Fed. Cir. 2009); *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991). Where plaintiffs cannot meet their burden of establishing that a court has jurisdiction over claims, the court should dismiss those claims. *See Truckee-Carson Irrigation Dist. v. United States*, 14 Cl. Ct. 361, 368 (1988), *aff'd*, 864 F.2d 149 (Fed. Cir. 1988) (Table).

B. Standard of Review Under RCFC 12(b)(6)

Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law. "To

survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* And "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability,'" it does not plead a claim on which it is entitled to relief. *Id.*

Although a court must accept the plaintiffs' allegations of fact as true, it is not required to accept as correct the legal conclusions the plaintiff would draw from such facts. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," and "naked assertion[s] devoid of further factual enhancement" do not suffice to state a cause of action and must be disregarded. *Id.* (quoting *Twombly*, 550 U.S. at 557) (internal quotation omitted); *accord Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009).

VI. ARGUMENT

A. Plaintiffs' Claims Should Be Dismissed for Lack of Subject Matter Jurisdiction Because They Have Not Yet Applied for a Special Use Permit for Access and the Claims are Therefore Not Ripe.

Plaintiffs allege that the Forest Service has taken their property by "attempting to extract special

use permits, permit fees, and by requiring Plaintiffs to follow prohibitively expensive procedures in order to obtain special use permits." Compl. at 1-2; ¶ 31. Plaintiffs fail to articulate whether the Forest Service has allegedly effectuated a physical or regulatory taking[3] But a taking claim based on the denial of a permit or a right of way from an agency is a properly analyzed as regulatory claim. *See, e.g.*, *Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1364 (Fed. Cir. 1999) (describing the denial of a permit as "a classic example of a regulatory taking claim"); *see also Palazzolo*, 533 U.S. at 617 (explaining that a regulatory taking may occur "when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs").

Plaintiffs allege that the Forest Service has "denied Plaintiffs of all meaningful access to their private property." Compl. at 2. But to the extent that the facts of Plaintiffs' Complaint could be construed as a regulatory taking for requiring them *to seek* a special use permit, their claim fails as a matter of law:

> [T]he mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking. The reasons are obvious. A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, *the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired.*

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126-27 (1985) (citing *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 293-297 (1981). (emphasis added). "Only where a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred." *Id.* at 127. Where no permit has been sought and denied, Plaintiffs' taking claim is not ripe. *See Howard W. Heck & Assocs. v. United States*, 134 F.3d 1468, 1473 (Fed. Cir. 1998); *see also Estate of Hage v. United States*, 687 F.3d 1281, 1286 (Fed. Cir. 2012) ("A regulatory takings claim 'is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.'" (quoting *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985)).

Ripeness is a constitutional and jurisdictional doctrine derived from Article III's "case or controversy" clause. *See State Farm Mut. Auto Ins. Co. v. Dole*, 802 F.2d 474, 479 (D.C. Cir. 1986). Where a defendant challenges subject matter jurisdiction under RCFC 12(b)(1) or otherwise, the party commencing the cause of action bears the burden of establishing jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (once jurisdiction is raised, Court presumes that "cause lies outside [our] limited jurisdiction" and that "the burden of establishing the contrary rests upon the party asserting jurisdiction") (citations omitted); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988).

Here, Plaintiffs' takings claims are not ripe because they have not taken any steps to comply with the Forest Service's ANILCA regulations requiring

them to seek a special use permit or easement to cross Forest Service land. *See* Ex. 7 ("Thus, the Forest Service has not had the opportunity to review any proposals or make any final decisions regarding repair or reconstruction of these roads."); *see generally Compl.* (failing to allege that Plaintiffs sought or were denied a special use permit). Notably, contrary to Plaintiffs' claims, the Forest Service has indicated its willingness to allow access to Plaintiffs' properties. *See* Ex. 6 ("[T]he Forest Service will continue to work with you to ensure that you continue to have adequate and reasonable access to your property."); ECF No. 1-2 (same).

Because of Plaintiffs' decision not to submit a special use permit application and thereby seek a decision from the Forest Service as to whether Plaintiffs may rebuild the relevant portions of FR 268 or FR 89, Plaintiffs have failed to ripen a claim, precluding this Court from determining if the Forest Service has taken—or will ever take—their property. This Court consequently lacks jurisdiction because Plaintiffs' taking claim "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue." *Williamson Cty. Reg'l Planning Comm'n*, 473 U.S. at 191; *see also Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 732-33, 735 (1998) (action not ripe where "courts would benefit from further factual development of the issues presented"); *Texas v. United States*, 523 U.S. 296, 300 (1998); *Stearns Co., Ltd. v. United States*, 396 F.3d 1354, 1357-58 (Fed. Cir. 2005) (takings claim premised on alleged mining rights not ripe where agency retains administrative authority to grant relief that would allow plaintiff to "use the property in question").

The Forest Service has stated its willingness ensure that reasonable access rights for landowners in this area are preserved. At this time, due to safety concerns and the fact Forest Roads 268 and 89 cannot currently support vehicular traffic, landowners may access their properties via a combination of vehicle and hiking. If a landowner wishes to obtain additional or alternative access, they have a means under the Forest Service regulations to pursue authorization for access and permission to reconstruct the roads. Unless and until the Forest Service issues a decision denying Plaintiffs' access, their claims that the Forest Service's actions have effectuated a taking are not ripe.

B. Plaintiffs Fail to State a Claim Upon Which Relief May be Granted Because Plaintiffs Lack a Compensable Property Interest in Forest Roads 268 or 89.

Plaintiffs contend that they "are successor holders of right-of-way easements that constitute real property rights first created and existing as derived" through R.S. 2477. Compl. ¶14; *id.* ¶ 20 ("Plaintiffs accordingly own easements that exist concurrently and in the same space as [Forest] Roads 268 and 89."). Plaintiffs repeatedly reference their "statutorily vested, real property right-of-way easement[s]," Compl. ¶¶ 1, 5, 9-10, 14, 20, but fail to articulate any theory as to how those alleged property interests were taken by the Forest Service. To the extent that Plaintiffs suggest the Forest Service's ANILCA special use permit requirements have effected a taking on these alleged easements, *see* Compl. ¶ 1 (claiming a compensable taking is the result of the Forest Service "denying and refusing to recognize the statutorily

vested real property right-of-way easements of Plaintiffs"), Plaintiffs are wrong.

To establish a taking, Plaintiff "must show that the government, by some specific action, took a private property interest for a public use without just compensation." *Adams v. United States*, 391 F.3d 1212, 1218 (Fed. Cir. 2004) (citing *Hodel*, 452 U.S. at 294 (Rehnquist J., concurring)). The Federal Circuit applies a two-part test to determine whether a government act constitutes a taking. *M & J Coal Co.*, 47 F.3d at 1153-54. First, a plaintiff must possess a compensable property interest at the time the United States is alleged to have taken the interest. *Maritrans Inc. v. United States*, 342 F.3d 1344, 1351 (Fed. Cir. 2003); *Holden v. United States*, 38 Fed. Cl. 732, 735 (1997) ("In order to properly state a claim for a taking under the Fifth Amendment, a plaintiff must allege and establish his ownership in a compensable property interest." (citations omitted)). Thus, in this case, Plaintiffs must establish a compensable interest in the Forest Service roads that were alleged to have been taken. Second, the Court must determine that the action taken by the United States actually took the compensable property interest. *Id.*; *M & J Coal Co.*, 47 F.3d at 1153-54.

Here, Plaintiffs cannot demonstrate that they own any property interest in Forest Roads 268 or 89. Plaintiffs do not present even a colorable argument that they own valid easements in the roads by way of R.S. 2477. No court has found that a *private* party may assert R.S. 2477 as a means of obtaining an easement in a *public* highway authorized by R.S. 2477. *See SW Four Wheel Drive Ass'n v*, 363 F.3d at 1071 (holding that association could not demonstrate a property interest in R.S. 2477 roads as members of the public); *Fairhurst Family Ass'n v. U.S. Forest Serv.*, 172 F.Supp.2d 1328,

1332 (D. Colo. 2001) (holding the term "highway" found in R.S. 2477 means "public road," and refusing to find a statutory right-establishing the existence of a R.S. 2477 highway.); *Peper v. U.S. Dep't of Agric.*, No. 04-cv-01382-ZLW-PAC, 2006 WL 2583119, at *1 (D. Colo. Sept. 5, 2006), *aff'd*, 478 F. App'x 515 (10th Cir. 2012) ("Plaintiff's interest in the road under R.S. 2477 is not the type of interest that permits a suit to quiet title because members of the public do not have title to public roads."); *see also Kinscherff*, 586 F.2d at 160 ("Members of the public as such do not have a 'title' in public roads. To hold otherwise would signify some degree of ownership as an easement. It is apparent that a member of the public cannot assert such an ownership in a public road."); *S. Utah Wilderness All. v. BLM*, 147 F. Supp. 2d 1130, 1143 (D. Utah 2001) (upholding BLM's definition that "a highway for purposes of R.S. 2477 is a road freely open to everyone; a public road," as reasonable (quoting U.S. Dept. of the Interior policy memorandum) (internal marks omitted)).

Plaintiffs' property interests are in fact limited to the extent of their inholdings, *see* Compl. ¶¶ 1, 5, 9, and as discussed above, any claim that the Forest Service has denied reasonable access to their inholdings is not ripe. If Plaintiffs' complaint is construed as arguing that the Forest Service has taken their easements in Forest Roads 268 or 89, that claim fails because Plaintiffs are barred from asserting such ownership interests in a public road. *See SW Four Wheel Drive Ass'n*, 363 F.3d at 1071; *Fairhurst Family Ass'n*, 172 F.Supp.2d at 1332; *Kinscherff*, 586 F.2d at 160. Because Plaintiffs lack a compensable property interest in Forest Roads 268 or 89 that could have been taken, the Complaint should be dismissed pursuant to RCFC 12(b)(6).

VII. CONCLUSION

The Forest Service acknowledges that Plaintiffs are entitled to the reasonable use and enjoyment of their inholding properties, with access subject to reasonable regulation under ANILCA. To the extent that Plaintiffs argue the ANILCA regulations and special use permit process effected a taking of their property by denying them meaningful access to their properties, that claim is not ripe. Plaintiffs have submitted no application for a special use permit. Nor has any permit for access been denied. The Court lacks jurisdiction over this claim and the United States respectfully requests the Court to dismiss Plaintiffs' claims under RCFC 12(b)(1).

Moreover, Plaintiffs' argument that they own an interest in in Forest Roads 268 or 89 by way of R.S. 2477 fails because private parties cannot assert an interest in public roads. The United States respectfully requests the Court to dismiss Plaintiffs' claims under RCFC 12(b)(6) because Plaintiffs fail to demonstrate that they own a compensable property interest in Forest Roads 268 or 89 and, thus, failed to state a claim upon which relief may be granted.

Respectfully submitted this 17th day of January, 2017.

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Footnotes

[1] 16 U.S.C. § 3210(a) states:
Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Agriculture may prescribe, the Secretary shall provide such access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: *Provided*, That such owner comply with rules and regulations applicable to ingress and egress to or from the National Forest System.

[2] The Factual Background section relies largely on facts alleged in the Complaint, which are assumed to be true solely for purposes of this motion. The United States submits the attached exhibits in support of its argument that Plaintiffs' claims should be dismissed under Rule 12(b)(1). Further, this Court may rely on the United States' exhibits and facts beyond the complaint in granting its motion under Rule 12(b)(6) where, as here, those documents clarify the allegations or do not add anything new to the allegations. *See Enervations, Inc. v. Minn. Mining and Mfg. Co.*, 380 F.3d 1066, 1069 (8th Cir. 2004) (finding that documents embraced by the pleadings are not "matters outside the

pleading," as contemplated by Rule 12(d)); *GFF Corp. v. Assoc'd Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384-85 (10th Cir. 1997) (listing cases from each circuit holding that documents "referred to in the complaint" and "central to the plaintiff's claim," are not matters outside the pleadings).

[3] Plaintiffs also fail to allege the amount of the (supposedly excessive) fees required to apply for a special use permit. *See generally Compl.* Nor do Plaintiffs include allegations that they have paid any fees whatsoever to the Forest Service for access to their property. *Id.*

EXHIBIT 1

USDA Forest Service
Santa Fe National Forest

Briefing Paper
Las Conchas Fire—Access to Private Land
In Bland and Cochiti Canyons

February 16, 2012

Issue: Forest Roads 268 and 89 access Bland and Cochiti Canyon from the south. These are the only roads providing access to those canyons. There are about 100 private parcels in the canyons, and 45-50 of those parcels had homes and improvements which were destroyed. The roads were almost completely destroyed by flooding resulting from heavy rain on the intensely burned watersheds. These roads will not be reconstructed in the foreseeable future, because repeated flooding events will continue until the watersheds recover. In addition, there is no public need to reconstruct the roads, even after recovery. The only potential need for the roads is to serve private land.

Background: The Las Conchas fire burned about 150,000 acres in the Jemez Mountains in the summer of 2011. Much of the area was burned at high intensity and created extensive resource damage. There are numerous private inholdings within the burn perimeter, and many homes and other improvements were destroyed. After the fire, we assessed the condition of roads accessing private land for hazards like falling trees, flooding, debris flows and rock fall. We cut trees posing imminent threats, cleared road surfaces and

repaired drainage. Beginning in August, we authorized private landowners to access their private land along certain roads we had cleared of imminent hazards. We did not authorize motorized access over the damaged portions of FR 268 and 89 because they had been destroyed as roads. Those private landowners were authorized to enter by hiking, either from a safe parking spot on each road or via Trail 113.

The Forest Service has a statutory obligation to provide access to private land within the National Forest boundary (Alaska National Interest Lands Conservation Act of 1980 (P.L. 96-487, 16 U.S.C. 3210, §1323(a)). However, we are not required (nor is it appropriate) to expend public funds to create or maintain the access.

Current Status: We are notifying each private landowner with property in Bland and Cochiti Canyons that we will not be reconstructing the roads and that, when watershed conditions improve sufficiently, we will consider proposals from an association of landowners if they want to reconstruct the roads. For the foreseeable future, they may access their land by hiking or using off-road motorcycle or ATV over certain routes.

Key Points:

- Access to landowners in these two canyons will not be available by conventional motorized vehicle for the foreseeable future;
- We will not reconstruct the roads with public funds after watershed recovery;
- This change exacerbates the losses already suffered by these landowners, and we can expect attempts to convince the Forest Service, FEMA or Sandoval County to reconstruct these roads

with public funds;

- Other landowners whose access is from the north are generally in a different situation, because roads were not entirely destroyed and long-term repeated flooding of devastating proportions is not expected. These landowners currently have been authorized motorized access, and that is expected to continue.

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EXHIBIT 2

United States Department of Agriculture
Forest Service
Santa Fe National Forest

Supervisor's Office
11 Forest Lane
Santa Fe, New Mexico 87508
PH 505-438-5300 FAX 505-438-5391

File Code: 2520-3
Date: September 23, 2011

Dear Private Landowners in Bland and Cochiti Canyons:

As you may know, we have experienced several significant flooding events in the Las Conchas fire burned area. We did a reconnaissance helicopter flight over Bland and Cochiti canyons on August 25 to look at effects of the first big flooding events on August 21 and 22. At that time, it was apparent that Forest Roads 89 and 268 were heavily damaged by flooding. A few short segments of FR 89 were still intact, but virtually the entire road is now destroyed. FR 268 had more remaining segments, but so much of it is damaged that it too is impassable. Flooding events since August 25 will have compounded the damage. At this time, we cannot predict when the landscape will have recovered sufficiently that conditions will stabilize in these canyon bottoms.

We have heard from a number of landowners in these areas who still want to access their property at least

one time for various reasons. As we approach the season when rain and flooding events will subside, we believe some combination of vehicle and hiking access can be authorized over particular routes and under certain conditions that will minimize risk.

We are prepared to consider limited access for landowners with an authorization that specifies a combination of driving and hiking over specific routes and under specific weather conditions. Specifically, for Cochiti Canyon/Pines, we can authorize vehicular access via FR 289/36/268 to the trailhead for Trail 113 on the west or via FR 289 to the trailhead for Trail 113 on the east. These routes and parking spots are shown on the attached map. From either of those points, you may travel by foot into Cochiti Canyon/Pines using a combination of Trail 113 and cross-country routes. Our staff has hiked Trail 113 from FR 289 and Trail 113 from FR 268 into Pines. Both routes can be traversed, but numerous hazards remain, including burned standing trees, washed out sections and unstable rocks on steep slopes. If you elect to hike into the canyon, you should choose a day with minimal wind and no rain predicted and plan to travel in and return to your vehicle early in the day. You should travel with a companion and leave information about your route and return time with family or friends.

- For those who need access into either canyon from the south, we can authorize vehicular access to a parking area situated along FR 89 a short distance after the intersection with FR 286 shown on the attached map or to the parking place on FR 268 also shown on the map. Do not park in a location at these points that will block the road for emergency access beyond that point.

> From either of those points, you may travel by foot up the old route of FR 89 or the old route of FR 268. Neither road still exists in a condition that can be accessed safely by vehicle. As long as a threat of rain exists, neither route from the south will be safe. On days when no rain occurs, either route should be safe from flooding.

On any of the routes authorized for foot travel, hazards still exist in the form of standing burned trees, which may fall with or without wind, rocks which may roll from steep slopes, and burned stump holes.

You can obtain an authorization for the travel by signing a copy of the attached waiver. Waivers and gate keys will be issued to individual landowners at the Jemez District Office in Jemez Springs (M-F 8:00 to 4:30), Walatowa Visitor Center (Fri-Mon 8:00-12:00/1:00-5:00), and Los Alamos Forest Service Office (Mon-Wed and Friday 8:00-12:00/12:30-4:30). For access from the south, waivers and lock combinations may also be issued at the Santa Fe National Forest Headquarters Office in Santa Fe (Mon-Fri 8:00-4:30). You may not acquire an authorization for anyone else, including family members. Each person is required to sign a waiver in person.

The waivers and keys are not transferable and must be in the possession of anyone entering the closed area. Further details are included in the waiver example enclosed.

Sincerely,

/s/ Maria T. Garcia
MARIA T. GARCIA

FOREST SUPERVISOR

LAS CONCHAS BURNED AREA ACCESS LIABILITY WAIVER AND AGREEMENT

WAIVER AND AGREEMENT HOLDER (print name): _____

This Waiver and Agreement authorizes the holder to access their private property within the area affected by the Las Conchas Fire by crossing over official National Forest Roads, trails and land during a declared Closure Order. This Agreement and Waiver waives any and all claims against the United States (which shall include the United States, including all agencies or instrumentalities of the United States, its assigns, agents, employees, contractors, lessees, cooperating agencies, and permittees, both in their individual and official capacities) for damages, injury, and or death associated with such access. No other rights or permission of any kind are extended with this Agreement and Waiver. Required conditions of this Agreement and Waiver are as follows:

I, the holder, have been advised and am aware that access across National Forest Roads and land within the area of a Closure Order is an inherently dangerous activity. I, the holder, have been advised and am aware that my presence at my private property within the area affected by the Las Conchas Fire is an inherently dangerous activity. I, the holder, have been advised and am aware that the following are some, but not all, of the potential public health and safety hazards, which may be encountered while accessing private property over NFS system lands and/or my presence at my private property within the area affected by the Las Conchas Fire:

- Fire
- Flash floods and landslides

- Fire weakened or dead trees
- Unsafe and/or substandard roads and trails which are not safe to travel
- Lack of signage for roads and trails and/or safety hazards on roads and trails
  Stump holes and large rolling rocks
  Firefighting personnel and equipment
- Firefighting activities
- Post-fire rehabilitation activities
- Hazardous materials
- Hidden hazards
- Attractive nuisances
- Artificial conditions which present an unreasonable risk of death, bodily harm or damage
- Lack of any warning signs or notice of hazards and/or conditions named above

I, the holder, accept and assume all risk of injury and/or death, and or damage to or loss of property associated with accessing private property over National Forest Roads and land, including but not limited to theft, vandalism, direct and indirect effects of fire, any fire-fighting and/or post fire rehabilitation, activities (including prescribed burns), avalanches, flash flood, rising waters, winds, falling limbs or trees, landslide, acts of third parties, and Acts of God; and I, for myself and for my heirs, executor, administrator, personal representative, and assigns, do hereby forever waive and release the United States from all rights and claims for direct or indirect injury, damages or losses, whether monetary or otherwise compensatory which I may have against the United States.

I, the holder, acknowledge and agree that I shall be liable for all injury and damage caused by me or my heirs, assigns, agents, employees, contractors, or

lessees. These damages include, but are not limited to, damage to government-owned roads, trails, improvements, and natural resources and all costs and damages associated with or resulting from the release or threatened release of a solid waste or hazardous material occurring during or as a result of activities of the holder or the holder's heirs, assigns, agents, employees, contractors, or lessees on, or related to the lands, property, and other interests covered by this waiver. In addition, I acknowledge I have an affirmative duty to protect lands of the United States from any such injury or damage associated with my activities.

I, the holder, acknowledge and agree that this waiver must be in my possession at all times while accessing private property across National Forest Roads, trails and land, that this waiver is non-transferable.

I, the holder, acknowledge and agree that any of my heirs, assigns, agents, employees, contractors, or lessees, who require access will be chaperoned personally by me at all times. I, the holder, acknowledge and agree that I am responsible for informing any of my heirs, assigns, agents, employees, contractors, or lessees, who require access for the requirements of this Waiver and Agreement, that I am responsible for ensuring my heirs, assigns, agents, employees, contractors, or lessees, who require access comply with the terms of this Waiver and Agreement. Failure of any heirs, assigns, agents, employees, contractors, or lessees, of the holder to fully comply with this Waiver and Agreement will cause the holder of this agreement to be fully liable for any incident which may occur as a result of non-compliance with this agreement.

I, the holder, shall indemnify, defend, and hold the United States harmless for any costs, damages, claims, liabilities, and judgments arising from past, present, and future acts or omissions by me in connection with accessing private property over National Forest Roads. This indemnification and hold harmless provision includes, but is not limited to, acts and omissions of my heirs, assigns, agents, employees, contractors, or lessees in connection with accessing private property over National Forest Roads, trails and land.

I, the holder, acknowledge issuance and receipt of one padlock key to the Forest Service installed padlock controlling gated access to the Forest. This key shall be retained only by the holder and no copies of the key shall be made. I acknowledge that possession of this key or any copy by anyone other than me will immediately cause the holder of this agreement to be fully liable for any incident which may occur as a result of noncompliance with this agreement, terminate this agreement, and my access permission will be forfeited regardless of circumstances. I acknowledge that I will ensure the padlock is immediately relocked by me once passing through the gate and that any failure to immediately re-lock the padlock, for any reason, whether intentional, negligent, an act of third party, or Act of God, will immediately terminate this agreement.

I, the holder, acknowledge and agree that my entry into the Santa Fe National Forest is strictly limited to traveling across official System roads, trails and land (no recreational use, hunting, wood gathering), and I further acknowledge that the only portions of the burned area I am authorized to use to access private lands are the roads and areas indicated on the attached map, which is a part of and must accompany this agreement.

I, the holder acknowledge and agree that access is limited to only that provided in this Waiver and Agreement and that any activity taken by Holder which is not expressly allowed by the Agreement and Waiver shall terminate this agreement, shall constitute a violation of the Closure Order, and may subject the holder to civil and criminal fines and penalties.

This Waiver and Agreement may be unilaterally terminated by the United States at any time for any reason without any notice or opportunity to cure. Upon verbal and/or written notice from the United States of termination of this Waiver and Agreement the holder will immediately deliver the padlock key to the United States. Termination of this Agreement and Waiver shall serve to terminate the right of access provided for under this Agreement, but the Waiver of all claims for access associated with this agreement shall remain in force and effect forever.

I, the holder, have read this waiver document, and certify by my signature below that I understand and accept these terms and conditions.

Signature: _____
Holder/Landowner

Date: _____

Signature: _____
Authorized Forest Service Officer

Date: _____

ROAD ACCESS LIABILITY WAIVER AND AGREEMENT

WAIVER AND AGREEMENT HOLDER (print name): _____

This Waiver and Agreement authorizes the holder to access their private property within the area affected by the Las Conchas Fire by crossing over official National Forest Roads during declared Closure Order #10-358. This Agreement and Waiver waives any and all claims against the United States (which shall include the United States, including all agencies or instrumentalities of the United States, its assigns, agents, employees, contractors, lessees, cooperating agencies, and permittees, both in their individual and official capacities) for damages, injury, and or death associated with such access. No other rights or permission of any kind are extended with this Agreement and Waiver. Required conditions of this Agreement and Waiver are as follows:

I, the holder, have been advised and am aware that access across National Forest Roads during Closure Order #10-358 is an inherently dangerous activity. I, the holder, have been advised and am aware that my presence at my private property within the area affected by the Las Conchas Fire is an inherently dangerous activity. I, the holder, have been advised and am aware that the following are some, but not all, of the potential public health and safety hazards, which may be encountered while accessing private property over NFS system lands and/or my presence at my private property within the area affected by the Las Conchas Fire:

- Fire
- Flash floods and landslides

- Fire weakened or dead trees
- Unsafe and/or substandard roads which are not safe to travel
- Lack of signage for roads and/or safety hazards on roads
- Stump holes and large rolling rocks
- Firefighting personnel and equipment
- Firefighting activities
- Post-fire rehabilitation activities
- Hazardous materials
- Hidden hazards
- Attractive nuisances
- Artificial conditions which present an unreasonable risk of death, bodily harm or damage
- Lack of any warning signs or notice of hazards and/or conditions named above

I, the holder, accept and assume all risk of injury and/or death, and or damage to or loss of property associated with accessing private property over National Forest Roads, including but not limited to theft, vandalism, direct and indirect effects of fire, any fire-fighting and/or post fire rehabilitation activities (including prescribed burns), avalanches, flash flood, rising waters, winds, falling limbs or trees, landslide, acts of third parties, and Acts of God; and I, for myself and for my heirs, executor, administrator, personal representative, and assigns, do hereby forever waive and release the United States from all rights and claims for direct or indirect injury, damages or losses, whether monetary or otherwise compensatory which I may have against the United States.

I, the holder, acknowledge and agree that I shall be liable for all injury and damage caused by me or my heirs, assigns, agents, employees, contractors, or

lessees. These damages include, but are not limited to, damage to government-owned roads, trails, improvements, and natural resources and all costs and damages associated with or resulting from the release or threatened release of a solid waste or hazardous material occurring during or as a result of activities of the holder or the holder's heirs, assigns, agents, employees, contractors, or lessees on, or related to the lands, property, and other interests covered by this waiver. In addition, I acknowledge I have an affirmative duty to protect lands of the United States from any such injury or damage associated with my activities.

I, the holder, acknowledge and agree that this waiver must be in my possession at all times while accessing private property across National Forest Roads, that this waiver is nontransferable.

I, the holder, acknowledge and agree that any of my heirs, assigns, agents, employees, contractors, or lessees, who require access will be chaperoned personally by me at all times. I, the holder, acknowledge and agree that I am responsible for informing any of my heirs, assigns, agents, employees, contractors, or lessees, who require access for the requirements of this Waiver and Agreement, that I am responsible for ensuring my heirs, assigns, agents, employees, contractors, or lessees, who require access comply with the terms of this Waiver and Agreement. Failure of any heirs, assigns, agents, employees, contractors, or lessees, of the holder to full comply with this Waiver and Agreement will immediately terminate this Waiver and Agreement.

I, the holder, shall indemnify, defend, and hold the United States harmless for any costs, damages, claims, liabilities, and judgments arising from past, present, and future acts or omissions by me in

connection with accessing private property over National Forest Roads. This indemnification and hold harmless provision includes, but is not limited to, acts and omissions of my heirs, assigns, agents, employees, contractors, or lessees in connection with accessing private property over National Forest Roads.

I, the holder, acknowledge issuance and receipt of one padlock key to the Forest Service installed padlock controlling gated access to the Forest, located along State Highway #4. This key shall be retained only by the holder and no copies of the key shall be made. I acknowledge that possession of this key or any copy by anyone other than me will immediately terminate this agreement, and my access permission will be forfeited regardless of circumstances. I acknowledge that I will ensure the padlock is immediately relocked by me once passing through the gate and that any failure to immediately re-lock the padlock, for any reason, whether intentional, negligent, an act of third party, or Act of God, will immediately terminate this agreement.

I, the holder, acknowledge and agree that my entry into the Santa Fe National Forest is strictly limited to traveling across official System roads (no stopping, cross country travel, parking, or recreational use), and I further acknowledge that the only roads I am authorized to use to access private lands are the roads indicated on the attached map, which is a part of and must accompany this agreement.

I, the holder acknowledge and agree that access is limited to only that provided in this Waiver and Agreement and that any activity taken by Holder which is not expressly allowed by the Agreement and Waiver shall terminate this agreement, shall constitute a violation of Closure Order #10-358, and may subject the holder to civil and criminal fines and penalties.

This Waiver and Agreement may be unilaterally terminated by the United States at any time for any reason without any notice or opportunity to cure. Upon verbal and/or written notice from the United States of termination of this Waiver and Agreement the holder will immediately deliver the padlock key to the United States. Termination of this Agreement and Waiver shall serve to terminate the right of access provided for under this Agreement, but the Waiver of all claims for access associated with this agreement shall remain in force and effect forever.

I, the holder, have read this waiver document, and certify by my signature below that I understand and accept these terms and conditions.

Signature: _____
Holder/Landowner

Date: _____

Signature: _____
Authorized Forest Service Officer

Date: _____

Las Conchas Fire – South Authorized Parking Location

[Printer Note: Map found @ https://drive.google.com/file/d/1aH2T7u6I6olti-6DeFqDn-fUaSRYIx-t/view?usp=sharing

Name	Address 1	City	Stat	Zip	
Stevenson Family	3333 Santa Clara SE	Albuquerque	NM	87106	No. 3629-1507
Thomas C. Zettel	5304 Estrellita de	Albuquerque	NM	87111-1668	No. 3629-1606
Harry M. Murphy,	3912 Hilton NE	Albuquerque	NM	87110	No. 3629-1705
Bolling P. &	1008 Montpelier Drive	Greensboro	NC	27410	No. 3629-1514
Leyndel G. Wilson	12900 SW 9th Street,	Beaverton	OR	97005-9204	No. 3629-1613
Michael L. &	2331 Salvador Road,	Albuquerque	NM	87105	No. 3629-1712
Dion Pat & Mary	535 Commanche NE	Albuquerque	NM	87107	No. 3629-1521
Mark Yerkes & Deborah Howard-	2 Adobe Lane	Sandia Park	NM	87047-9330	No. 3629-1620
Estate of Burton	864 Nicklaus Drive	Rio Rancho	NM	87124-3436	No. 3629-1729
Roxilana L. Moore	1613 Mesa Drive	Roswell	NM	88201	No. 3629-1538
Thomas W. & Laurel M. Reed	10501 Lagrima De Oro Road NE, #4108	Albuquerque	NM	87111-6924	No. 3629-1637
Rick & Susan J.	1104 Park Avenue SW	Albuquerque	NM	87102	No. 3629-1743
Maloy Gang Trust	4241 Roma NE	Albuquerque	NM	87108	No. 3629-1545
Lawrence M. &	70 Georgia O'Keeffe	Durango	CO	81301	No. 3629-1644
Billie Alameda, c/o Geer, Wissel, &	P.O. Box 7549	Albuquerque	NM	87194	No. 3629-1750

Name	Address 1	City	Stat	Zip	
Thomas J. & Theresa M.	1360 Barranca Road	Los Alamos	NM	87544	No. 3629-1552
Margaret R. Bom	2712 Whippoorwill	Charleston	IL	61920-4144	No. 3629-1651
Webb Family	3214 Falkirk Road,	Rio Rancho	NM	87144-6208	No. 3629-1767
Steven, Rosa, & Alejandro	2530 Lakeview SW	Albuquerque	NM	87105	No. 3629-1569
Quentin Lee Webb	2109 Broadway, Apt.	New York	NY	10023-2106	No. 3629-1668
Toby R. &	913 Adams NE	Albuquerque	NM	87110	No. 3629-1774
Linda Louise and	140 Las Paredes	Corrales	NM	87048-8426	No. 3629-1576
Theron & Sherilyn	37 Camino Cerrito	Edgewood	NM	87015-9737	No. 3629-1675
Terry & Catherine	PO BOX 547	Edgewood	NM	87015	No. 3629-1781
Niall Edmund	P.O. Box 216	Rowe	NM	87562-0126	No. 3629-1583
Jessica M. Schenk & Andrew L.	9104 Snowheights Blvd NE	Albuquerque	NM	87112-2723	No. 3629-1682
John E. & Maxine	10000 Del Chaparral	Albuquerque	NM	87111	No. 3629-1798
Joseph B. &	98 C Gold Mine Road	Cerrillos	NM	87010-9700	No. 3629-1590
Melissa M.	2615 Isleta Boulevard	Albuquerque	NM	87105-5810	No. 3629-1699
Cynthia A.	2615 Isleta Boulevard	Albuquerque	NM	87105-5810	No. 3629-1804
Phillip R. Casados	8115 Wellsburg Court	Albuquerque	NM	87120	No. 3629-1200

Name	Address 1	City	Stat	Zip	
Kathy H. Ulrich &	10204 Ellen Court NE	Albuquerque	NM	87112	No. 3629-1279
Stewart & Carol	1107 Roadrunner	Albuquerque	NM	87107	No. 3629-1378
Hugh & Sandra	302 Hermosa SE	Albuquerque	NM	87108-2614	No. 3629-1477
Kirkland Jones	15495 Flying Circle .	Helotes	TX	78023	No. 3629-1286
Daniel N. Seitz	2889-B Nickel Street	Albuquerque	NM	87544-2115	No. 3629-1385
Brian & Amber	140 Las Paredes	Corrales	NM	87048	No. 3629-1484
Alan R. Dowling	P.O. Box 1595	Magdalena	NM	87825	No. 3629-1293
Edward D.	P.O. Box 1501	Los Lunas	NM	87031	No. 3629-1392
John M. Gallimore	1292 Cobie Lane	Ammon	ID	83406-4629	No. 3629-1491
Peter & Peer	3508 Camino Jalisco	Santa Fe	NM	87507	No. 3629-1118
Everett C. &	233 South Atlantic	Cocoa Beach	FL	32931	No. 3629-1125
Canada del Sol	P.O. Box 2362	Corrales	NM	87048	No. 3629-1132
Everett F. &	5704 Tinnin Road NW	Albuquerque	NM	87107	No. 3629-1149
Melinda Hall,	P.O. Box 1433	Pena Blanca	NM	87041	No. 3629-1163
Maggie M. Craw	P.O. Box 1297	Pena Blanca	NM	87041	No. 3629-1170
Carolyn R.	1500 Gloria Court NE	Albuquerque	NM	87112	No. 3629-1187
Michael A. &	P.O. Box 1066	Moriarty	NM	87035	No. 3629-1194
James P. Mullane	1 La Canada Ranch	Pena Blanca	NM	87401-5018	No. 3629-1156

Name	Address 1	City	Stat	Zip	
Gilbert B. Casados	4108 Lanceleaf Court	Albuquerque	NM	87114	No. 3629-1309
Daniel A. Welch	P.O.Box 130	Crestone	CO	81131-0130	No. 3629-1408
Donald R. Parker	7413 Coors SW	Albuquerque	NM	87121	No. 3629-1217
Otto & Judith	361 Big Horn Ridge	Albuquerque	NM	87122-1424	No. 3629-1316
Gloria Jean	285 Minnesota	Roseville	MN	55113	No. 3629-1415
Jose C. Roybal	P.O. Box 1225	Pena Blanca	NM	87041	No. 3629-1224
Gregory R. &	1617 Cagua NE	Albuquerque	NM	87110	No. 3629-1323
Craig A. & Linda	10708 Calle Linda NW	Corrales	NM	87048	No. 3629-1422
Frederick L. &	1404 Peyton Road	Los Lunas	NM	87031	No. 3629-1231
Thomas L. &	1378 Calle La Bona	Bernalillo	NM	87004-9149	No. 3629-1330
Marilyn R. &	5337 Veronica Drive	Albuquerque	NM	87111	No. 3629-1439
Gilbert & Carolyn	1609 Bluffside SW	Albuquerque	NM	87105	No. 3629-1248
Donald R.	P.O.Box 1687	Cortez	CO	81321	No. 3629-1347
Estella Sanchez	526 Mullen Road NW	Albuquerque	NM	87107	No. 3629-1446
Devona B. Jensen	P.O. Box 543	Richland	WA	99352	No. 3629-1255
Ronald Albert	14416 Arcadia NE	Albuquerque	NM	87123	No. 3629-1354
James & Rebecca	1466 Golden Eye Loop	Rio Rancho	NM	87144-5485	No. 3629-1453
Robert N. & Grace	6129 Katson NE	Albuquerque	NM	87109	No. 3629-1262
Arlen & Joetha J.	HC 63 Box 1	Pena Blanca	NM	87041	No. 3629-1361
Julia Y. Seligman,	3201 San Rafael	Albuquerque	NM	87106-1526	No. 3629-1460

EXHIBIT 3

Maria T. Garcia

Forest Supervisor

Santa Fe National Forest

11 Forest Lane

Santa Fe, NM 87508

Dear Ms. Garcia:

I have been told that Sandoval County is interested in rebuilding a road (FR#268?) which would allow access to my properties near Bland. Can you confirm that the USFS and County are in discussion about repair of a road in this area?

I am planning a trip to New Mexico in late May or early June. I would like to get permission to cross Forest service lands in order to see the condition of my properties. Please advise me as to the procedures and any restrictions.

I would also like to assure you that I would be interested in discussing the sale or trade of my properties. I understand that such a trade or sale would be of value to the USFS in order to control access to this part of the Santa Fe National Forest.

Sincerely,
Kirkland Jones

15495 Flying Circle
Helotes, Texas 78023.

EXHIBIT 4

United States Department of Agriculture
Forest Service
Santa Fe National Forest

Supervisor's Office
11 Forest Lane
Santa Fe, New Mexico 87508
PH 505-438-5300 FAX 505-438-5391

File Code: 1010/5420
Date: March 28, 2013

Kirkland Jones, Ph.D.
15495 Flying Circle
Helotes, TX 78023

Dear Mr. Jones:

Thank you for your March 19, 2013, letter inquiring about access to your property in Bland Canyon and about the potential for a land purchase or trade.

We also heard that Sandoval County might be interested in rebuilding FR 268. Since the destroyed portion of the road is primarily on National Forest System land, we met with Sandoval County Public Works Director Ricardo Campos and staff members in the Roads Department on November 8, 2012, to discuss any potential interest on their part. We learned that, in fact, they do not have any plans to rebuild the road. As I discussed in my April 13, 2012, letter to you and other landowners, it is not feasible to reconstruct the road until the watershed heals; and the cost of rebuilding the

road to re-establish public access for the small portion of National Forest south of the gate would not be justified.

We have a process in place to allow private landowners access to their properties in Bland and Cochiti Canyons. FR 268 is closed to public motorized access, but you may access your property by signing a waiver. I am enclosing a copy of the waiver and a map that shows the point on FR 268 beyond which access is not available by standard four-wheel vehicles. Beyond that point, you may walk, ride horseback, or (potentially) ride an off-road motorcycle or ATV. When you arrive in the area check in with either Roger Norton or Mike Frazier at our office and they will accept your signed waiver, give you the combination to the lock, and give you more specific information.

As I said in my letter of May 22, 2012, you may discuss the possibility of a land purchase with Roger Norton (505-438-5385). We are unable to consider a land exchange because of the much lengthier and more complex requirements and our limited staff.

Sincerely,

MARIA T. GARCIA
Forest Supervisor

Enclosures (3)

EXHIBIT 5

Order Number 10-363

UNITED STATES DEPARTMENT OF AGRICULTURE
SANTA FE NATIONAL FOREST
LAS CONCHAS FIRE RESTRICTIONS

PROHIBITIONS:

Pursuant to 16 U.S.C. 551 and 36 CFR 261.50(a), the following acts are prohibited in the area, roads, and trails within the boundaries of Las Conchas Fire bum area, with the exception of the Valles Caldera National Preserve Area as described in this Order, and as depicted on the attached map hereby incorporated into this Order as Exhibit A (the "restricted area"), within the following counties: Los Alamos, Sandoval, Rio Arriba and Santa Fe within the state of New Mexico.

1. Going into or being upon the restricted area. **36 CFR 261.52(e)**

EXEMPTIONS:

Pursuant to 36 CFR 261.50(e), the following persons are exempt from this Order:

1. Persons with a Forest Service permit or letter specifically exempting them from the effect of this Order.
2. Any Federal, State, or local officer, or member of an organized rescue or fire fighting force in the performance of an official duty.

RESTRICTED AREA:

From the south side of the fire heading west, the following areas are closed:

1. All National Forest System (NFS) lands north of Jemez Indian Reservation and north and east of Forest Road (FR) 266 to the intersection with FR 10.
2. Heading north on FR 10 any NFS lands east of FR 10 to the intersection with NM Highway 4.
3. Heading east on NM Highway 4, any NFS lands south of NM Highway 4 to the Las Conchas Trailhead.
4. Following a line directly north to the southern boundary of the Valles Caldera National Preserve, all NFS lands to the south of the Preserve Boundary and east to the boundary with the Bandelier National Monument.
5. Starting at a point on the northern boundary of the Valles Caldera National Preserve, lands east of FR 457 to the junction of FR 144.
6. At the junction of FR 457 and FR 144, all lands south of FR 144.
7. At the junction of FR 144 and FR 27 all lands east and south of FR 27 to the Forest boundary with the Abiquiu Land Grant, then all NFS lands south and east of the Grant to the boundary of the Abiquiu Land Grant at Forest Road 31.
8. All NFS lands south and west of FR 31 to its junction with FR 144.
9. Following FR 144 east to the Forest Boundary, all NFS lands south to the boundary with Santa Clara Indian Reservation.
10. All NFS lands within Los Alamos County and Sandoval County north of Highway 4 and west of Highway 501.

AREAS EXEMPT FROM THE RESTRICTED AREA (OPEN AREAS):

TR 287 -Quemazon Trail to Pipeline Road (non-motorized entry only) to trail intersection with Los Alamos
TR 290 -Perimeter Trail from Quemazon Trail north around Los Alamos
TR 69 -Mitchell Trail to Guaje Ridge Trail
TR 285 -Guaje Ridge Trail east from the intersection with Mitchell Trail
All trails east of Mitchell Trail and south of Guaje Ridge Trail
TR 279 -Cabra Loop Trails
TR 286 -Pajarito Trail to the south rim of Guaje Canyon
TR 297 -Rendija Canyon Trail
FR 442 -South rim of Guaje Canyon to Cabra Loop trails
FR 144
TR 282 - from Pajarito Mountain Ski area to the rim of Guaje Canyon including the Nordic Ski Trails around Canada Bonita
FR 279 - Pipeline Road from the intersection of Quemazon Trail to TR 282
TR 280 - The Nail Trail from the Camp May Road to West Jemez Road 501

PURPOSE:

The purpose of this Order is to provide for the public's health and safety and to protect National Forest system lands, resources and facilities during the current period of fire rehabilitation activities.

IMPLEMENTATION:

1. This Order will be in effect December 29, 2011, and shall remain in effect until July 30, 2012 or rescinded, whichever occurs first.
2. Any violation of this prohibition is punishable as a Class B misdemeanor by a fine of not more than $5,000.00 for individuals and $10,000.00 for organizations, or by imprisonment for not more than six (6) months, or both. [Title 16 USC 551, Title 18 USC 3559, 3571, and 3581]
3. This Order supersedes, rescinds, and replaces any previous orders prohibiting the same acts covered by the Order.

Done at Santa Fe, New Mexico, this _____ day of December. 2011.

_____
MARIA T. GARCIA
Forest Supervisor
Santa Fe National Forest

EXHIBIT 6

United States Department of Agriculture
Forest Service
Santa Fe National Forest

Supervisor's Office
11 Forest Lane
Santa Fe, New Mexico 87508
PH 505-438-5300 FAX 505-438-5391

File Code: 7730
Date: April 13, 2012

Joseph B. & Thomas J. Gammon
98 C Gold Mine Road **CERTIFIED MAIL - RETURN**
Cerrillos, NM 8701 0-9700 **RECEIPT REQUESTED**
NUMBER: No. 3629-1590

Dear Joseph B. & Thomas J. Gammon:

This letter is to inform you of the results of an assessment of roads affected by last year's devastating Las Conchas Fire and my decision regarding Forest Road #268 and Forest Road #89, which provide access into Bland and Cochiti Canyons. After much consideration, I have concluded I must close these two roads to public access for the foreseeable future. Specifically, the roads will be closed to conventional motorized travel beyond the points described in my September 23, 2011, letter (enclosed). Our assessment showed that due to the magnitude of damage by the fire and subsequent flooding, public safety would be highly threatened by use of the roads. Flooding has completely eliminated the roads over much of their length.

Consequently, Forest Roads #268 and #89 can no longer be considered viable forest transportation system roads.

Additionally, last summer's extreme fire behavior left the upper canyons especially vulnerable, which will likely result in repeated flooding events and unstable conditions over the next several years. Any road reconstruction improvements made in the next few years will likely be destroyed by future flooding. Unfortunately, even if reconstructing these roads were a viable option, it cannot be done by the Forest Service. I cannot expend public funds rebuilding roads for which there is no general public need. In these instances, the roads' primary beneficiaries are the owners of private inholdings at the end of each road.

As you know, since the fire I have authorized access into both canyons for private landowners by a combination of methods, as described in my letter of September 23, 2011, to landowners. Although Forest Roads #268 and #89 will not be open to the public, the Forest Service will continue to work with you to ensure that you continue to have adequate and reasonable access to your property.

The following two options are available to you as landowners so that you may establish future vehicular access to your property:

1. A new (reconstructed) road over existing alignment. You and your neighbors can collectively work together to reconstruct the old road over more or less the same alignment. We can facilitate the creation of a formal road association, which would then be granted a

recordable private road easement which would ensure legal and physical access to your private land.

2. A new road over a new alignment. You and your neighbors could work together to establish a formal road association (as above) and build a road over a new route which we would help you choose. Unfortunately, given the topography of these canyons, new road alignments will be challenging to locate. A private road easement would be granted to the newly formed road association in the same manner as above.

I would not recommend that either of these approaches be attempted until the watershed condition heals sufficiently so that flooding is no longer a predictable threat. Until a permanent method of future access is established, access may still be achieved as described in my September 23, 2011, letter.

I realize that the decision to close Forest Road #268 and #89 to conventional motorized access has implications for you. I can only offer my sincerest condolences and my promise to you that I will commit whatever resources I have at my disposal to address the transition from access via open system road to private easement. If you have further questions, please feel free to call either Roger Norton (505-438-5385) or Mike Frazier (505-438-5350).

We have searched Sandoval County land ownership records and our own records to create as comprehensive a mailing list as we can generate. I am enclosing the list of land owners this letter is being mailed to. If you know of a landowner in the area historically served by these roads that is not on the list,

please contact Roger Norton at the number above or at rnorton@fs.fed.us.

Sincerely,

MARIA T. GARCIA
Forest Supervisor

Enclosures; Letter dated 09/23/2011
Mailing List

Name	Name	Name
Stevenson Family Ltd. Partnership	Cynthia A. Rodgers	Joseph B. & Thomas J. Gammon
Thomas C. Zettel	Phillip R. Casados	Melissa M. Rodgers
Harry M. Murphy, Jr.	Gilbert B. Casados	Brian & Amber Kass
Bolling P. & Francis Lowrey	Daniel A. Welch	Alan R. Dowling
Leyndel G. Wilson	Donald R. Parker	Edward D. Hofheins
Michael L. & Brenda L. Sanchez	Otto & Judith Appenzeller Revocable Trust	John M. Gallimore
Dion Pat & Mary Beth Maloy	Gloria Jean Johnson	Peter & Peer Hofstra
Mark Yerkes & Deborah Howard-Yerkes	Jose C. Roybal	Canada del Sol HomeownersAssc, c/o Greg Walker
Estate of Burton D. Ayers	Gregory R. & Gloria M. Olson	Everett F. & Helen Keso
Roxilana L. Moore	Craig A. & Linda L. Olson	Melinda Hall, Robert S. Massey & Scott Massey
Thomas W. & Laurel M. Reed	Frederick L. & Patricia J. Hanson	Maggie M. Craw
Rick & Susan J. Bennett	Thomas L. & Charlotte S. Wilson	Carolyn R. Gorman & Kathryn A. Dieruf
Maloy Gang	Marilyn R. &	Michael A. &

Name	Name	Name
Trust	Robert J. Antinone	Priscilla C. Ortiz
Lawrence M. & Luisa C. Cullum	Gilbert & Carolyn R. Valdez	James P. Mullane & Becky Dixon
Billie Alameda, c/o Geer, Wissel, & Levy, P.A.	Donald R. Barkhurst	Everett C. & Patricia P. Cooper
Thomas J. & Theresa M. Gorman Revocable Trust	Estella Sanchez Living Trust	John E. & Maxine H. Cronin
Margaret R. Born	Devona B. Jensen	Daniel N. Seitz and Jerry Adair
Webb Family Limited Partnership	Ronald Albert Metzger	
Steven, Rosa, & Alejandro Escalante	James & Rebecca Williams	
Quentin Lee Webb	Robert N. & Grace S. Brown	
Toby R. & Elizabeth A. Maloy	Arlen & Joetha J. Asher	
Linda Louise and Centers	Julia Y. Seligman, et al	
Theron & Sherilyn Maloy Trust	Kathy H. Ulrich & Karen L. Hampton	
Terry & Catherine Peterson	Stewart & Carol Hanley	
Niall Edmund Ocahir Doherty	Hugh & Sandra Martin	

Name	Name	Name
Jessica M. Schenk & Andrew L. Starbuck	Kirkland Jones	

EXHIBIT 7

From: Dickman, Dawn - OGC
To: A. Blair Dunn, Esq.
Cc: Tammy Pelletier; Dori Richards; andrew.smith@usdoj.gov; mmiano@slo.state.nm.us; Garcia, Maria T-FS; Norton, Roger -FS; Frazier, Michael -FS; Currie, Cassandra – OGC
Subject: RE: Bland Canyon Property Access and roads
Date: Tuesday, May 03, 2016 10:59:00 AM

Mr. Dunn,

As previously explained in my letter of March 21, 2015, your clients do not hold any known easements over those portions of forest roads 268 and 89 on the national forest, nor do they have any other apparent private property interest in those portions on public land. Further, no R.S. 2477 public highway has ever been established or acknowledged over either of these roads. Finally, while inholders may have a right to access their property, such right is subject to reasonable regulations. All inholders must comply with the federal laws and regulations applicable to ingress and egress across the national forests.

The USDA has given clear, consistent messages to the landowners of inholding properties that may rely on these roads. As I discussed in my March 21 letter, landowners have been repeatedly notified of their options by the Santa Fe National Forest for gaining access and reconstructing these roads. These options include the possibility of acquiring an easement and seeking authorization to repair or reconstruct these roads. The Forest Service has never said landowners

could repair or reconstruct the roads without first going through the proper procedures and receiving approval to do so. Until such approval is given, any action to repair or reconstruct those roads is unauthorized and may be in violation of federal law and subject to prosecution. To date we have no record of any landowner along these roads contacting the forest to begin the process of obtaining such authorization. Thus, the Forest Service has not had the opportunity to review any proposals or make any final decisions regarding repair or reconstruction of these roads.

If your clients have questions about their specific situation and how they might proceed with gaining access and possibly reconstructing the roads, please have them contact either Mike Frazier at (505) 438-5350 or Roger Norton at (505) 438-5385 at the Santa Fe National Forest Supervisor's Office.

Dawn M. Dickman
Attorney-Advisor
USDA Office of the General Counsel
P.O. Box 586
Albuquerque, NM 87103-0586
Ph: (505) 248-6006
Email: dawn.dickman@ogc.usda.gov

From: A. Blair Dunn, Esq. [mailto:abdunn@ablairdunn-esq.com]
Sent: Thursday, April 21, 2016 8:54 AM
To: mgarcia@fs.fed.us; Dickman, Dawn - OGC <DAWN.DICKMAN@OGC.USDA.GOV>
Cc: Tammy Pelletier <warba.llp.tammy@gmail.com>; Dori Richards <dorierichards@gmail.com>; andrew.smith@usdoj.gov; mmiano@slo.state.nm.us
Subject: Bland Canyon Property Access and roads

Please find attached for your consideration.

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Electronically filed Feb. 17, 2017

HUGH MARTIN,
SANDRA KNOX MARTIN,
KIRKLAND JONES, and
THERON MALOY AND
SHERILYN MALOY,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA
Defendants.

Judge Patricia E. Campbell-Smith

RESPONSE AND MEMORANDUM IN OPPOSITION TO THE UNITED STATES' MOTION TO DISMISS

Plaintiffs, by their attorneys WARBA, LLP (A. Blair Dunn, Esq.), respectfully hereby responds to Defendants' Motion to Dismiss, and opposes the Motion to Dismiss on the following grounds:

INTRODUCTION

In their Complaint, Plaintiffs have alleged the following basic narrative: Plaintiffs own private property, including mining claims, which are surrounded by United States Forest lands. The main access road to these lands predates New Mexico statehood and runs upon historically established private

easements. When the road was destroyed as a result of a large forest fire and attendant consequences, Sandoval county attempted to repair the road because the County also has an easement that runs along the same path. Furthermore, Plaintiffs have attempted to use their own resources to have the road repaired. Defendants, however, stopped the only substantial attempt to repair the road with threat of criminal prosecution. Defendants refuse to allow Plaintiffs or the County to repair the roads without first going through the process of obtaining a special use permit – a process that will be prohibitively expensive. Accordingly, Plaintiffs assert that Defendant has effectuated a compensable taking of both their inheld property and mining claims and by seizing and refusing to acquiesce to the historical private easements that belong to Plaintiffs and belonged to Plaintiffs' predecessors in interest.

The Motion to Dismiss is predicated upon a Defendants' refusal to recognize Plaintiffs' compensable property interests, and it obscures the administrative history of this case. Defendants cast this as an administrative matter in which Plaintiffs should be required to apply for a special use permit to repair a road needed to cross United States Forest land to reach their inheld property. Defendants obscure the core issue presented here: Plaintiffs claim a private property interest in an easement along the road Plaintiffs seek to repair. The refusal to recognize a private property interest in the easements, and the barriers the Defendants seek to place in front of Plaintiffs' use of their private property form a compensable taking. Defendants do not wish to confront the notion that Plaintiffs are exerting as private individuals a vested private property easement that provided access to their private property patented mining claims until

Defendants decided that Plaintiffs should go through the costly and cumbersome process of obtaining special use permits and threatened criminal prosecution.

THE DEFENDANTS HAVE EFFECTUATED A COMPENSABLE TAKING

A. Private Property Vested Easements for Right of Way Access to Private Property Patented Mining Claims are a Compensable Property Interest

A brief review of the relevant statutory provisions and their history will help to address how rights of way such as the ones in this case, which the United States argues are forest roads, came to be vested easements held by these landowners and Sandoval County. As the United States addressed in its Motion, and as Courts have consistently recognized, the base statutory provision upon which the Plaintiffs' rights of way easements exists is the Act of 1866, or as it came to be later known, RS 2477:

> *Sec. 8. And be it further enacted, that the right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.*

Mining Act of July 26, 1866, § 8, 14 Stat. 253, formerly § 2477 of the Revised Statutes and later 43 U.S.C. § 932. (emphasis added). Following RS 2477 came the Mining Act of 1872, R.S. § 2328 derived from act May 10, 1872, ch. 152, §9, 17 Stat. 94, which vested in the owners of patented mining claims[12]the right to establish a right of way for ingress and egress among other things pursuant RS 2477. The Act states:

> *Sec. 9. That sections one, two, three, four, and six of an act entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," approved July twenty-sixth, eighteen hundred and sixty-six, are hereby repealed, but such repeal shall not affect existing rights. Applications for patents for mining-claims now pending may be prosecuted to a final decision in the general land office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this act; and all patents for mining-claims heretofore issued under the act of July twenty-sixth, eighteen hundred and sixty-six, shall convey all the rights and privileges conferred by this act where no adverse rights exist at the time of the passage of this act.*

(*emphasis added*)

The next major law implicated is the Organic Act of 1897,which, among other things, sets out how the reservation of National Forest Lands such as the Santa Fe National Forest[3] is and was to occur including. It was provided that claims for entry onto mineral lands located within the forests were to occur pursuant to the existing mining laws of the United States such as the General Mining Act of 1872. The Organic Act of 1897 states in relevant part:

> *And any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein*

contained.

[4]LOCATION AND ENTRY OF MINERAL LANDS.

19. The law provides that "any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry", notwithstanding the reservation. This makes mineral lands in the forest reserves subject to location and entry under the general mining laws in the usual manner.

7. It is further provided, that

Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of the Interior. Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: Provided. That such persons comply with the rules and regulations covering such forest reservations.

RS 2477 created both public easements held by the states, and also statutorily granted private easements to those individuals or companies that

> established and patented mining claims. The United States District Court for the District of Nevada, relying on precedent from other similar case, has explained that:
>
> [f]rom the foregoing the Court concludes, that, the terms of Section 8 of the Act of July 26, 1866 (14 Stat. 251 et seq., 43 U.S.C.§ 932) was a grant in *praesenti*, which became effective upon the construction of the road in 1921; that, at that time the title of the United States to the right-of-way passed from the United States and vested in the defendants' predecessors and ceased to be a portion of the public domain, without any further action by either or by any public authority; that, any subsequent disposition of the fee title of the land over which it passed was subject to such right-of-way

U.S. v. 9,947.71 Acres of Land, More or Less, in Clark County, State of Nev., 220 F. Supp. 328, 335 (D. Nev. 1963).

Consistent with the above statutory provisions, Plaintiffs have alleged in their Complaint that their interests in the relevant easements are private property. To support their assertion, they have alleged facts (which this Court must assume to be true) regarding the history of the roads and rights of way in question, and regarding the in held properties that are only reasonably accessed by way of the historical rights of way.

The United States is therefore in error when it asserts that these roads, which have been previously recognized to be RS 2477 roads, are now reclassified as forest system roads subject to the regulation of the United States Forest Service. Such a contention runs

contrary to the law prohibiting the agencies of the United States from making determinations regarding RS 2477 roads which specifically states:

> No final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to Revised Statute 2477 (43 U.S.C. 932) shall take effect unless expressly authorized by an Act of Congress **subsequent to the date of enactment of this Act**.

Omnibus Consolidated Appropriations Act, 1997, PL 104–208, Sec. 108, September 30, 1996, 110 Stat 3009 (*emphasis added)*.[5] The final "rule or regulation" language included in this broad prohibition has been reviewed and interpreted by the United States, via the General Accounting Office. B300912, Letter to The Honorable Jeff Bingaman, dated February 6, 2004, (EXHIBIT A attached hereto).

The United States has determined that agency decisions, such as provided for in a memorandum of understanding that result in the determination of the validity of an R.S. 2477 road, violate the congressional prohibition contained in PL 104-208. *Id.* at 1. In reviewing R.S. 2477 roads and their status, the GAO noted that:

> Congress repealed R.S. 2477 in 1976 as part of its enactment of FLPMA, along with the repeal of other federal statutory rights-of-way, but it expressly preserved R.S. 2477 rights-of-way that already had been established. In its entirety, R.S. 2477 provided that:
>
> "the right of way for the construction of

> highways over public lands, not reserved for public uses, is hereby granted."
>
> R.S. 2477 was self-executing and did not require government approval or public recording of title. As a result, uncertainty arose regarding whether particular rights-of-way had in fact been established. This uncertainty, which continues today, has implications for a wide range of entities, including the Department and other federal agencies, state and local governments who assert title to R.S. 2477 rights-of-way, and those who favor or oppose continued use of these rights-of-way.

In its decision, the GAO noted that as a result of actions of the Department of the Interior, Congress enacted a "permanent prohibition" on any agency determining the validity of RS 2477 rights-of-way, but that the Department could *disclaim* interests therein. B-300912 *See* EXHIBIT A. Despite this prohibition, the Department of the Interior in 2003, entered into a memorandum of understanding with the state of Utah, by which the Department would implement a "State and County Road Acknowledgment Process" to "acknowledge the existence of certain R.S. 2477 rights-of-way on [BLM] land within the State of Utah." *Id.* the GAO found that the MOU was a "final rule or regulation subject to Section 108's prohibition" as there was little question that the MOU pertains to the recognition, management or validity of R.S. 2477 rights-of-way.

B. Defendants' Refusal to Permit the Repair of Roads on Private Property Easements Constitutes a Compensable Taking Under the Fifth Amendment and under the Tucker Act.

The Court of Federal Claims has recently recognized in *Klamath Irrigation v. U.S.*, 129 Fed. Cl. 722, 730 (Fed. Cl. 2016) that:

> As described by the United States Court of Appeals for the Federal Circuit: "Decisions of the Supreme Court have drawn a clear line between physical and regulatory takings. The former involve a physical occupation or destruction of property, while the latter involve restrictions on the use of the property." *CRV Enters., Inc. v. United States*, 626 F.3d at 1246 (citing cases). "The distinction is important because physical takings constitute per se takings and impose a 'categorical duty' on the government to compensate the owner, whereas regulatory takings generally require balancing and 'complex factual assessments,' utilizing the so-called *Penn Central* [*Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646] test." Id. (quoting *Tahoe–Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322–23, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002)). The United States Court of Appeals for the Federal Circuit has held that "our focus should primarily be on the character of the government action when determining whether a physical or regulatory taking has occurred." *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1289 (Fed. Cir. 2008).

The *Klamath* Court also recognized that "[t]he United States Court of Appeals for the Federal Circuit has established a two-part test to determine whether government actions amount to a taking of private property under the Fifth Amendment. A court first

determines whether a plaintiff possesses a cognizable property interest in the subject of the alleged takings. Then, the court must determine whether the government action is a 'compensable taking of that property interest.'" *Id. at* 729 (*citations omitted*).

An easement is a real property interest. An "easement, if permanent and not merely temporary, normally would be the equivalent of a fee interest," *U.S. v. Causby*, 328 U.S. 256, 262 (1946). As a fee interest, an easement represents a compensable property interest under the standard articulated in *Lucas v. S.C. Coastal Council*, 505 U.S. 103, 1015, 1027-30 (1992).

The Supreme Court has further explained that requiring a person to give up a claim to property physically seized by the government in exchange for obtaining a special use is a compensable taking:

> Yet we have repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights. *E.g.*, *United States v. American Library Assn., Inc.*, 539 U.S. 194, 210, 123 S.Ct. 2297, 156 L.Ed.2d 221 (2003) ("[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech *even if he has no entitlement to that benefit* " (emphasis added and internal quotation marks omitted)); *Wieman v. Updegraff*, 344 U.S. 183, 191, 73 S.Ct. 215, 97 L.Ed. 216 (1952) (explaining in unconstitutional conditions case that to focus on "the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue"). Even if respondent would have been entirely within its rights in denying

> the permit for some other reason, that greater authority does not imply a lesser power to condition permit approval on petitioner's forfeiture of his constitutional rights.

Koontz v. St. Johns River Water Mgt. Dist., 133 S. Ct. 2586, 2596 (2013).

C. Plaintiffs' Claims are Ripe Because the United States has Physically Seized Plaintiffs' Real Property Interest Under Threat of Civil and Criminal Prosecution

Because the Plaintiffs have alleged the compensable taking of private property interests, Defendants' arguments regarding ripeness are inapposite. In its Motion the United States fails to recognize that, on the facts pleaded in the Complaint, the United States Forest Service as has physically deprived Plaintiffs of the property interest in their easement for the road that provides access to the mining claims and in-holding properties and in so doing have physically deprived them of the use and enjoyment, including the commercial mining value, of those properties. The Defendants have also attempted to erect an insurmountable regulatory barrier in the form of a Special Use Permit (which depends on environmental impact work that is cost prohibitive). As Plaintiffs have alleged, Defendants carried out these actions and sent a letter from legal counsel[6] for the United States Forest Service stating:

> [f]inally, we note that your letter asserts "it is the intention of the landowners to utilize and

> repair the road associated with this vested easement in the very near future." As stated above, we do not agree your clients possess a vested easement and we caution that anyone using national forest lands in an unauthorized manner may be subject to criminal and civil penalties under federal law.

The effect of this final action by the United States Forest Service is to unlawfully assert control of a road that USFS did not construct and that existed to serve mining claims patented and operating before the United States Forest Service reservation was even established in this area.

The United States also sidesteps this physical taking of property by offering that if Plaintiffs will forego the compensable property interest in the right of way easement by applying for a special use permit then they will be allowed some use of their property. This is exactly the type of unconstitutional condition that the Supreme Court found to constitute a taking in the *Koontz*. As the Court in Koontz elaborated: "[O]ur decisions in those cases reflect two realities of the permitting process. The first is that land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation." *Koontz v. St. Johns River Water Mgt. Dist.*, 133 S. Ct. 2586, 2594 (2013). Here, because the United States is effectively seizing a right of way and

claiming it as federal property, and because it is also requiring a special use permit, the Defendants have effectuated both a physical and a regulatory taking.

Importantly, taking physical control of the road is a *per se* taking depriving Plaintiffs not only of the compensable property interest in the easement, but physically depriving them of the use of the patented mining claims and in-holding property. *Palazzolo v. Rhode Island*, 533 U.S. 606, 61618; (2001); *Lucas*, 505 U.S. at 1015, 1027-30. Requiring Plaintiffs to obtain a special use permit to access their property upon the condition of agreeing to surrender or agreeing to abandon their claims to a statutorily-granted vested easement places Plaintiffs in an untenable situation and is a regulatory taking. *See Koontz v. St. Johns River Water Mgt. Dist.*, 133 S. Ct. 2586, 2594. This case presents to this Court the rare case where the United States has satisfied both the tests for a physical and regulatory taking. Under either scenario the case is most certainly ripe for adjudication by this Court that the United States' motion with regard to dismiss under Rule 12(b)(1) must fail.

It is worth noting that the United States' reliance upon the refusal of Plaintiffs to seek a special use permit in order to comply with the Forest Service's ANILCA (1980) regulation to establish that Plaintiffs' claims are unripe runs afoul of the express prohibition of PL 104–208, Sec. 108, 110 Stat 3009 (1997) that federal agencies are prohibited from interfering with the RS 2477 rights of way unless specifically authorized by subsequent act of Congress.

In summary, the Complaint states a claim for a compensatory taking, whether under a physical or regulatory taking theory. Dismissal is therefore not proper on the grounds that Plaintiffs' claims are not ripe.

D. Plaintiffs have a Compensable Property Interest by Virtue of the Statutorily-Granted, Vested Right of Way Easements They Possess that were Constructed by Their Predecessors-in-Interest to Serve the Patented Mining Claims Existing Before the Forest Reservation was Established.

Contrary to the arguments of the United States, Plaintiffs are not *private* individuals asserting a *public* easement. They are *private* individuals asserting *private* real property interests. Plaintiffs are asserting that, they now possess rights of way easements to access their property. This easement was private property, which Plaintiffs privately possessed until taken by the United States Forest Service through physical occupation and control under the threat of criminal prosecution.

The United States government has long argued against the notion that private vested easements across public ground for rights-of-way exist, but good grounds and precedent exist to support just that outcome. Plaintiffs will admit to the Court that there are only a few cases deciding private vested easements existing across federal lands. In *United States v. 9,947.71 Acres of Land, More or Less, in Clark Cty., State of Nev.*, 220 F. Supp. 328, (D. Nev. 1963)[7] the Court observed "there is a paucity of case authority on the precise question involved." *Id.* at 331. Yet, in spite of the lack of extensive case history, the United States Federal Court for the District of Nevada concluded:

> It follows by simple logic that, if the work done on making a roadway to a mining claim could be allowed as annual assessment work to the value of at least one hundred dollars, or a total of five hundred dollars on the mining claim, then the

road or right-ofway had some value, and was property.

But there are other authoritative cases which bear upon the proposition as to whether or not such a right-of-way is property and when it becomes such. In *Estes Park Toll-Road Co. v. Edwards*, (1893) 3 Colo.App. 74, 32 P. 549, the appellant was resisting the efforts of the county to collect a tax on the right-ofway of the toll-road it had built for a distance of fourteen miles on public land, and had operated the same since its construction in 1876, contending that thus it could not be taxed for much the same reasons as advanced here by the United States, viz: that the road was across public lands and the only grant of 43 U.S.C. 932was to the public, and that title to the ground occupied by the roadbed was in the United States, and that hence the roadbed could not be taxed. The court disagreed with the appellant. It pointed out that, 'The language used in regard to the right of way for highways (in 43 U.S.C. 932) is 'Is hereby granted.' The word 'grant,' in such connection, is very significant; in fact, seems to be a key for the solution of the question involved. 'Grant:' * * * 'A generic term, applicable to all transfers of real property' * * *. Itis stipulated that in the year 1876 the grant was accepted, the road constructed, and has since been maintained. This grant and the acceptance were all that was necessary to pass the government title to the right of way, and vest it in the grantee permanently, subject to defeasance in case of abandonment. See *Flint & P.M. Railroad Co. v. Gordon*, 41 Mich. 420, 2 N.W.Rep. 648. After entry and appropriation of

> the right of way granted, and the proper designation of it, the way so appropriated ceased to be a portion of the public domain, was withdrawn from it; and the lands through which it passed were disposed of subject to the right of the road company, such right being reserved in the grant. The road company, as shown, became the owner of the right of way. By the use of its money it improved this right of way, making a highway over which the public could pass by the payment of tolls. Although the public became entitled to use the road, such right was only by compliance with the fixed regulations recognizing the ownership * * * it is clear that the road company could maintain trespass or other actions for any unwarranted interference with its possession and rights. * * * It is also clear that the company had such title as could be sold and transferred, and the successor invested with the right of possession. * * *Tested by these well-settled principles, it will readily be seen that the contention of plaintiff that it had no tangible, taxable property in *335 the road cannot be sustained. It had its granted right of way, together with its road, for the use of which it exacted dues. A toll road is very analogous to a railway to which congress grants the right of way over the public domain. * * * The fact that the county commissioners had supervisory control to regulate tolls can have no bearing whatever. * * * The right to so regulate * * *neither divests, defines, nor modifies ownership.'

United States v. 9,947.71 Acres of Land, More or Less, in Clark Cty., State of Nev., 220 F. Supp. 328, 334-35 (D.

Nev. 1963).[8] Similarly, as cited to in the foregoing case, in the Solicitor's opinion for Interior found in 1959 in his opinion (attached hereto as EXHIBIT C) that "it has traditionally been customary for mining locators, homestead, and other public land entry men to build and or use such roads across public lands other than granted rights-ofway as were necessary to provide ingress and egress to and from their entries or claims without charge, the question whether a fee may be charged for such use is not only of broad, general interest but to make such a charge now would change a long practice." 66 I.D. 361 (1959).

CONCLUSION

Defendants' motion to dismiss should be denied. Defendants do not own the roads or the right of way easements in question. Plaintiffs own not only the patented mining property and in-holding property, but also the easements that serve those properties and the United States has deprived them of the use of the properties and easement through inverse condemnation by physical and regulatory taking. The case is ripe, the Plaintiffs' have compensable property interests, and the United States has taken their property without just compensation in violation of the 5th Amendment. The United States Motion should be denied.

Respectfully submitted

WARBA, LLP

By /s/ A. Blair Dunn

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(505) 750-3060

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Footnotes

[1]**United States Revised Statutes Chp. 6, Title 32, 30 U.S. Code § 33, - Existing rights-** All patents for mining claims upon veins or lodes issued prior to May 10, 1872, shall convey all the rights and privileges conferred by sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title and section 661 of title 43 where no adverse rights existed on the 10th day of May, 1872.

[2]The patents by which these landowners now hold as the successors in title were originally granted in the late 1800's pursuant to United States Revised Statutes Chp. 6, Title 32 conferring upon patent holder the rights associated with Sec 8 of the RS 2477.

[3]The Santa Fe National Forest was established July 1, 1915, subsuming the relevant portion of the **Jemez National Forest** in New Mexico which was established as the **Jemez Forest Reserve** by the U.S. Forest Service on October 12, 1905 with 1,237,205 acres (5,006.79 km^2). **Jemez Forest Reserve** became a National Forest on March 4, 1907. On July 1, 1915 most of the Jemez National Forest was combined with Pecos National Forest to establish Santa Fe National Forest, and the Jemez National Forest name was discontinued.

[4]**RULES AND REGULATIONS GOVERNING FOREST RESERVES** Established Under Section 24 OF THE ACT OF MARCH 3, 1891. (26 STATS., 1095.)

[5]The United States relies heavily on ANILCA, 94 Stat. 2371, despite the clear direction of the 1997 law that they could only affect RS 2477 roads pursuant to an express authorization of Congress subsequent to 1997.

[6]*See* EXHIBIT B, Letter from USDA OGC Counsel Dawn Dickman, March 19, 2015

[7]This case has no negative treatment. It is

distinguished by S. Utah Wilderness All. v. Bureau of Land Mgt., 147 F. Supp. 2d 1130 (D. Utah 2001) discussion public easements not private easements.

[8]To acquire the benefit tendered by the act of 1866 nothing more was necessary than for the road to be constructed. No patent is required in such cases; but the offer and acceptance taken together are equivalent to a grant. The complainant, therefore, by accepting the offer of the government, obtained a grant of the right of way which was at least perfectly good as against the government, and must be held to be perfectly good as against this defendant unless his patent ante-dates it by relation, or unless the equities springing from his possession and improvement would preclude any right being acquired adversely. *Flint & P.M. Ry. Co. v. Gordon*, 2 N.W. 648, 655 (Mich. 1879)

United States General Accounting Office
Washington, DC 20548

B-300912

Exhibit A

February 6, 2004

The Honorable Jeff Bingaman
Ranking Minority Member
Committee on Energy and Natural Resources
United States Senate

Subject: Recognition of R.S. 2477 Rights-of-Way under the Department of the Interior's FLPMA Disclaimer Rules and Its Memorandum of Understanding with the State of Utah

Dear Senator Bingaman:

This responds to your request for our opinion on actions by the Department of the Interior (the Department or DOI) in recognizing rights-of-way across public lands granted by Revised Statute 2477 (R.S. 2477), through use of a Federal Land Policy and Management Act (FLPMA) disclaimer-of-interest process which the Department has incorporated into a Memorandum of Understanding with the State of Utah (Utah MOU). Specifically, this opinion addresses:

> (1) Whether either the Department's January 2003 amendments to its disclaimer-of-interest regulations implementing FLPMA § 315, 43 U.S.C. § 1745 (2003 Disclaimer Rule),[1] or the Utah MOU entered into in April 2003[2] is a "final rule or regulation . . . pertaining to the recognition,

> management, or validity of a right-of-way pursuant to [R.S. 2477]" prohibited from taking effect by section 108 of the Department of the Interior and Related Agencies Appropriations Act, 1997 (Section 108); and, independent of this Section 108 prohibition,
>
> (2) Whether the Department may use the authority of FLPMA § 315 to disclaim interests in R.S. 2477 rights-of-way.

Your request raises a number of legal issues as to which no court has ruled to date and as to which there are a range of colorable arguments. As summarized below and detailed in the enclosed opinion, we conclude that the 2003 Utah MOU, but not the 2003 Disclaimer Rule, is a final rule or regulation prohibited from taking effect by Section 108. We further conclude, based on applicable rules of statutory construction and administrative law, that on balance, FLPMA § 315 otherwise authorizes the Department to disclaim United States' interests in R.S. 2477 rights-of-way.

In preparing this opinion, we requested the legal views of the Department on the issues raised by your request. We obtained these views through the Department's written responses to our inquiries, an in-person conference, and a number of telephone interviews with the Department's legal staff. We also reviewed the Department's responses to separate inquiries by you and by Senator Lieberman on these matters,[3] as well as the Department's statements in various regulatory and policy documents and reports.

BACKGROUND

In order to promote settlement of the American West in the 1800s and provide access to mining deposits located under federal lands, Congress granted rights-of-way across public lands for the construction of highways by a provision of the Mining Law of 1866, now known as R.S. 2477. Congress repealed R.S. 2477 in 1976 as part of its enactment of FLPMA, along with the repeal of other federal statutory rights-of-way, but it expressly preserved R.S. 2477 rights-of-way that already had been established. In its entirety, R.S. 2477 provided that:

> "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."[4]

R.S. 2477 was self-executing and did not require government approval or public recording of title. As a result, uncertainty arose regarding whether particular rights-of-way had in fact been established. This uncertainty, which continues today, has implications for a wide range of entities, including the Department and other federal agencies, state and local governments who assert title to R.S. 2477 rights-of-way, and those who favor or oppose continued use of these rights-of-way. In an effort to resolve questions regarding the existence of particular R.S. 2477 rights-of-way, the Department has issued a series of policy and other documents over the years discussing how it would administratively recognize or validate specific rights-of-way. By 1993, according to the Department, the agency and the courts together had recognized about 1,453 R.S. 2477 rights-of-way across Bureau of Land Management (BLM) lands, with about 5,600 claims remaining, primarily in Utah, and an unknown number of unasserted potential claims.[5] After the Department issued a proposed rule in

1994 to establish a formal process for evaluating R.S. 2477 claims, Congress responded by enacting temporary moratoria and, in 1996, a permanent prohibition on certain R.S. 2477-related activity. The permanent prohibition, set forth in Section 108, states that:

> "No final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to [R.S. 2477] shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act."[6]

Mindful of this Section 108 restriction, DOI took two major actions in 2003 relating to R.S. 2477 rights-of-way that have generated considerable attention in Congress and elsewhere and are the focus of your request.[7] First, the Department issued the 2003 Disclaimer Rule on January 6, 2003, amending the Department's existing regulations, promulgated in 1984, implementing FLPMA § 315. FLPMA § 315 authorizes the Department to issue recordable disclaimers of U.S. interests in lands in certain circumstances. As pertinent here, § 315 provides that:

> "After consulting with any affected Federal agency, the [Department] is authorized to issue a document of disclaimer of interest or interests in any lands in any form suitable for recordation, where the disclaimer will help remove a cloud on the title of such lands and where [the Department] determines [that] a record interest of the United States in lands has terminated by operation of law or is otherwise invalid . . .."

FLPMA § 315(a), 43 U.S.C. § 1745(a). DOI's FLPMA § 315 regulations establish a disclaimer application process, see 43 C.F.R. subpart 1864, and in the preamble to the 2003 Disclaimer Rule, DOI formally announced for the first time that it might use this process to validate R.S. 2477 rights-of-way, although it stated that FLPMA § 315 has always provided such authority. The Department also stated in the January 2003 preamble that because the 2003 Disclaimer Rule did not contain "specific standards" for evaluating asserted R.S. 2477 rights-of-way, it did not "pertain" to their recognition, management, or validity and thus did not run afoul of Section 108. See 68 Fed. Reg. at 496-97.

The Department's second major R.S. 2477-related action in 2003 was issuance of the Utah MOU on April 9, 2003. The Utah MOU states that DOI will implement a "State and County Road Acknowledgment Process" to "acknowledge the existence of certain R.S. 2477 rights-of-way on [BLM] land within the State of Utah," and the process DOI will use to make these acknowledgments is the FLPMA § 315 disclaimer process. See Utah MOU at 2-3. The State of Utah or any Utah county may request initiation of this acknowledgment/disclaimer process for "eligible roads"; such roads must meet specified criteria including "meet[ing] the legal requirements of a right-ofway granted under R.S. 2477." Id. at 3. On January 14, 2004, the Governor of Utah submitted the first application under the Utah MOU for acknowledgment and a recordable disclaimer of interest of specific R.S. 2477 rights-of-way.

SUMMARY OF CONCLUSIONS

As detailed in the enclosed opinion, we conclude that

the 2003 Utah MOU, but not the 2003 Disclaimer Rule, is a final rule or regulation prohibited from taking effect by Section 108. We further conclude that FLPMA § 315 otherwise authorizes the Department to disclaim United States' interests in R.S. 2477 rights-of-way.

With respect to the first issue, although the 2003 Disclaimer Rule itself is clearly a "final rule or regulation," we do not believe it is a final rule or regulation "pertaining to the recognition, management, or validity" of R.S. 2477 rights-of-way subject to Section 108. Because the terms of the 2003 Disclaimer Rule (as well as the original 1984 regulations) are silent on R.S. 2477 rights-of-way, we do not believe the Rule pertains to R.S. 2477 rights-of-way as contemplated by Section 108. The preamble to the 2003 Disclaimer Rule does discuss recognition and validity of R.S. 2477 rights-of-way, but the preamble does not qualify as a substantive rule under the Administrative Procedure Act (APA), which we believe was Congress' intention in using the term "final rule or regulation" in Section 108. Moreover, because the 2003 Disclaimer Rule preamble does not prescribe procedural or substantive standards by which R.S. 2477 rights-of-way will be evaluated, it does not "pertain" to R.S. 2477 rights-of-way within the meaning of Section 108.

On the other hand, we conclude that the Utah MOU is a final rule or regulation subject to Section 108's prohibition. There is little question that the MOU pertains to the "recognition, management, or validity" of R.S. 2477 rights-of-way; the purpose of the MOU was to resolve years of conflict over these precise issues. We also believe the MOU is an APA substantive rule and thus a "final rule or regulation" under Section 108. It both satisfies the APA's definition of "rule"—"an

agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy," see 5 U.S.C. § 551(4)—and meets the key test by which courts have defined substantive rules—it has a binding effect on the agency and other parties and represents a change in law and policy.

Apart from Section 108's prohibition, on balance, we conclude that FLPMA § 315 authorizes DOI to disclaim interests in R.S. 2477 rights-of-way. This interpretation of FLPMA § 315 represents a novel application of the statute by the Department, but one which, under applicable principles of statutory construction and administrative law, is entitled to substantial deference. A number of the key terms in FLPMA § 315 are ambiguous—notably, "lands," "interests in lands," and "cloud on title"—and in such instances, we afford considerable weight to the interpretation of the agency charged with implementing the statutes so long as the interpretation is reasonable. We find the Department's interpretations of these terms to be reasonable. The Department reads "lands" to include a partial interest in lands, consistent with its longstanding definition of that term in its FLPMA § 315 disclaimer regulations. Under this interpretation, a particular R.S. 2477 right-of-way—which is an "interest in lands"— suffers a "cloud on title" when there is uncertainty about whether the right-of-way has in fact been established, or whether instead the United States has retained its right to exclusive use of the surface property at issue. The remaining requirement of FLPMA § 315—that a "record interest of the United States in lands has terminated by operation of law"—also is satisfied. When an easement such as an R.S. 2477 right-ofway is granted, it creates two separate property interests: a

servient estate (here, owned by the United States) and a dominant estate (here, owned by the holder of the

R.S. 2477 right-of-way). At the same time, a record interest of the United States terminates because its interest in exclusive use of the land over which the right-ofway now runs terminates. We recognize that this interpretation of FLPMA § 315 by DOI is a novel one and it is not the only reasonable interpretation. However, under established principles of statutory construction and firmly embedded in administrative law, courts give substantial deference to an implementing agency's interpretation if it is one of several reasonable interpretations, and thus we do so here in opining on how courts would address these issues.

In sum, we conclude that the Utah MOU, but not the 2003 Disclaimer Rule, is a final rule or regulation prohibited from taking effect by Section 108. We conclude further that FLPMA § 315 otherwise authorizes the Department to disclaim the United States' interests in R.S. 2477 rights-of-way.

Please contact Susan D. Sawtelle, Associate General Counsel, at (202) 512-6417, Karen Keegan, Assistant General Counsel, at (202) 512-8240, or Amy Webbink, Senior Attorney, at (202) 512-4764, if there are questions concerning this opinion.

Sincerely yours,
Anthony H. Gamboa General Counsel
Enclosure

Footnotes

"Conveyances, Disclaimers and Correction Documents," 68 Fed. Reg. 494 (Jan. 6, 2003).

[2]Memorandum of Understanding Between The State of Utah and The Department of the Interior On State and County Road Acknowledgment (Apr. 9, 2003).

[3] See Letter from Assistant Secretary of the Interior for Land and Minerals Management to the Honorable Jeff Bingaman (June 19, 2003), responding to Senator Bingaman's April 21, 2003 Letter to the Secretary of the Interior; Letter from Assistant Secretary of the Interior for Land and Minerals Management to the Honorable Joseph Lieberman (Sept. 22, 2003), responding to Senator Lieberman's July 2, 2003 Letter to the Secretary of the Interior.

[4] "An Act Granting Right of Way To Ditch and Canal Owners Over The Public Land, and for Other Purposes" (Mining Law of 1866), Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, codified at R.S. 2477, recodified at 43 U.S.C. § 932, repealed by Pub. L. No. 94-579, § 706(a), 90 Stat. 2793 (1976).

[5] U.S. Dep't of the Interior, Report to Congress on R.S. 2477: The History and Management of R.S 2477 Right-of-Way C aims on Federal and Other Lands (June 1993) at 29.

[6]Department of the Interior and Related Agencies Appropriations Act, 1997, § 108, enacted by the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996). We have previously determined that Section 108 is permanent law. See B-277719, Aug. 20, 1997.

[7] In addition to your request for our legal opinion and your correspondence to the Secretary, at least 88 members of the House of Representatives, as well as Senator Lieberman, have written to the Secretary in 2003 expressing concern about these actions.

EXHIBIT B

U.S. Department of Agriculture P. O. Box 586 Office of the General Counsel Albuquerque, NM 87103 Mountain Region Fax: (505) 248-6013

March 19, 2015

Mr. A. Blair Dunn Western Agriculture, Resource and Business Advocates, LLP 6605 Uptown Blvd. NE, Ste 280 Albuquerque, NM 87110

Re: Forest Roads #268 and #89, Santa Fe National Forest

Dear Mr. Dunn,

This letter represents the U.S. Department of Agriculture's response to your letter dated January 26, 2015 regarding the two above-referenced forest roads. You state that your clients rely on these particular roads for access to their patented mining claims near Bland and Cochiti Canyons. More specifically, you assert these roads constitute a "vested ROW easement, held both by [your clients] privately and by the public as a county road." The Department of Agriculture does not agree with your position regarding these roads.

You state that your clients possess a "statutorily granted easement" over these two roads. However, the statutes cited in your letter do not contain language granting an easement to private citizens. Furthermore, we are not aware of any court interpreting the referenced statutes to convey an easement by implication, nor would we expect a court to say as much given "the established rule that land grants are

construed favorably to the Government, that nothing passes except what is conveyed in clear language, and if there are doubts they are resolved for the Government, not against it." *U.S. v. Union Pac. R. Co.*, 353 US 112, 116 (1957); *Albrecht v. U.S.*, 831 F.2d 196, 198 (10th Cir. 1987)("In a public grant nothing passes by implication, and unless the grant is explicit with regard to property conveyed, a construction will be adopted which favors the sovereign."); *see also e.g.*, *U.S. v. Jenks*, 129 F.3d 1348, 1354 (10th Cir. 1997) (holding land patents granted under the Homestead Act of 1862, which contains language similar to the Mining Act of 1866, did not include an implied easement for access).

We do not understand what is meant by your statement that the alleged right of away is "not an easement created by public use." According to your letter, your clients' claim stems from R.S. 2477 (Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253, *codified at* 43 U.S.C. § 932, *repealed* 1976), which by definition granted right-of-ways only for public roads created by public use. *Fairhurst Family Association v. USFS*, 172 F.Supp.2d 1328, 1332(D. Colo. 2001)(holding the term "highway" found in R.S. 2477 means "public road," and refusing to find a "statutory rightof-way" separate from a public road). Evidence of public use is an essential element to establishing the existence of a R.S. 2477 highway. *Southern Utah Wilderness Alliance v. BLM*, 147 F.Supp.2d 1130, 1138-1145 (D. Utah 2001). As we have explained previously, courts have repeatedly and consistently held that private citizens do not hold a title interest in public roads under R.S. 2477. *E.g.*, *SW Four Wheel Drive Ass'n v. BLM*, 363 F.3d 1069, 1071 (10th Cir. 2004); *Fairhurst*, 172 F.Supp.2d at 1332; *Peper v. USDA*, 2006 WL 2583119, 1 (D.Colo. 2006)). There is nothing unusual or unique about this situation to

indicate it should be treated any different from previously unsuccessful claims by inholders regarding R.S. 2477 roads.

Finally, we note that your letter asserts "it is the intention of the landowners to utilize and repair the road associated with this vested easement in the very near future." As stated above, we do not agree your clients possess a vested easement and we caution that anyone using national forest lands in an unauthorized manner may be subject to criminal and civil penalties under federal law.

As in holders, your clients have a right to access their property, but such right is subject to reasonable regulations. *U.S. v. Jenks*, 22 F.3d 1513, 1516 (10th Cir. 1994). In holders must comply with the rules and regulations applicable to ingress and egress across national forest system lands. *Id.* The Santa Fe National Forest has worked to ensure that reasonable access rights for landowners in this area have been preserved, despite the safety based decision to close these two roads. Alternatives have been identified in letters sent to landowners on September 23, 2011, and April 13, 2012. It is suggested that the landowners work with the Forest Service to reconstruct road access as was described in those letters.

Please feel free to contact me by email or phone at (505) 248-6006 with questions or to discuss these issues further.

Sincerely,
Dawn M. Dickman
USDA Office of the General Counsel

UNITED STATES DEPARTMENT OF THE INTERIOR

Fred A. Seaton, *Secretary*

George W. Abbott, *Solicitor*

DECISIONS

OF THE

DEPARTMENT OF THE INTERIOR

Edited by
MARIE J. TURINSKY
LEOTA BOYLE

VOLUME 66
JANUARY-DECEMBER 1959

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PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1959, to December 31, 1959. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

The Honorable Fred A. Seaton served as Secretary of the Interior during the period covered by this volume; Mr. Elmer F. Bennett served as Under Secretary; Messrs. Fred G. Aandahl, Roger C. Ernst, Royce A. Hardy, and Ross L. Leffler served as Assistant Secretaries of the Interior; Mr. D. Otis Beasley served as Administrative Assistant Secretary; and Mr. George W. Abbott served as Solicitor of the Department of the Interior.

This volume will be cited within the Department of the Interior as "66 I.D."

Secretary of the Interior

Errata

Page 46— Footnote 8, last line, *ASBCOA* should read ASBCA.

Page 52— Last paragraph, line 8, see. *251.14* should read sec. *257.14*.

Page 151— Fourth paragraph, line 12, *Columbia* Carbon Co., Liss, should read *Columbian* Carbon Co., Liss.

Page 260— Third paragraph, line 5, Henry *W.* Morgan, et al., should read Henry *S.* Morgan, et al.

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I concur:

PAUL H. GANTT, *Acting Chairman.*

Board Member HERBERT J. SLAUGHTER, who was on leave, did not participate in the disposition of this appeal.

RIGHTS OF MINING CLAIMANTS TO ACCESS OYER PUBLIC LANDS TO THEIR CLAIMS

Mining Claims: Generally—Rights-of-Way: Act of January 21, 1895

The United States Mining Laws give to the locators and owners of mining claims as a necessary incident the right of ingress and egress across public lands to their claims for purposes of maintaining the claims and as a means toward removing the minerals.

Mining Claims: Generally—Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Rights-of-Way

The rights-of-way provided for in 43 CFR, 1954 Rev., 115, 154-179 (Supp.) for the Oregon and California Railroad and Reconveyed Coos Bay Grant lands were primarily for timber roads. Roads "acquired by the United. States" as those words are used in those regulations, do not include roads constructed by others under statutory right for mining purposes.

Rights-of-Way: Act of January 21, 1895—Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Rights-of-Way—Fees

One who applies for a right-of-way under the act of January 21, 1895, must comply with the requirements of the regulations and pay whatever fee that they require. And, whether he acquire a right-of-way under an appropriate rights-of-way act or use the land for that or any other purpose, he must comply with all applicable regulations issued under .the Oregon and California Grant land laws, which are directed to the management of the area, but such regulations may not impose fees for the enjoyment of rights granted by other laws unless clearly authorized by law.

M-36584 OCTOBER 20, 1959

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT.

You have asked whether a mining claimant, who builds a road to his mining claim across public land, may be charged a fee for the use of such road, where no exclusive right-of-way is applied for or granted by the United States.

In the particular case to which you call my attention it is alleged that mining locations were made on public land more than 50 years ago and the claimant, to provide access to his claims and a way for hauling ore from the claims, constructed a road, over public lands. Your inquiry will be discussed in the light of these allegations. Your inquiry results because the regulations in 43 CFR, 1954 Rev., 115.154-179 may be susceptible of the construction that such a charge must be made. These regulations relate only to rights-of-way for tram roads *granted* under the act of January 21, 1895 (28 Stat. 635; 43 U.S.C., 1952 ed., sec. 956), and the act of August 28, 1937 (50 Stat. 874; 43 U.S.C., 1952 ed., see. 1181a), and apply, primarily at least, to purchasers

of timber on the Oregon and California Railroad Grant lands. Unless there is reason, for saying that the act of August 28, 1937, contains provisions under which a charge may be made for using a road even though it is not a right-of-way granted under the 1895 act the principle or right to charge for the use of *any* road on public lands by *any* user as it is said the regulations applicable to the Oregon and California, lands may indicate to be, would apply equally to the public lands generally. Since it has traditionally been customary for mining locators, homestead and other public land entrymen to build and/or use such roads across public lands other than granted rights-of-way as were necessary to provide ingress and egress to and from their entries or claims without charge, the question whether a fee may be charged for such use is not only of broad, general interest but to make such a charge now would change a long practice.

I do not believe that a charge may be made in such cases. The general authority of the Secretary and the Director, Bureau of Land Management, over the public lands (5 U.S.C., 1952 ed., sec. 485; 43 U.S.C., 1952 ed., see, 7 [see note fol.]) might be construed to permit it, were it not for the fact that legislation providing for the making of entries and locations necessarily presupposes a right of passage as an incident to the other rights granted, and the general rule that free passage over the public lands has always been recognized. Until recent years free *use* of the public range was the custom. See *Buford* v. *Houte*, 133 U.S. 320 (1890) and *McKelvey* v. *United States*, 260 U.S. 353 (1922). Prior to the enactment of the mining laws, minerals in such lands were freely exploited by the public without hindrance. (1 Lindley, *Mines*, secs. 46 and 56, 3d ed. 1914, and cases cited.) The Taylor Grazing Act (43 U.S.C., 1952 ed., sec. 315) took away

the free grazing privilege previously sanctioned by custom just as the mining laws of 1867 and 1872 took away the implied license to mine. But in both of these cases the changes were made by legislation, not by executive action. The Taylor Grazing Act and subsequent legislation have established a policy of management of the public lands similar, although, with minor exceptions, not as comprehensive or as rigid as that provided by law for certain reservations. Perhaps the control provided by law for national forest reserves more nearly approaches that provided for the Oregon and California Railroad Grant lands, and to a lesser degree the public domain grazing districts. As to such national forest lands, Congress in the act of June 4, 1897 (30 Stat. 36; 16 U.S.C., 1952 ed., sec. 478), expressly reserved the right of ingress and egress to settlers, and to others for "all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof," subject to compliance with the rules and regulations covering such national forests. The Department of Agriculture in its regulations, 36 CFR, 1949 ed., 251.5(c) (Supp.) does not even require the constructor of a road in such cases (said to have a "statutory right" of access), to obtain a permit, but, with minor exceptions, does require that permission be obtained by others. Thus the practice of that Department is directly contrary to the proposal discussed here. With respect to public lands in grazing districts the law reserves the right of ingress and egress and provides that nothing in it "shall restrict" mining activities, in substantially the same language as is used in the 1897 act, *supra*. The only applicable regulation of the National Park Service relate to Death Valley National Monument, 36 CFR, 1949 ed., 20.26 (a) (4) (Supp.) and Mt. McKinley National Park, 36 CFR, 1949 ed., 20.44 (Supp.). Those regulations require only

that a miner obtain a permit and as to Death Valley Monument, keep his road in good repair while using it. No fee is charged. Although not so stated as in the national forest regulations, the basis for the free use appears to be the "statutory right" of access.

In general Congress has recognized the right of "free passage or transit over or thought public lands; * * *" and has enacted penal legislation to prevent its obstruction. Section 3, act of February 25, 1885 (23 Stat. 322; 43 U.S.C., 1952 ed., sec. 1062). It has also provided relief to the owners of mining claims where access was denied for any reason. Act of June 21, 1949 (63 Stat. 214; 30 U.S.C., 1952 ed., sec. 28b).

The genesis and history of the mining laws make it clear that Congress intended to give the miner free access to minerals in the public lands and to leave him free to mine and remove them without charge. Congress in the 1860's failed to go along with an executive recommendation for disposing of the minerals by lease in order to raise revenue. It has consistently since then left the miner free and untrammeled so far as his mineral rights are concerned. In recent years it has subsidized the miners of certain strategic and critical minerals. Further, Congress, in effect, confirmed the miner's rights previously exercised under sufferance as much as it granted mining rights. It declared the minerals to be "free," 30 U.S.C., 1952 ed., sec. 22, and by section 38 of that title it is declared, in effect, that a location need not be recorded in order to acquire the right to mine so far as the United States is concerned, adverse possession being sufficient. It has always been recognized that the policy of Congress is to encourage the development of minerals and every facility is afforded for that purpose. *United States* v. *Iron Silver Mining Co.*, 128 U.S. 673 (1888) and *Steel* v. *Smelting Company*, 106 U.S. 447 (1882).

Congress knew, when it enacted the mining laws, that miners necessarily would have to use public lands outside of the boundaries of their claims for the running of tunnels and for roads. In effect, it provided only for a procedure where possession could be maintained and patent to the land could be obtained. Otherwise the clear intent was that the miner should have the right to appropriate the minerals and convey them to market. Lindley in his 3d edition on *Mines*, volume 2, sections 629 and 631, points out that roadways are necessary as an adjunct to working a claim and as a means toward removing the minerals.

The Department has recognized that roads were necessary and complementary to mining activities. It early adopted the policy of recognizing work done in the construction of roads to carry ore from mining claims as legitimate development work accreditable to the claims as assessment and patent work. *Emily Lode*, 6 L.D. 220 (1887). In *Douglas and Other Lodes*, 34 L.D. 556 (1906), it held that such roadways were not applicable. But in *Tacoma and Roche Harbor Lime Co.*, 43 L.D. 128 (1914), after discussing a number of pertinent court and departmental decisions, the Department adopted the rule as stated in Lindley on Mines and allowed credit toward patent expenditures to a trail subject only to proof of the applicability of the trail work to specific locations. The principle was applied to an aerial tramway in *United States* v. *El Portal Mining Co.*, 55 I.D. 348 (1935), citing the *Tacoma* case, *supra.* These cases obviously recognize the right of a mining claimant to construct roads across public lands for necessary use in mining operations even to the point of crediting expenditures made in that connection toward meeting the requirements of the statute. And, as already indicated, it has preserved that right in express terms in at least two general laws providing for Federal use of

public lands.

We may reasonably apply here a principle that the courts have frequently applied in cases measuring the powers of the United States to legislate in relation to matters within the exclusive jurisdiction of a State, and the reverse. Executive action along the line proposed could be used to completely destroy the rights granted by Congress under the mining laws. It is true that where a tramway right-of-way is granted under the 1895 act, *supra*, the Department, for more than 20 years, has charged an annual rental. But that charge is made under the discretionary power granted by Congress to the Secretary under the act. Such rights when granted in the past have vested an exclusive right of user in the mining claimant. A road constructed by a mining claimant for purposes connected with his claim, without the benefit of such a grant is not exclusive and there is no specific law giving the Secretary discretionary authority to grant that right-of-way "under general regulations" as under the 1895 act.

It appears that the presumed authority to charge a fee is based on 43 CFR, 1954 Rev., 115.171(b) (Supp.) providing for the payment by a permittee for the use of a road "constructed or acquired" by the United States. There is also authority to charge for tram-road rights-of-way, granted pursuant to 43 CFR, 1954 Rev., 244.52, in section 244.21 (Supp.). But both sections 115.171(b) and 244.21 pertain to *granted*, rights-of-way. They do not apply to roads constructed by an entryman or locator solely to provide access to his entry or claim. The road was not built by the United States nor can it be deemed to have been acquired by it in the sense contemplated by section 115.171(b). Even if the word "acquired" as there used is given its broadest possible meaning it is not believed that it would encompass an access road of the kind discussed here. It

is true that the title to the land is in the United States but the road is in the nature of a "private road" across another's land which is primarily used by one or more persons but which may be used by anyone. The United States can no doubt use such a road or permit its permittees or licensees to do so at least to the extent that it does not unduly interfere with its use for the legitimate purpose for which it was built. If it is abandoned for that purpose it falls in the public domain if used as a public road, otherwise it is the sole property of the United States.

In practice the Bureau of Land Management has granted tram road rights-of-way on the public domain elsewhere than on the Oregon and California Grant lands only where miners or others have desired an exclusive right of user. On the Oregon and California Grant lands, and interspersed public lands, the need for the use of such granted rights-of-way by a class of persons no doubt is such as to require all users to participate in their maintenance and this may well be justified, if not under the 1895 act certainly under the 1937 act, but this may be done without extending, the fee principle to roads constructed under clearly implied statutory authority as ways of necessity, unless such extension is required or authorized by law.

With respect to timber roads on the Oregon and California Railroad Grant lands, it is noted that the regulation governing the grant of rights-of-way under the 1895 act also cites the 1937 Timber Management Act, *supra,* as statutory authority. The latter act gives the Secretary broad authority in the management and sale of timber whereas the later act of April 8, 1948 (62 Stat. 162), extends the mining laws to the area with only two qualifications: *(1)* that the ownership and management of the timber is reserved to the United States and (*2*) that mining claimants must record their

locations and assessment work affidavits in the land office. Beyond this the law vests no discretionary authority over such claims in the Secretary. This is a further reason for believing that Congress intended that, except as provided in the law, miners' rights on such land would be the same as on other public domain land. It is true that neither the 1937 act nor the 1948 act contains language respecting the right of passage similar to that in the National Forest and Taylor Grazing Acts. But this is far from conclusive of a different intent. In the light of the history of the 1948 act it seems likely that Congress did not then feel that it had intended in 1937 to affect mining rights in those lands at all. They had been consistently protected everywhere else. The 1948 act clearly intended to restore the status quo and to give to miners everything they enjoyed on public lands except as otherwise expressly provided.

I cannot agree with the State supervisor in his belief that the act of August 31, 1951 (65 Stat. 290; 5 U.S.C., 1952 ed., sec. 140), applies here. That act requires Federal agencies to charge for—

> any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility *performed, furnished, provided, granted, prepared, or issued by any Federal agency* ***. (Italics added.)

The grant of the mineral with all incidents thereunto pertaining is direct from Congress to the miner. The act contains no language that could be construed to authorize a Federal agency to make a charge in such case. The act does not require that the Department examine all grants made by Congress and amend them so as to impose charges for rights freely granted,

whether expressly as the right to locate and mine, or by reasonable, if not necessary; implication, as the right of passage.

The Bureau of Land Management has made no grant nor performed any service. The miner built the road by implied authority from Congress. He is liable in damages if he unnecessarily causes loss or injury to the property of the United States and, as previously stated, his right to use the road, even though he built it, is not exclusive but his right to use it for mining purposes is as evident as his right to mine.

Although no charge may be made on a road as constructed and used as a necessary incident to the maintenance of a mining location and its development, a miner who wishes to use a road built or acquired by the United States must comply with the applicable regulations. And, if he applies for and obtains a right-of-way under the 1895 act he must pay whatever fee is required by the regulations. And, of course, any person who uses public land within the Oregon and California Grant lands area must comply with all applicable and reasonable regulations issued under the act of August 28, 1937, *supra*, as amended, for the management of the area, but that act does supersede the mining laws.

EDMUND T. FRITZ
Acting Solicitor.

ESTATE OF JOHN STEVENS OR JOHN STEPHENS

IA-1002 *Decided October 26, 1959*

The next of kin of an Indian decedent, who is not an enrolled member of the Klamath Tribe with at least one-sixteenth degree of Indian blood of

the Klamath Tribe, may not inherit the decedent's restricted or trust property within the Klamath Reservation, but such property will escheat to the Tribe.

APPEAL FROM AN EXAMINER OF INHERITANCE BUREAU OF INDIAN AFFAIRS

Clyde Busey, as guardian ad litem fro Stanley Stevens, a mentally incompetent adult person, has appealed to the Secretary of the Interior from a decision of an Examiner of Inheritance, dated September 24, 1958, denying his petition for a rehearing in the matter of the estate of John Stevens or John Stephens, who died intestate on or about December 29, 1941.

In his original order, dated July 2, 1958, the Examiner found that Stanley Stevens was the son and only apparent heir at law of John Sevens, but that he was not entitled to inherit the trust or restricted property herein involved because, as has been conceded, he was not an enrolled member of the Klamath Tribe, and thus did not qualify as an heir under the provisions of section 5 of the act of June 1, 1938 (52 Stat. 605, 606).[1] This section was repealed by the act of August 13, 1954 (68 Stat 718, 721).

The real property herein involved is described as the NW¼ of Section 20, T. 36 S., R. 10 E., W.M., Oregon, containing 160 acres. The original allottee of that property was Kate Stanley, a Klamath Indian, to whom allotment No. 1553 was made and a trust patent

Footnote

"Hereafter only enrolled members of the Klamath

Tribe of not less than one-sixteenth degree Indian blood of the Klamath Tribe shall inherit or take by devise any restricted or trust property within the Klamath Reservation * * *."

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Electronically filed Mar. 10, 2017
No. 16-1159 L
Hon. Patricia E. Campbell-Smith

HUGH MARTIN and SANDRA KNOX MARTIN, KIRKLAND JONES, and THERON and SHERILYN MALOY, Plaintiffs,
v.

THE UNITED STATES OF AMERICA,
Defendant.

UNITED STATES' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS [ECF NO. 11]

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United States Department of Justice
Environment & Natural Resources Division

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I. INTRODUCTION

In their response, Plaintiffs fail to grapple with the arguments presented by the United States in seeking to dismiss Plaintiffs' claims. See Pls.' Resp. & Mem. in Opp'n to the United States' Mot. to Dismiss, ECF No. 12 ("Pls.' Br."). It is undisputed that Plaintiffs have not presented the U.S. Forest Service ("Forest Service") with an application for a special use authorization to access their inholding properties under the Forest Service's Alaska National Interest Lands Conservation Act of 1980 ("ANILCA") regulations.[1] See 36 C.F.R. §§ 251.110, 251.50. The Forest Service has not prevented Plaintiffs from accessing their properties in Bland and Cochiti Canyons and, indeed, has made clear that it will work with Plaintiffs (and other landowners in the area) to authorize reasonable ingress and egress. Because Plaintiffs have not submitted an application nor been denied an authorization to access their properties, and they do not cite any other evidence or action by the government, they cannot demonstrate that the government took their inholding properties under the Fifth Amendment. Their claim should therefore be dismissed as unripe.

Nor have Plaintiffs presented any evidence that they in fact own a "private easement" in Forest Roads 268 or 89. See Pls.' Br. 1. Plaintiffs' claim that they obtained an easement in the roads by way of R.S. 2477 fails as a matter of law. In support of their claim that a private party can assert rights in a public highway, Plaintiffs cite to a single district court case that is refuted by a large body of law holding that state and local governmental bodies are the only parties that can properly assert rights in a public highway.

Plaintiffs argue that the Forest Service "effectuated a compensable taking of both their inheld

property and mining claims," Pls.' Br. 2, under both permanent and regulatory takings theories. Id. at 16. But Plaintiffs' arguments are unsupported by the facts and the law. The Court should grant the United States' motion to dismiss pursuant to Rule 12(b) of the Rules of the United States Court of Federal Claims ("RCFC") because Plaintiffs' claims are not ripe and because Plaintiffs lack a compensable property interest in Forest Roads 268 or 89.

ARGUMENT

A.The Court Lacks Subject Matter Jurisdiction Because Plaintiffs Claims are Not Ripe.

Plaintiffs do not assert that they have applied for a special use authorization. Instead, Plaintiffs argue without authority that they do not need to seek an authorization because they "have alleged the compensable taking of private property interests." Pls.' Br. 10. That is not the law. Plaintiffs state that their claims are ripe, but fail to articulate an argument supporting their assertion. See id. at 10-13. Plaintiffs appear to argue that the Forest Service made an "offer[] that if Plaintiffs will forego the compensable property interest in the right of way easement by applying for a special use permit then they will be allowed some use of their property." Pls.' Br. 11. This is a mischaracterization of the Forest Service's position. As explained in our opening brief, the Forest Service acknowledges inholders' right to reasonable ingress and egress access to their properties. See U.S. Mot. 3-8. And the Forest Service has stated it will ensure that reasonable access rights for the landowners are preserved. Id. at 11. That access, however, is regulated by the special use authorization process set

forth in the Forest Service's ANILCA and special use regulations. Id. at 6-8; 36 C.F.R. §§ 251.110, 251.50.

Because Plaintiffs have not applied for a special use authorization or sought a decision from the Forest Service as to whether Plaintiffs may rebuild the relevant portions of Forest Roads 268 or 89, Plaintiffs' claim that the Forest Service has taken their property is not ripe. See United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126-27 (1985) ("A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense . . . ."); Howard W. Heck & Assocs. v. United States, 134 F.3d 1468, 1471 (Fed. Cir. 1998); Estate of Hage v. United States, 687 F.3d 1281, 1286 (Fed. Cir. 2012); see also U.S. Mot. 13-16.

Plaintiffs' reliance on Koontz v. St. Johns River Water Management District, 133 S. Ct. 2586, 2593 (2013), to support the claim that Plaintiffs were required to "give up a claim to property physically seized by the government in exchange for obtaining a special use" permit is misplaced. See Pls.' Br. 10; Koontz, 133 S. Ct. at 2593 (explaining that the state refused to approve a permit for construction unless petitioner "agreed to one of two costly concessions"). The facts here are easily distinguished in that Plaintiffs have neither sought nor been denied a special use authorization and, notably, the Forest Service has not requested Plaintiffs to deed any property interest to the agency.

Plaintiffs' reliance on a decision of the Department of the Interior, Rights of Mining Claimants to Access Over Public Lands to Their Claims, 66 Interior Dec. 361 (1959), fares no better. There the Acting Solicitor was opining on "whether a mining claimant, who builds a road to his mining claim across

public land, may be charged a fee for the use of such road, where no exclusive right-of-way is applied for or granted by the United States." Id. at 361. The Acting Solicitor explains that "[a]lthough no charge may be made on a road . . . necessary . . . to the maintenance of a mining location and its development, a miner who wishes to use a road built or acquired by the United States must comply with the applicable regulations." Id. at 366. Here, the Forest Service has never suggested that it would charge a toll or fare to use Forest Roads 268 or 89 in the event that they are rebuilt and, thus, Plaintiffs' reliance on the Acting Solicitor's opinion is misplaced.

Moreover, even if Plaintiffs had a property interest in the roads (which they do not), Plaintiffs would still be required to seek a special use permit to rebuild the roads. See S. Utah Wilderness All. v. Bureau of Land Mgmt., 425 F.3d 735, 745 (10th Cir. 2005), as amended on denial of reh'g (Jan. 6, 2006) ("We . . . conclude that the holder of an R.S. 2477 right of way across federal land must consult with the appropriate federal land management agency before it undertakes any improvements to an R.S. 2477 right of way beyond routine maintenance.").

This Court lacks jurisdiction because Plaintiffs' taking claim "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 191 (1985), superseded by statute on other grounds, 47 U.S.C. § 332(c)(7)(B)(v); Stearns Co., Ltd. v. United States, 396 F.3d 1354, 1357-58 (Fed. Cir. 2005) (takings claim premised on alleged mining rights not ripe where agency retains administrative authority to grant relief that would

allow plaintiff to "use the property in question"). Unless and until the Forest Service issues a decision denying a request from Plaintiffs' for a permit to access their inholding properties, Plaintiffs' claims that the Forest Service has taken their inholding properties are not ripe.

B. Plaintiffs Fail to State a Claim Because They Lack a Compensable Property Interest in Forest Roads 268 or 89.

Contrary to Plaintiffs' suggestion, the United States does not dispute that an easement is a property interest that could be the subject of a valid takings claim. See Pls.' Br. 8-10; see also Ridge Line, Inc. v. United States, 346 F.3d 1346, 1352 (Fed. Cir. 2003) ("It is well established that the government may not take an easement without just compensation." (citing United States v. Dickinson, 331 U.S. 745, 748 (1947))). Plaintiffs here, however, have not demonstrated that they own an easement or property interest in either Forest Road 268 or 89, which the Forest Service could have taken from them.

Plaintiffs contend that "the base statutory provision upon which the Plaintiffs' rights of way easements exist[]" is R.S. 2477. Pls.' Br. 3. Moreover, Plaintiffs claim that R.S. 2477 "created both public easements held by the states, and also statutorily granted private easements to those individuals or companies that established and patented mining claims." Id. at 5. Neither assertion is supported by law. Plaintiffs cite to a single case, United States v. 9,947.71 Acres of Land, 220 F. Supp. 328 (D. Nev. 1963), to support their argument that they own Forest Roads 268 and 89 by way of R.S. 2477. Indeed, no other court has come to the same conclusion as the 9,947.71 Acres of

Land court did in interpreting R.S. 2477. The Deputy Solicitor for the U.S. Department of the Interior explained the anomaly, noting that

> [a] highway is a road freely open to everyone; a public road. See, e.g., WEBSTER'S NEW WORLD DICTIONARY, (College Ed. 1951) at 686; Harris v. Hanson, 75 F. Supp. 481 (D. Idaho 1948); Karb v. City of Bellingham, 377 P.2d 984 (Wash. 1963). Because a private road is not a highway, no right-of-way for a private road could have been established under R.S. 2477. Insofar as the dicta in United States v. 9,947.71 Acres of Land, 220 F. Supp. 328 (D. Nev. 1963) concludes otherwise, we believe the court was clearly wrong. The court's error in that case was in confusing the standards of R.S. 2477 with other law of access across public lands; i.e., the road at issue in that case was a road to a mining claim, and the Department had previously distinguished such roads from public highways such as might be constructed pursuant to R.S. 2477. See Rights of Mining Claimants to Access Over the Public Lands to Their Claims, 66 I.D. 361, 365 (1959). The court in 9,947.71 Acres of Land specifically found that the road in question was not a public road or highway, 220 F. Supp. at 336-37, and it therefore follows that it could not have been an R.S. 2477 road.9/ Rather, it was an access road under the Mining Law of 1872, and even assuming the court correctly concluded that its taking by the government was compensable, the court's discussion of R.S. 2477 was not pertinent to the legal question presented.

> 9/ In fact, the State of Nevada had officially taken the position that the road in question was not considered a public road or highway. See 220 F. Supp. at 337.

U.S. Department of the Interior, REPORT TO CONGRESS ON R.S. 2477: THE HISTORY AND MANAGEMENT OF R.S. 2477 RIGHTS-OF-WAY CLAIMS ON FEDERAL AND OTHER LANDS (1993), Appendix II, Exhibit J at 8 (attached in pertinent part as Exhibit 1). The decision in 9,947.71 Acres of Land should instead be read to support the United States' position that Plaintiffs are entitled to reasonable access rights through the mining and homesteading laws, see e.g., U.S. Mot. 3-8, which are permitted through the Forest Service's ANILCA and special use regulations as described above.

Meanwhile, Plaintiffs fail to acknowledge or address the overwhelming body of case law—presented in the United States' opening brief— that refutes Plaintiffs' claim that a private party can assert rights to a public highway through R.S. 2477. See SW Four Wheel Drive Ass'n v. Bureau of Land Mgmt., 363 F.3d 1069, 1071 (10th Cir. 2004); Fairhurst Family Ass'n v. U.S. Forest Serv., 172 F. Supp. 2d 1328, 1332 (D. Colo. 2001); Peper v. U.S. Dep't of Agric., No. 04cv-01382-ZLW-PAC, 2006 WL 2583119, at *1 (D. Colo. Sept. 5, 2006), aff'd, 478 F. App'x 515 (10th Cir. 2012); Kinscherff v. United States, 586 F.2d 159, 160 (10th Cir. 1978) (per curiam); S. Utah Wilderness All. v. Bureau of Land Mgmt., 147 F. Supp. 2d 1130, 1143 (D. Utah 2001); see also U.S. Mot. at 16-18.

Furthermore, Plaintiffs make two incorrect assertions to support their legally-untenable claim: (1) that Forest Roads 268 and 89 "have been previously recognized" as R.S. 2477 roads and that "are now

reclassified" as Forest System roads, Pls.' Br. 6; and (2) that the Forest Service impermissibly made a determination with respect to the Forest Roads' status under R.S. 2477. Id. First, Plaintiffs offer no evidence or support that any entity, including Sandoval County, has ever recognized or sought recognition of Forest Roads 268 and 89 as R.S. 2477 roads.

Second, in its correspondence with Plaintiffs and its Motion to Dismiss, the Forest Service has not made any arguments as to whether these two particular roads[2] are R.S. 2477 roads. While Plaintiffs cite to the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 108, 110 Stat. 3009, and the U.S. General Accounting Office's letter of February 6, 2004, see Pls.' Br. 7, Ex. A, ECF No. 12-1, which address the Bureau of Land Management's disclaimer of interests in R.S. 2477 rights-of-way and the Section 108 prohibition against federal agencies promulgating a "final rule or regulation . . . pertaining to the recognition, management, or validity" of an R.S. 2477 claim, those cites are inapposite here. The Forest Service has made no determination with respect to the applicability of R.S. 2477 to Forest Roads 268 and 89 because no request to do so has been made by any state or local government entity, such as Sandoval County.

As explained above, to the extent that Plaintiffs allege a taking of their inholding properties as a result of the Forest Service's requirement for them to seek a special use authorization to access their inholdings, that claim is not ripe. See supra § A; U.S. Mot. 13-16. Further, Plaintiffs own no property interest in the roads that were alleged to have been taken and their claims should therefore be dismissed pursuant to RCFC 12(b)(6). See Maritrans Inc. v. United States, 342 F.3d 1344, 1351 (Fed. Cir. 2003); Holden v. United

States, 38 Fed. Cl. 732, 735 (1997); see also U.S. Mot. 13-16.

III. CONCLUSION

For the reasons stated in the United States' Motion to Dismiss, ECF No. 11, and the foregoing reasons, the United States respectfully requests the Court to dismiss Plaintiffs' claims under RCFC 12(b)(1) because Plaintiffs' claim that the Forest Service took their inholding properties is not ripe and, thus, the Court lacks jurisdiction. Further, the United States respectfully requests the Court to dismiss Plaintiffs' claims under RCFC 12(b)(6) because Plaintiffs fail to demonstrate that they own a compensable property interest in Forest Roads 268 or 89 and, thus, fail to state a claim upon which relief may be granted.

Respectfully submitted this 10th day of March, 2017.

JEFFREY H. WOOD
Acting Assistant Attorney General
United States Department of Justice
Environment & Natural Resources Division

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Footnotes

1 As noted in our opening brief, ANILCA governs Forest Service land outside of Alaska. See United States' Mot. to Dismiss and Mem. in Supp. 6, ECF No. 11 ("U.S. Mot."); United States v. Jenks, 22 F.3d 1513, 1516, n.3 (10th Cir. 1994).

2 The United States reserves the right to fully argue this issue at a later date.

FORM 26. Docketing Statement **Form 26**
Rev. 10/16

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 17-2224

Martin, FU BM.
v.
United States

DOCKETING STATEMENT

This Docketing Statement must be completed by all counsel and filed with the court within 14 days of the date of docketing. When the United States or its officer or agency is a party, this Docketing Statement must be completed by all counsel and filed with the court within 30 days of docketing. All questions must be answered or the statement will be rejected.

Name of the party you represent Martin, Knox, Jones and Maloy

Party is (select one)

☒ Appellant/Petitioner ☐ Cross-Appellant

☐ Appellee/Respondent ☐ Intervenor

Tribunal appealed from and Case No.
U.S. Cort of Federal Claims No. 1:16-cv-1159 PEC

Date of Judgment/Order May 22, 2017
Type of Case Civil, Just Compensation under 28 USC 1491

Relief sought on appeal
Reversal of Dismissal and Remand for Further Proceedings

Relief awarded below (if damages, specify)
_____

Briefly describe the judgment/order appealed from
Order granting Motion to Dismiss
_____

_____
Nature of judgment (select one)

☒ Final Judgment, 28 USC 1295

☐ Rule 54(b)

☐ Interlocutory Order (specify type)
_____

☐ Other (explain; *see* Fed. Cir. R. 28(a)(5))
_____
_____

Name and docket number of any related cases pending before this court plus the name of the writing judge if an opinion was issued. If none, please state none.
NONE

_____

Brief statement of the issues to be raised on appeal
Did the Court of Claims err in determining that takings

claims of Plaintiffs was not ripe because the Plaintiffs had not sought to obtain a permit from the US Government that would have required the surrender of their property interest as the US Government repeatedly stated that they did not recognize the property interest of Plaintiffs?

Have there been discussions with other parties relating to settlement of this case? ☐ Yes ☒ No
If "yes," when were the last such discussions?

☐ Before the case was filed below?

☐ During the pendency of the case below?

☐ Following the judgment/order appealed from?

If "yes," were the settlement discussions mediated?
☐ Yes ☒ No

If they were mediated, by whom?
_____

Do you believe that this case may be amenable to mediation?

☐ Yes ☒ No

Please explain why you believe the case is or is not amenable to mediation.
Because upon a reversal of the lower court's order the parties would likely be at a stage to discuss just

compensation.

Provide any other information relevant to the inclusion of this case in the court's mediation program.

I certify that I filed this Docketing Statement with the Clerk of the United States Court of Appeals for the Federal Circuit and served a copy on counsel of record, this 26th day of July, 2017 by Email
(manner of service)

A. Blair Dunn, Esq. **/s/ A. Blair Dunn**
Name of Counsel **Signature of Counsel**

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FORM 26. Docketing Statement **Form 26**
Rev. 10/16

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 17-2224

Martin
v.
United States

DOCKETING STATEMENT

This Docketing Statement must be completed by all counsel and filed with the court within 14 days of the date of docketing. When the United States or its officer or agency is a party, this Docketing Statement must be completed by all counsel and filed with the court within 30 days of docketing. All questions must be answered or the statement will be rejected.

Name of the party you represent United States

Party is (select one)

☐ Appellant/Petitioner ☐ Cross-Appellant

☒ Appellee/Respondent ☐ Intervenor

Tribunal appealed from and Case No.
Court of Federal Claims No. 1:1-cv-1159

Date of Judgment/Order 5/22/17
Type of Case 5th Amendment Takings

Relief sought on appeal

Plaintiff seeks reversal of CFC's order dismissing complaint, U.S. seeks affirmance

Relief awarded below (if damages, specify)
none

Briefly describe the judgment/order appealed from
CFC granted government's motion to dismiss for lack of subject jurisdiction

Nature of judgment (select one)

☒ Final Judgment, 28 USC 1295

☐ Rule 54(b)

☐ Interlocutory Order (specify type)

☐ Other (explain; *see* Fed. Cir. R. 28(a)(5))

Name and docket number of any related cases pending before this court plus the name of the writing judge if an opinion was issued. If none, please state none.
NONE

Brief statement of the issues to be raised on appeal

Whether plaintiffs have stated a takings claim that is ripe for review.

Have there been discussions with other parties relating to settlement of this case? ☐ Yes ☒ No
If "yes," when were the last such discussions?

☐ Before the case was filed below?

☐ During the pendency of the case below?

☐ Following the judgment/order appealed from?

If "yes," were the settlement discussions mediated?
☐ Yes ☒ No

If they were mediated, by whom?
_____

Do you believe that this case may be amenable to mediation?
☐ Yes ☒ No

Please explain why you believe the case is or is not amenable to mediation.
The issue before the court is a threshold jurisdictional question best resolved by legal ruling.

Provide any other information relevant to the inclusion of this case in the court's mediation program.

I certify that I filed this Docketing Statement with the Clerk of the United States Court of Appeals for the Federal Circuit and served a copy on counsel of record, this 26th day of July, 2017 by CM/ECF
(manner of service)

Erika B. Kranz **s/ Erika B. Kranz**
Name of Counsel **Signature of Counsel**

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No. 2017-2224

In the

United States Court of Appeals
for the Federal Circuit

HUGH MARTIN, SANDRA KNOX-MARTIN, KIRKLAND JONES, and THERON AND SHERILYN MALOY,
Plaintiff-Appellants,
v.
UNITED STATES,
Defendant-Appellee.

Appeal from the United States Court Of Federal Claims,
No. 1:16-cv-01159
The Honorable **Patricia Campbell-Smith**, Judge Presiding.

CORRECTED OPENING BRIEF AND ADDENDUM OF PLAINTIFFS-APPELLANTS

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ORAL ARGUMENT REQUESTED

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

17-2224
Martin v. United States
CERTIFICATE OF INTEREST

Counsel for the: Appellant

Western Agriculture, Resource and Business Advocates, LLP (A. Blair Dunn and Marshall J. Ray)

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me

Hugh Martin
Sandra Knox
Kirkland Jones
Theron Maloy
Sherilyn Maloy

2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:

Hugh Martin
Sandra Knox
Kirkland Jones
Theron Maloy
Sherilyn Maloy

3. Parent corporations and publicly held companies that own 10 % or more of stock in the party:

None
None
None
None
None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

Date: July 10, 2017
Signature of counsel: s/ A. Blair Dunn
Printed name of counsel: A. Blair Dunn

Please Note: All questions must be answered

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Cases

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STATEMENT OF PRIOR RELATED APPEALS

There are no other appeals related to the instant case.

JURISDICTIONAL STATEMENT

The United States Court of Federal Claims had subject matter jurisdiction to hear Appellant's underlying case pursuant to the Fifth Amendment to the United States Constitution and the Tucker Act, 28 U.S.C. § 1491 *et seq.*, as such case arises from the actions of federal officials with the United States Forest Service requiring the surrender of Appellant's property interest in an easement in exchange for a special use permit in order to continue to access their properties, i.e. a taking of Appellant's property interests without authority and/or just compensation.

This Court has jurisdiction to hear Appellant's appeal pursuant to 28 U.S.C. § 1295(a)(3). The Court of Federal Claims issued its Decision granting the United States' Motion to Dismiss on May 19, 2017 (Appx002-007) and issuing Final Judgment (Appx001). Appellant timely appealed the lower Court's Decision on June 16, 2017.

STATEMENT OF THE ISSUES

I. **Did the Court of Claims err in determining that the takings claims of Plaintiffs were not ripe because the Plaintiffs had not sought to obtain a permit from the US Government that would have required the surrender of their property interest as the US government repeatedly stated that**

they did not recognize the property interest of Plaintiffs?

STATEMENT OF THE CASE

Appellants filed their "Complaint for Just Compensation" in the Court of Federal Claims on September 19, 2016. In that complaint, they alleged that the refusal of the United States Forest Service to recognize the pre-existing real property interests in the road that served their patented real property within the United States Forest lands, and the threat of criminal and civil prosecution if they exercised their property rights without their real property rights to the easement in order to obtain a special use permit constituted a taking under the Fifth Amendment of the Constitution.

On January 17, 2017, the United States moved to dismiss for lack of jurisdiction, claiming that the action was barred because it was not yet ripe for a decision. The United States argued that, to the extent that Appellants had not applied for a special use permit and faced denial of that permit, the Appellants had not yet lost access to their private inholdings and therefore the claim was not yet ripe. The United States also moved for dismissal on grounds of failure to state a claim, which was not addressed in the Court's Opinion granting the Motion to Dismiss and Judgment respectively entered on May 19, 2017 and May 22, 2017 from which this Appeal was taken.

STATEMENT OF THE FACTS

Appellants Hugh Martin and Sandra Knox Martin (collectively "the Martins") and Kirkland Jones own certain real property in Bland Canyon, which has

historically been accessed by a road currently known as Forest Service Road ("FR") 268. *See* Complaint for Just Compensation Under 28 U.S.C. § 1491 (Appx012-020), *see also* ECF No. 10. The Martins allege that they own mining claims known as the Pino Lode, the Mogul Lode, the Crown Point Lode, the Avondale Lode, the Monte Cristo Lode, and the Carena Lode. Compl. (Appx012-015). Mr. Jones alleges that he owns the Denver Girl Lode mining claim. (Appx016).

Appellants Theron and Sherilyn Maloy (collectively "the Maloys") own certain real property in Cochiti Canyon, which has historically been accessed by FR 89. (Appx017). The Maloys allege that they own land in the Pine Creek Meadows subdivision, as well as "the northerly portion of the Pine Tree Lode" mining claim. (Appx017-019).

Beginning on June 26, 2011, the Las Conchas fire burned in the Jemez Mountains region of northwest New Mexico, including portions of the Santa Fe National Forest, as well as numerous private inholdings. (Appx023). "[M]any homes and other improvements were destroyed." (Appx052, Appx064).

Subsequent heavy rains lead to significant flooding in the burned area, which "heavily damaged" FR 89 and 268. (Appx052, Appx066).

"After the fire, [the Forest Service] assessed the condition of roads accessing private lands for hazards like falling trees, flooding, debris flows and rock fall." (Appx053). On August 25, 2011, Forest Service personnel conducted a reconnaissance of the burned area by helicopter and observed that "[a] few short segments of FR 89 were still intact" and that "FR 268 had more remaining segments, but so much of [FR 268 was] damaged that it too [was] impassable." (Appx053, Appx066). In its letter of September 23, 2011, the Forest Service noted that "flooding events

since August 25 [] have compounded the damage," and that virtually the entire length of FR 89 had been destroyed. (Appx053, Appx066). ("The destruction of these roads rendered the [p]roperties at issue in this lawsuit inaccessible to vehicle traffic."). The Forest Service "cut trees posing imminent threats, cleared road surfaces and repaired drainage," in the burned area. (Appx053).

"Beginning in August [2011, the Forest Service] authorized private landowners to access their private land along certain roads [] cleared of imminent hazards." *Id.* However, due to the extent of the damage to FR 89 and FR 268, the Forest Service "did not authorize motorized access over the damaged portions." *Id.*

Instead, private landowners were "authorized to enter by hiking, either from a safe parking spot on [FR 89 or FR 268] or via Trail 113." (Appx053, Appx064).

On September 23, 2011, the Forest Service notified private landowners that it would authorize limited access to the affected properties through "some combination of vehicle and hiking." (Appx053, Appx066). The Forest Service proposed certain access routes and explained the process for obtaining a waiver to access the area. (Appx053, Appx066-067, Appx068-070, Appx071-073). On March 19, 2013, Mr. Jones requested information regarding accessing his property, (Appx053, Appx079), and the Forest Service responded on March 28, 2013, explaining the process by which Mr. Jones could gain access to his property. (Appx053, Appx081). No permit fees were requested of Mr. Jones. *Id.*

On December 29, 2011, the Forest Service issued an Order restricting activities within the Las Conchas fire area, including FR 89 and FR 268. Ex. 5. The Forest Service determined that "[t]hese roads will

not be reconstructed in the foreseeable future, because repeated flooding events will continue until the watersheds recover." (Appx054, Appx064). On April 13, 2012, the Forest Service notified the affected landowners, including Plaintiffs, that it would continue to close FR 89 and FR 268 "to public access for the foreseeable future." (Appx054, Appx086-087) The Forest Service explained the available options for affected landowners to "establish future vehicular access to [their] property," as follows:

> 9. A new (reconstructed) road over existing alignment. You and your neighbors can collectively work together to reconstruct the old road over more or less the same alignment. We can facilitate the creation of a formal road association, which would then be granted a recordable private road easement which would ensure legal and physical access to your private land.
>
> 10. A new road over a new alignment. You and your neighbors could work together to establish a formal road association (as above) and build a road over a new route which we would help you choose. Unfortunately, given the topography of these canyons, new road alignments will be challenging to locate. A private road easement would be granted to the newly formed road association in the same manner as above.

Id. at 1(Appx054, Appx090). Appellants then sought through Counsel to notify the United States Forest Service of their intention to utilize their vested right of way easements to reestablish the roads to their mining

in-holding properties. (Appx033) Appellants were informed by the Forest Service that their property right easements in the right of ways to access their properties would not be recognized and that any attempt to use their property rights would incur potential civil and criminal prosecution by the United States Government. (Appx033-034). Appellants were offered the options above on the condition that they waive or abandon their real property interests in the road. (Appx034).

SUMMARY OF ARGUMENT

This case presents a situation in which the United States is extorting Appellants' real property interest in a mine haul road easement in exchange for the continued use of inholding properties by permission of the federal government via a special use permit. Plaintiffs wish to fix the damaged roads leading to their various properties, which are held within federal lands. Plaintiffs own historical easements on those roads that pre-date statehood and that are recognized as vested property of Appellants. In this case, however, the United States has prohibited Appellants from treating the easements as their own property and repairing the roads that were damaged in the fire so that they can continue to use them for access to the property and to make use of the inheld mining claims. As Appellants alleged in their complaint below, the United States instead has chosen to treat the road as its sole property, to ignore or deny Appellant's asserted ownership interest, and to impose onerous pre-requisites upon the Appellants to be able to use their own property. This case is therefore directly comparable to the scheme that United States Supreme Court admonished against in the case of *Koontz v. St.*

Johns River Water Mgt. Dist., 133 S. Ct. 2586, 2596 (2013). As in *Koontz*, in order to continue to obtain the quiet use and enjoyment of their property, Appellants were given the options of criminal prosecution or the surrender of their property right in favor of the federal government in exchange for a permit that would not allow them the full historical use of their patented mining properties. That is not really a choice and by imposing it upon Appellants, the United States has already taken property without just compensation.

Accordingly, the Court of Federal Claims erred as matter of law in concluding that the false choice presented by the United States did not present a ripe claim for taking of property without just compensation in violation of the 5th Amendment. The choice offered by the United States confirms that the United States is already denying the existence of, or attempting to extinguish, Appellants' property rights.

In its decision below, the Court of Federal Claims misinterpreted the actions of the Government. The lower court erred when it failed to recognize that federal agencies were barred by federal law from unilaterally determining that the RS 2477 roads in question where not the property of Appellants. Nevertheless, even though it was unlawful for the United States to determine that the roads were not the real property of the Appellants, it did so and then threatened the Appellants with prosecution if Appellants attempted to exercise their right to the use of the real property easements and to repair the damaged roads without first obtaining a special use permit. And, again, the United States Government offered the alternative of obtaining a special use permit, but acquiescence to the special use permitting process would have amounted to an acknowledgement by Appellants that they were waiving preexisting real

property interests.

ARGUMENT STANDARD OF REVIEW

The Circuit Court reviews the Court of Federal Claims' dismissal of a complaint for lack of jurisdiction, *de novo*, as a question of law. *Boyle v. United States*, 200 F.3d 1369, 1372 (Fed. Cir. 2000), *citing Moyer v. United States*, 190 F.3d 1314, 1317–18 (Fed.Cir.1999); *New York Life Ins. Co. v. United States*, 190 F.3d 1372, 1377 (Fed.Cir.1999).

I. The Court of Claims erred in determining that Appellants' takings claims were not ripe because, by requiring Appellants to obtain a permit to repair roads on easements belonging to Appellants, the United States was effectively requiring Appellants to surrender their property interest in those easements to the United States Government and to incur onerous expenses in order to regain access to their inholding properties.

An easement is a real property interest. An "easement, if permanent and not merely temporary, normally would be the equivalent of a fee interest," *U.S. v. Causby*, 328 U.S. 256, 262 (1946). As a fee interest, an easement represents a compensable property interest under the standard articulated in *Lucas v. S.C. Coastal Council*, 505 U.S. 103, 1015, 1027-30 (1992).

Appellants' position is simple: the road that has historically accessed the inheld properties in this case runs along an easement that belongs to the owners of the inholding mining claims (i.e., Appellants). The easement exists pursuant to Revised Statute 2477 (43

U.S.C. 932) ("RS 2477"). According to PL 104–208, Sec. 108, 110 Stat 3009 (1997), federal agencies are prohibited from interfering with the RS 2477 rights of way unless specifically authorized by subsequent act of Congress:

> No final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to Revised Statute 2477 (43 U.S.C. 932) shall take effect unless expressly authorized by an Act of Congress **subsequent to the date of enactment of this Act**.

Omnibus Consolidated Appropriations Act, 1997, PL 104–208, Sec. 108, September 30, 1996, 110 Stat 3009 (*emphasis added).* The final "rule or regulation" language included in this broad prohibition has been reviewed and interpreted by the United States, via the General Accounting Office. B-300912, Letter to The Honorable Jeff Bingaman, dated February 6, 2004, (Appx109-113).

The United States has determined that agency decisions, such as provided for in a memorandum of understanding that result in the determination of the validity of an R.S. 2477 road, violate the congressional prohibition contained in PL 104-208. *Id.* at 1. In reviewing R.S. 2477 roads and their status, the GAO noted that:

> Congress repealed R.S. 2477 in 1976 as part of its enactment of FLPMA, along with the repeal of other federal statutory rights-of-way, but it expressly preserved R.S. 2477 rights-of-way that already had been established. In its entirety, R.S. 2477 provided that:

> "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." R.S. 2477 was self-executing and did not require government approval or public recording of title. As a result, uncertainty arose regarding whether particular rights-of-way had in fact been established. This uncertainty, which continues today, has implications for a wide range of entities, including the Department and other federal agencies, state and local governments who assert title to R.S. 2477 rights-of-way, and those who favor or oppose continued use of these rights-of-way.

In its decision, the GAO noted that, as a result of actions of the Department of the Interior, Congress enacted a "permanent prohibition" on any agency determining the validity of RS 2477 rights-of-way, but allowed that the Department could *disclaim* interests therein. The lower court did not analyze the validity of Appellants' claim to an RS 2477 right of way. Rather, the court focused on the Appellants' ability to obtain a special use permit to be able to repair the physical road to continue accessing inholding properties. Such a holding constitutes an implicit rejection of any claim to an RS 2477 easement, and such rejection was not accompanied by any analysis. The lower court also ignored Appellants' contentions that the special use permitting process was extortionate and led to a waiver of Appellants' RS 2477 claim. The Supreme Court of the United States warned: "[e]xtortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without

just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2596, 186 L. Ed. 2d 697 (2013).

Justice Alito writing for the Supreme Court has further explained that requiring a person to give up a claim to property physically seized by the government in exchange for obtaining a special use is a compensable taking:

> Yet we have repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights. *E.g.*, *United States v. American Library Assn., Inc.*, 539 U.S. 194, 210, 123 S.Ct. 2297, 156 L.Ed.2d 221 (2003) ("[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech *even if he has no entitlement to that benefit* " (emphasis added and internal quotation marks omitted)); *Wieman v. Updegraff*, 344 U.S. 183, 191, 73 S.Ct. 215, 97 L.Ed. 216 (1952) (explaining in unconstitutional conditions case that to focus on "the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue"). Even if respondent would have been entirely within its rights in denying the permit for some other reason, that greater authority does not imply a lesser power to condition permit approval on petitioner's forfeiture of his constitutional rights.

Koontz v. St. Johns River Water Mgt. Dist., 133 S. Ct. 2586, 2596 (2013).

Because the Appellants alleged the compensable taking of private property interests through the extortion of the surrender of the property interest in the easement, the lower Court's decision regarding ripeness is inapposite. The United States' offer to Appellants is as follows: apply for a special use permit and take on the enormous costs, including environmental impact studies associated with the permitting process, implicitly give up any claim to ownership of an RS 2477 right of way, and, in exchange, you may participate in the permitting process and, perhaps, receive a permit to repair the road to access your inholding estates.

Such an offer from the United States Forest Service is therefore a taking which is ripe for a claim for just compensation. The United States is pressuring Appellants to recognize Government ownership of the roads accessing the inholding properties and to subject themselves to requirements that would only apply if the Government truly owned those roads and the right of ways upon which they run. The United States has therefore deprived Appellants of their RS 2477 right of way and of the use and enjoyment, including the commercial mining value, of the inheld properties.

Appellant's demonstrated in their Complaint that the United States completed the extortion via a letter from legal counsel (Appx033-034). for the United States Forest Service stating:

> [f]inally, we note that your letter asserts "it is the intention of the landowners to utilize and repair the road associated with this vested easement in the very near future." As stated above, ***we do not agree your clients possess a***

> ***vested easement and we caution that anyone using national forest lands in an unauthorized manner may be subject to criminal and civil penalties under federal law.***

(Appx034) (emphasis added). There could not be a clearer denial of an asserted property right: "[W]e do not agree your clients possess a vested easement.". As such, the lower court's decision to dismiss the Complaint as unripe is puzzling. The effect of this final action by the United States Forest Service was unlawfully to assert sole and unilateral control over a road that the United States Forest Service did not construct and that existed to serve mining claims patented and operating before the United States Forest Service reservation was even established in this area.

This is exactly the type of unconstitutional condition that the Supreme Court found to constitute a taking in *Koontz*. As the Court in Koontz elaborated: "[O]ur decisions in those cases reflect two realities of the permitting process. The first is that land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation." *Koontz v. St. Johns River Water Mgt. Dist.*, 133 S. Ct. 2586, 2594 (2013). Here, because the United States was barred by PL 104–208, Sec. 108 from determining that Appellants

do not have a RS 2477 right of way. Yet, going even further than the government agency in *Koontz*, the United States here explicitly told Appellants that it does not recognize their property rights in the RS 2477 right of way, in addition to demanding that Appellants cede any claims to the easements by engaging in the permitting process. To be clear, the United States claims the road and any right of way upon which it runs as exclusive federal property, and threatened criminal prosecution of those who would continue to attempt to utilize the road as vested compensable property interest. Allowing Appellants to surrender one property interest (an easement) in exchange for a federal permit to access the remainder of Appellants' property is a compensable taking.

Importantly, taking physical control of the road by threatening criminal prosecution of a person found using their own property is a *per se* taking depriving Plaintiffs not only of the compensable property interest in the easement, but physically depriving them of the use of the patented mining claims and in-holding property. *Palazzolo v. Rhode Island*, 533 U.S. 606, 616-18; (2001); *Lucas*, 505 U.S. at 1015, 1027-30. Requiring Plaintiffs to obtain a special use permit to access their property upon the condition of agreeing to surrender or agreeing to abandon their claims to a statutorily-granted vested easement places Plaintiffs in an untenable situation and is a therefore a regulatory taking. *See Koontz v. St. Johns River Water Mgt. Dist.*, 133 S. Ct. 2586, 2594. This case presents to this Court the rare case where the United States has satisfied both the tests for a physical and regulatory taking. Under either scenario the case became ripe for adjudication upon the moment that the United States sought to coerce the surrender of a real property interest under threat of civil and criminal prosecution

in favor of granting the continued use of property only through a revocable privilege of a special use permit.

In summary, the Appellants stated a claim for a compensable taking, that was made ripe by the attempted coercion of surrendering that right by the threat of criminal and civil prosecution for the continued use of the property that the United States Government was barred by federal law from infringing. Dismissal for lack of ripeness was therefore in error.

CONCLUSION

Based on the above, Appellant requests that this Court reverse the decision of the Court of Federal Claims, and find that the United States Government's actions in seizing physical control of the property of Appellants by threat of loss of liberty, was a ripe claim of the taking of property within the Fifth Amendment. Respectfully submitted this 25th day of August 2017.

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ADDENDUM

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No. 17-2224

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MARTIN, ET AL.,
Plaintiffs-Appellants, v.

UNITED STATES,
Defendant-Appellee.

Appeal from the United States Court of Federal Claims
Case No. 1:16-cv-01159 (Hon. Patricia E. Campbell-Smith)

ANSWERING BRIEF OF APPELLEE UNITED STATES

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STATEMENT OF RELATED CASES

No appeals from the same civil action were previously before this Court or any other appellate court. Undersigned counsel is not aware of any pending related cases within the meaning of Federal Circuit Rule 47.5.

STATEMENT OF JURISDICTION

This case arose under the Fifth Amendment of the United States Constitution. The Court of Federal Claims ("CFC") had jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a)(1).

The CFC's judgment is final as to all claims. See Appx007. This Court has jurisdiction under 28 U.S.C. § 1295(a)(3).

The CFC entered final judgment on May 22, 2017, following a reported opinion issued on May 19, 2017. Martin v. United States, 131 Fed. Cl. 648 (May 19, 2017); see also Appx010. Appellants filed their notice of appeal on June 16, 2017. See Appx010. This appeal is timely under Fed. R. App. P. 4(a)(1)(B). To the extent ripeness is viewed as a jurisdictional issue, the United States challenges the court's jurisdiction over Plaintiffs' takings claim, due to the failure to obtain a final agency decision.

STATEMENT OF THE ISSUES

Plaintiffs-Appellants Hugh Martin, Sandra Knox Martin, Kirkland Jones, Theron Maloy, and Sherilyn Maloy (collectively, "Plaintiffs") claim to own inholdings in the Santa Fe National Forest. Plaintiffs have historically reached the inholdings using two Forest Roads that were severely damaged following a 2011

fire. The Forest Service has elected not to repair or rebuild these roads, but it has offered Plaintiffs alternative means of access. Plaintiffs claim vested private easements along the roads and assert that the agency's requirement that they obtain a special-use authorization before conducting rebuilding activities is a taking of those private property rights.

I. To be eligible for compensation for a Fifth Amendment taking, a plaintiff must identify a cognizable property interest that can support a Fifth Amendment claim for just compensation. Plaintiffs allege that they hold easements under a statute that authorized construction of public roads across unreserved federal lands. Do Plaintiffs, as private individuals, have a cognizable property interest in these public rights-of-way?

II.A Plaintiffs do not allege that the United States has physically occupied or invaded their (alleged) private property, but instead allege that the government's regulation interferes with use of their property. Should Plaintiffs' takings claim be evaluated as a
physical taking?

II.B For the government to effect a regulatory taking, it must have taken an action that goes too far in burdening private property. A requirement to apply for special-use authorization does not on its own constitute a taking. Instead, a takings claim may ripen after the government has an opportunity to reach a final decision on an authorization application. Plaintiffs here have not applied for the required authorization. Do Plaintiffs have a ripe regulatory takings claim?

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

In 1866, as a means of providing rights-of-way for the construction of public highways across unreserved public domain lands, Congress enacted a statute commonly referred to as "R.S. 2477." See Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253 (codified at 43 U.S.C. § 932), repealed by Federal Land Policy and Management Act of 1976 ("FLPMA"), Pub. L. No. 94-579, § 706(a), 90 Stat. 2743, 2793. This statute provided that the "right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Id. As a result, lands on which highways were constructed prior to segregation from the public domain are encumbered by public highway rights-of-way. See Humboldt Cnty. v. United States, 684 F.2d 1276, 1280–82 (9th Cir. 1982). In 1976, Congress repealed R.S. 2477, but preserved "any valid" right-of-way "existing on the date of approval of this Act." See FLPMA §§ 701(a), 706(a), 90 Stat. at 2786, 2793.

The 1872 Mining Act, ch. 152, 17 Stat. 91 (codified as amended at 30 U.S.C. §§ 22–54), made public land available "for the purpose of mining valuable mineral deposits." United States v. Coleman, 390 U.S. 599, 602 (1968). Locators of certain mineral claims "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations," contingent on "compl[iance] with the laws of the United States." 30 U.S.C. § 26.

The Forest Service Organic Administration Act ("Organic Act"), ch. 2, 30 Stat. 34, 34–36 (1897) (codified at 16 U.S.C. §§ 437–82, 551), established the National Forest System. The Act provides the statutory basis for management of forest reserves, but also "ensured

access over national forest land to 'actual settlers' and 'protect[ed] whatever rights and licenses with regard to the public domain existed prior to the reservation.'" United States v. Jenks, 22 F.3d 1513, 1515 (10th Cir. 1994). The Alaska National Interest Lands Conservation Act of 1980 ("ANILCA"), Pub. L. No. 96-487, 94 Stat. 2371 (codified at 16 U.S.C. § 3101 et seq.), clarified the Forest Service's obligation to provide access to inholdings: "[T]he Secretary [of Agriculture] shall provide such access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof" provided that inholding owners "comply with rules and regulations applicable to ingress and egress to or from the National Forest System." 16 U.S.C. § 3210(a). In other words, owners' rights of access to their property are "not absolute." Adams v. United States, 255 F.3d 787, 795 (9th Cir. 2001).

Among the regulations for accessing inholdings is one that requires landowners to apply for a special-use authorization. 36 C.F.R. § 251.112(a); see also id. § 251.50 (special-use regulations). To the extent rights of access are claimed under common law, rather than ANILCA, the Organic Act likewise directs that the Forest Service may "adopt reasonable rules and regulations which do not impermissibly encroach upon" those possessory rights. United States v. Weiss, 642 F.2d 296, 299 (9th Cir. 1981). The Forest Service's special- use authorization requirement has been upheld as a proper exercise of its "substantial latitude" for regulating access, regardless of the source of an inholder's access rights. Jenks 22 F.3d at 1518.

B. Factual Background

Plaintiffs allege that they own patented mining claims or patented homestead claims (or both) in Bland Canyon or Cochiti Canyon within the Santa Fe National Forest in New Mexico. Plaintiffs further alleges that their access to these properties has historically been via Forest Service Roads ("FR") 89 and 268.

Those roads were heavily damaged in the aftermath of the Las Conchas fire, which began on June 26, 2011, and quickly became the largest fire in New Mexico history at that time. See National Park Service: The Las Conchas Fire, available at https://www.nps.gov/band/learn/nature/lasconchas.htm (last accessed Oct. 17, 2017). The fire destroyed homes and other buildings in the Bland and Cochiti Canyons. Appx064. Loss of vegetation in these intensely- burned areas resulted in flooding during heavy rain events. Appx064. This flooding seriously damaged FR 89 and FR 268, rendering both impassible and susceptible to further damage during unstable conditions. Appx066.

In the weeks after the fire, the Forest Service notified private landowners in Bland and Cochiti Canyons—including all plaintiffs in this lawsuit—of the flooding and its effects on FR 89 and FR 268. Appx066. The Forest Service acknowledged that private property owners might want to access their property, and it explained that they could do so through a combination of vehicle and hiking access. Appx066–67. The Forest Service further explained that even its recommended hiking routes were fraught with hazards. Appx067.

In the spring of 2012, the Forest Service notified private landowners of the results of its post-fire and post-flooding assessment of FR 89 and FR 268. It explained that because the roads were "completely eliminated" by flooding "over much of their length,"

they would be closed to conventional motorized travel for the foreseeable future. Appx086. The Forest Service further explained that because of continuing instability in the canyons, "road reconstruction improvements made in the next few years will likely be destroyed by future flooding." Accordingly, the agency was not able to "expend public funds rebuilding roads" that primarily benefit "the owners of private inholdings at the end of each road" and "for which there is no general public need." Appx086. Recognizing that those private inholding owners would still desire access, the Forest Service assured the inholders that it "will continue to work with [them] to ensure that [they] continue to have adequate and reasonable access" to those inholdings. Appx086.

The agency identified two options for establishing future vehicular access: a new road over the existing alignment, or a new road over a new alignment. In either case, the Forest Service explained that it would facilitate the creation of a formal road association of private owners, that it would help inholders choose a new road alignment if they preferred that option, and that it would then grant the road association an easement for the reconstructed or new road. Appx086. At the same time, the agency recommended that rebuilding activities wait until "the watershed condition heals sufficiently so that flooding is no longer a predictable threat," and recommended park-and- hike access in the interim. Appx087.

Through counsel, Plaintiffs contacted the Department of Agriculture in the winter of 2015 regarding their assertion that they held a vested easement in FR 89 and FR 268. See Appx033–34. The agency responded by explaining that it did not agree that private parties held an easement over the roads. Id. It acknowledged that "[a]s inholders, your clients

have a right to access their property, but such right is subject to reasonable regulations" such as those "applicable to ingress and egress across national forest system lands." Appx034. As of May 3, 2016, no landowner along FR 89 or FR 268 had begun the process to obtain authorization to reconstruct those roads. Appx090.[1]

C. Proceedings in the CFC

Plaintiffs filed their complaint in the CFC on September 19, 2016, alleging that the Forest Service effected a taking of "statutorily vested real property right-of-way easements" as a result of its "denying and refusing to recognize" those alleged easements, "attempting to extract special use permits [and] permit fees," and "requiring Plaintiffs to follow prohibitively expensive procedures in order to obtain special use permits." Appx005. The United States moved to dismiss the complaint pursuant to RCFC 12(b)(1) and 12(b)(6), arguing that Plaintiffs had failed to identify a compensable property interest in the Forest Roads and that the CFC lacked jurisdiction because Plaintiffs did not have a ripe takings claim. ECF No. 11.

The CFC concluded that it lacked subject matter jurisdiction over Plaintiffs' claims. The CFC first determined that Plaintiffs had not adequately alleged a physical taking of a private interest in FR 89 or FR 268. The court found that "plaintiffs have not alleged facts that suggest defendant, or any third party, has physically occupied the property at issue." Appx005. The court explained that Plaintiffs' assertions that the Forest Service had "physically seized" their alleged interest in the roads "do not accurately reflect any allegations in the complaint." Appx006. Because the complaint "centered on the issue of defendant's

allegedly improper requirement that plaintiffs apply for a permit before repairing the roads at issue," Appx005, the CFC concluded that it was "properly evaluated as alleging a regulatory taking." Appx006.

The CFC further determined that the regulatory takings claim was unripe because precedent "clearly establishes that a claim for a regulatory taking is not ripe until a permit is both sought and denied," Appx006.

Accordingly, the court dismissed the complaint for lack of subject-matter jurisdiction. In so doing, the CFC expressly stated that its opinion did not include any "determination as to whether plaintiffs have a vested property right in the easements they allege are coextensive with" FR 89 and FR 268. Appx007.

SUMMARY OF ARGUMENT

The CFC was correct to dismiss Plaintiffs' complaint alleging a taking of their supposed vested easement interest in two roads through the Santa Fe National Forest, and this Court should affirm for either of two reasons.

First, Plaintiffs lack a cognizable interest in the property they allege was taken. They insist that R.S. 2477 conferred upon them, as private individuals, an enforceable easement to access their inholding property across Forest Service lands and that this easement is not subject to Forest Service regulation. But R.S. 2477 created only public rights-of-way, and Plaintiffs cannot base their takings claim on property that they, private individuals, do not own.

Second, even if Plaintiffs possessed a cognizable property interest in the public road rights-of-way, the court still lacks jurisdiction over their claim. Plaintiffs have not alleged facts that could support a physical taking, and their regulatory takings claim is not yet

ripe. The mere application of a regulation is not itself a taking; instead, a claimant has a ripe takings claim only after he applies for and obtains a final government decision applying that regulation to his property. Because Plaintiffs have not applied for authorization to conduct road-construction activities, there is no final agency decision that could form the basis for a ripe regulatory takings claim.

STANDARD OF REVIEW

An order dismissing a claim based on lack of ripeness is reviewed de novo. McGuire v. United States, 707 F.3d 1351, 1357 (Fed. Cir. 2013). Nonetheless, the plaintiff bears the burden of establishing jurisdiction and justiciability. Benitec Austl., Ltd. v. Nucleonics, Inc., 495 F.3d 1340, 1349 (Fed. Cir. 2007); Taylor v. United States, 303 F.3d 1357, 1359 (Fed. Cir. 2002). A plaintiff likewise has the burden of establishing a compensable property interest in a Fifth Amendment takings case. Estate of Hage v. United States, 687 F.3d 1281, 1291 (Fed. Cir. 2012).

The court may consider material outside the pleadings in order to determine whether it has jurisdiction over the case. See Rocovich v. United States, 933 F.2d 991, 993 (Fed. Cir. 1991). In weighing whether a plaintiff has stated a claim upon which relief may be granted, a court must accept a plaintiff's allegations of fact as true, but it does not accept a plaintiff's assertions regarding the legal implications of those facts. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Instead, a complaint that states a claim with "facial plausibility" (i.e. more than "sheer possibility") is one that includes "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

ARGUMENT

Plaintiffs' complaint is premised on a legal claim that they hold a vested road easement across Forest Service land. This assertion is incorrect for several reasons. Alternatively, Plaintiffs' failure to engage with the agency's authorization process renders their takings claim unripe.

I. Plaintiffs do not possess a compensable property interest that could support a takings claim.

The CFC dismissed Plaintiffs' takings claim on ripeness grounds and elected not to "make a determination as to whether plaintiffs have a vested property right in the easements they allege are coextensive with County Roads 268 and 89." Appx007. This Court may nonetheless determine that the complaint was appropriately dismissed for the independent reason that Plaintiffs possess no property interest that could support their Fifth Amendment takings claim. See Rexnord Indus., LLC v. Kappos, 705 F.3d 1347, 1356 (Fed. Cir. 2013) (appellee may defend appealed-from decision on any ground that is supported by the record).

This Court has a well-established two-part test to evaluate claims that a governmental action constitutes a taking of private property without just compensation. See Acceptance Ins. Cos. v. United States, 583 F.3d 849, 854 (Fed. Cir. 2009); Maritrans Inc. v. United States, 342 F.3d 1344, 1351 (Fed. Cir. 2003). The threshold question of this inquiry is whether the claimant has established a "property interest" for purposes of a claim for just compensation under the Fifth Amendment. Acceptance Ins., 583 F.3d at 854. Only once a court has determined that the plaintiff has

a cognizable property interest does the court then determine whether the government has effected a taking of that interest. Id. Where a complaint fails to adequately allege a "cognizable property interest that could be 'taken'" by government action, the complaint is properly dismissed for failure to state a claim upon which relief may be granted under RCFC 12(b)(6). Id. at 859.

On appeal, Plaintiffs assert but one basis for their allegedly-compensable property interest: they contend that they hold "a fee interest" in "an easement that belongs to the owners of the inholding mining claims," and these easements "exist[] pursuant to Revised Statute 2477." Br. 9–10. This assertion is incorrect as a matter of law. R.S. 2477 authorized rights-of-way for the construction of public roads across unreserved federal lands. While that statute "required no administrative formalities" to establish such a right of way, the right vested only in "states or localities." S. Utah Wilderness All. v. Bureau of Land Mgmt., 425 F.3d 735, 741 (10th Cir. 2005). The public was—and is—free to traverse a road established under R.S. 2477, but the law did not confer any property rights on private parties.

Indeed, courts have uniformly rejected private parties' claims to public roads allegedly established pursuant to R.S. 2477, because they do not have "title" to public roads, which is "vested in the public generally." Kinscherff v. United States, 586 F.2d 159, 160 (10th Cir. 1978); see also Sw. Four Wheel Drive Ass'n v. Bureau of Land Mgmt., 363 F.3d 1069, 1071 (10th Cir. 2004); N. New Mexicans Protecting Land Water & Rights v. United States, 161 F. Supp. 3d 1020, 1044 (D.N.M. 2016). Put another way, "the right of an individual to use a public road is not a right or interest in property"; only a "governmental entity" has an

ownership interest in such an easement. Long v. Area Manager, Bureau of Land Reclamation, 236 F.3d 910, 915 (8th Cir. 2001).

The legal status of roads established under R.S. 2477 is fatal to Plaintiffs' takings claim. A claim for compensation under the Fifth Amendment requires identification of a property interest held by the plaintiff. Indeed, it "is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation" for a taking of that property. Wyatt v. United States, 271 F.3d 1090, 1096 (Fed. Cir. 2001); see also Calvin v. United States, 956 F.2d 1131, 1134 (Fed. Cir. 1992). Critically, "[p]ublic property"—in contrast to "private property"—cannot form the basis of a private party's takings claim. Air Pegasus of D.C., Inc. v. United States, 424 F.3d 1206, 1217–18 (Fed. Cir. 2005) (holding that plaintiff did not have a cognizable property interest because navigable airspace is public, not private, property). Plaintiffs cannot meet the essential property-interest requirement by claiming only an interest that R.S. 2477 may afford the public generally.

Accordingly, because Plaintiffs fail to satisfy their burden of identifying a cognizable property right that can support their Fifth Amendment claim for compensation, see Estate of Hage, 687 F.3d at 1291, this Court should affirm the CFC's dismissal of the complaint.

II. The Court of Federal Claims correctly dismissed Plaintiffs' takings claim on ripeness grounds.

Even if (contrary to the foregoing) Plaintiffs possessed a vested private property right in an easement across federal land that could support a takings claim, such claim must be evaluated as a

regulatory—not physical—takings claim. But any regulatory takings claim is unripe for review.

A. Plaintiffs have not alleged a physical taking.

Plaintiffs assert that this case may be understood as alleging both a regulatory and a physical taking. Br. 15–16. It is clear, however, that Plaintiffs allege only a regulatory taking.

It is well-established that a taking may occur either by physical invasion or by regulation. See, e.g., Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1009 (1992). The distinction between these two types of takings claims is "fundamental." Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 325 (2002). A regulatory taking may occur when "regulations prohibiting private uses" go "too far," Id. at 323, 326; see also Palazzolo v. United States, 533 U.S. 606, 617 (2001). In contrast to regulatory takings, physical takings are "relatively rare, easily identified, and usually represent a greater affront to individual property rights." Tahoe-Sierra, 535 U.S. at 324.

"[T]he sole question governing physical takings is whether or not the government has physically occupied the plaintiff's property." Tuthill Ranch, Inc. v. United States, 381 F.3d 1132, 1136 (Fed. Cir. 2004); see also Yee v. City of Escondido, Cal., 503 U.S. 519, 527 (1992) ("The government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land."). Where, as here, it is alleged that the government merely restricts the use of a road easement—instead of occupying that property—the easement holder cannot have suffered a physical taking as a matter of law. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432 (1982) (emphasizing that whether there has been an "actual

physical invasion" is the critical inquiry in assessing whether a physical taking has occurred); Tuthill Ranch, 381 F.3d at 1137 (explaining that "[p]hysical invasions short of an occupation and regulations that merely restrict the use of property may qualify as regulatory takings, but not as physical takings"). Plaintiffs do not allege that the Forest Service has invaded or physically occupied either of the roads at issue. Indeed, as the CFC correctly noted, the only physical damage to FR 89 and FR 268 came as a result of natural processes—a forest fire and subsequent flooding. Appx005. Plaintiffs therefore have not alleged any action by the Forest Service that could constitute a physical taking.

Plaintiffs cite two regulatory takings cases, Palazzolo and Lucas, in support of their argument that the complaint alleges a physical taking. Br. 15. But the only government action alleged to constitute a taking here was the Forest Service's regulation (requiring that plaintiffs obtain a special-use authorization before conducting road-construction activities) of their alleged easement in a way that supposedly interferes with their property rights. See Appx005–06. This assertion bears the hallmarks of a classic regulatory takings claim. See Tahoe-Sierra, 535 U.S. at 323, 326.

Plaintiffs contend that the Forest Service has "extort[ed]" them by "demanding that Appellants cede" (or "waive or abandon") their "statutorily granted vested easement," citing a letter from the U.S. Department of Agriculture's Office of the General Counsel. Br. 6, 7, 15. But the letter makes no such demand. Appx033–34. Instead, it states that the Department "does not agree" with Plaintiffs' position that they, as private parties, hold a property interest in R.S. 2477 easements. The letter further states that, as inholders within a National Forest, Plaintiffs have "a right to access [their] property," which the Forest has

worked to ensure by providing various options to reconstruct the damaged roads. Appx033–34. This letter provides no support for Plaintiffs' allegation that the government has physically appropriated (or threatened to appropriate) their property through extortion. Instead, it demonstrates that although the agency's legal opinion is that Plaintiffs' rights do not include the claimed easement interest, the Forest Service has worked to ensure Plaintiffs' continued access to their inholdings.[2] See Appx034. The letter supports the interpretation of the complaint as asserting a regulatory takings claim, since it is the Forest Service's application of "reasonable regulations" that is the government action asserted to constitute a taking. See Appx034.

In sum, Plaintiffs have not alleged facts that could conceivably support a physical takings claim. Instead, they have alleged that government regulation constituted a compensable limitation of the use of their property. Accordingly, the complaint must be evaluated under the law governing regulatory takings claims.

B. Any regulatory takings claim is not ripe for review.

An "essential prerequisite" to adjudicating a regulatory-takings claim is "a final and authoritative determination of the type and intensity of development legally permitted on the subject property." MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348 (1986). Put another way, a "court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." Id. Thus, the governing decisions "uniformly reflect an insistence on knowing the nature and extent of permitted" use before adjudicating "the constitutionality of any particular

application" of a regulation. Id. at 351; accord Palazzolo, 533 U.S. at 618–26; Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985).

This Court has "consistently followed" the final-decision rule: a regulatory takings claim is unripe "unless a permit is applied for and denied." Boise Cascade Corp. v. United States, 296 F.3d 1339, 1351 (Fed. Cir. 2002). Accordingly, a property owner must engage in the administrative process when doing so "could reasonably result in a more definite statement of the impact of the regulation." McGuire, 707 F.3d at 1361 (quoting Morris v. United States, 392 F.3d 1372, 1376 (Fed. Cir. 2004)).

Tested by these standards, Plaintiffs' claim of a regulatory taking due to the imposition of a special-use authorization requirement is not ripe for judicial review. Even assuming for the sake of argument that R.S. 2477 did give Plaintiffs a cognizable private property interest in an easement along the roads in question, that easement "would still be subject to reasonable Forest Service regulations." Adams v. United States, 3 F.3d 1254, 1258 n.1 (9th Cir. 1993); see also S. Utah Wilderness All., 425 F.3d at 746; Jenks, 22 F.3d at 1515; United States v. Volger, 859 F.2d 638, 642 (9th Cir. 1988). Whether that regulation goes "too far" cannot be discerned unless and until Plaintiffs engage in the authorization process. The Forest Service has repeatedly invited Plaintiffs to contact the Santa Fe National Forest to discuss the process for moving forward with road reconstruction, see Appx034; Appx090, but Plaintiffs have not accepted that invitation.[3]

Plaintiffs cannot avoid their ripeness problem by insisting that the authorization requirement itself constitutes a taking. The Supreme Court has made

clear that "the mere assertion of regulatory jurisdiction by a government body does not constitute a regulatory taking. . . . [A]fter all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired." United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126–27 (1985). This Court recently reaffirmed this principle, rejecting the argument that the "mere existence of a requirement for a special use permit constitutes a regulatory taking" and holding that the "government may regulate private property; it is only when a regulation 'goes too far'" that it will be deemed a compensable taking. Estate of Hage, 687 F.3d at 1288 (also holding that plaintiffs' failure to seek a special-use permit to maintain their irrigation ditches rendered their claims unripe).

Accordingly, the CFC correctly concluded that "even assuming plaintiffs' characterization of their interest is correct," their "regulatory takings claim is not ripe." Appx007. The CFC's dismissal on that basis should be affirmed.

CONCLUSION

The Court of Federal Claims' dismissal of Plaintiffs' complaint should be affirmed.

[OCTOBER 2017]

90-1-23-14796

Respectfully submitted,

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Footnotes

1 Plaintiffs confirmed in their CFC briefing that no plaintiff had paid any fees or applied for a permit. Appx004.

2 Note that Plaintiffs do not contend that the government has taken the inholdings themselves, only the "statutorily granted vested easements" they claim to hold under R.S. 2477. Br. 15.

3 In fact, it is not at all clear from the complaint that Plaintiffs even intend to conduct the road repairs, with or without Forest Service authorization. Plaintiffs balk at the cost of obtaining special-use authorization, but make no mention whether they are prepared to undertake the expense of road repairs.

STATUTORY AND REGULATORY ADDENDUM

Public Law 94-579
94th Congress

An Act

To establish public land policy; to establish guidelines for its administration; to provide for the management, protection, development, and enhancement of the public lands; and for other purposes.
(Oct. 21, 1976 [S. 507])

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
(Federal land Policy and Management Act of 1976.)

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TITLE V—RIGHTS OF-WAY

TITLE VII—EFFECT ON EXISTING RIGHTS; REPEAL OF EXISTING LAWS; SEVERABILITY

EFFECT ON EXISTING RIGHTS

Sec. 701. (a) Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act.
(43 USC 1701 note.)

(b) Notwithstanding any provision of this Act, in the event of conflict with or inconsistency between this Act and the Acts of August 28, 1937 (50 Stat. 874; 43 U.S.C. 1181a-1181j), and May 24, 1939 (53 Stat. 753), insofar as they relate to management of timber resources, and disposition of revenues from lands and resources, the latter Acts shall prevail.

(c) All withdrawals, reservations, classifications, and designations in effect as of the date of approval of this Act shall remain in full force and effect until modified under the provisions of this Act or other applicable law.

(d) Nothing in this Act, or in any amendments made by this Act, shall be construed as permitting any person to place, or allow to be placed, spent oil shale, overburden, or byproducts from the recovery of other minerals found with oil shale, on any Federal land other than Federal land which has been leased for the recovery of shale oil under the Act of February 25, 1920 (41 Stat. 437, as amended; 30 U.S.C. 181 et seq.).

(e) Nothing in this Act shall be construed as

modifying, revoking, or changing any provision of the Alaska Native Claims Settlement Act (85 Stat. 688, as amended; 43 U.S.C. 1601 et seq.).

(f) Nothing in this Act shall be deemed to repeal any existing law by implication.

(g) Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States or—

(1) as affecting in any way any law governing appropriation or use of, or Federal right to, water on public lands;

(2) as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control;

(3) as displacing, superseding, limiting, or modifying any interstate compact or the jurisdiction or responsibility of any legally established joint or common agency of two or more States or of two or more States and the Federal Government;

(4) as superseding, modifying, or repealing, except as specifically set forth in this Act, existing laws applicable to the various Federal agencies which are authorized to develop or participate in the development of water resources or to exercise licensing or regulatory functions in relation thereto;

(5) as modifying the terms of any interstate compact;

(6) as a limitation upon any State criminal statute or upon the police power of the respective States, or as derogating the authority of a local police officer in the performance of his duties, or as depriving any State or political subdivision thereof of any right it may have to

exercise civil and criminal jurisdiction on the national resource lands; or as amending, limiting, or infringing the existing laws providing grants of lands to the States.

(h) All actions by the Secretary concerned under this Act shall be subject to valid existing rights.

(i) The adequacy of reports required by this Act to be submitted to the Congress or its committees shall not be subject to judicial review.

(j) Nothing in this Act shall be construed as affecting the distribution of livestock grazing revenues to local governments under the Granger-Thye Act (64 Stat. 85, 16 U.S.C. 580h), under the Act of May 23, 1908 (35 Stat. 260, as amended; 16 U.S.C. 500), under the Act of March 4, 1913 (37 Stat. 843, as amended; 16 U.S.C. 501), and under the Act of June 20, 1910 (36 Stat. 557).

REPEAL OK LAWS RELATING TO HOMESTEADING AND SMALL TRACTS

SEC. 702. Effective on and after the date of approval of this Act, the following statutes or parts of statutes are repealed except the effective date shall be on and after the tenth anniversary of the date of approval of this Act insofar as the listed homestead laws apply to public lands in Alaska:
(Effective date.)

Act of	Chapter	Section	Statue at Large	43 U.S. Code
1. Homesteads:				
Revised				161, 171

Act of	Chapter	Section	Statue at Large	43 U.S. Code
Statue 2280				
Mar. 3, 1891	561	5	26:1097	161, 162.
Revised Statute 2290				162
Revised Statute 2295				163
Revised Statute 2291				164
June 6, 1912	153		37:123	164, 169, 218.
May 14, 1880	89		21:141	166, 185, 202, 223.
June 6, 1900	821		31:683	166,223.
Aug. 9, 1912	280		37:267	
Apr. 6, 1914	51		38:312	167.
Mar. 1, 1921	90		41:1193	
Oct. 17, 1914	325		38:740	168.
Revised Statute 2297				169.

Act of	Chapter	Section	Statue at Large	43 U.S. Code
Mar. 31, 1881	153		21:511	
Oct. 22, 1914	335		38:786	170.
Revised Statute 2292				171.
June 8, 1880	136		21:166	172.
Revised Statute 2301				173.
Mar. 3, 1891	561	6	26:1098	
June 3, 1896	312	2	29:197	
Revised Statute 2288				174.
Mar. 3, 1891	561	3	26:1097	
Mar. 3, 1905	1424		36:991	
Revised Statute 2296				175.
Apr. 28, 1922	155		42:502	
May. 17, 1900	479	1	31:179	179.
Jan. 26, 1901	180		31:740	180.

Act of	Chapter	Section	Statue at Large	43 U.S. Code
Sept. 5, 1914	294		38:712	182.
Revised Statute 2300				183.
Aug. 31, 1918	166	8	40:957	
Sept. 13, 1918	173		40:960	
Revised Statute 2302				184, 201
July 26, 1892	251		27:270	185.
Feb. 14, 1920	76		41:434	186.
Jan. 21, 1922	32		42:358	
Dec. 28, 1922	19		42:1067	
June .12, 1930	471		46:580	
Feb. 25, 1925	326		43:081	187.
June. 21, 1934	690		48:1185	187a.
May. 22, 1902	821	2	32:203	187b.
June. 5, 1900	716		31:270	188, 217.
Mar. 3, 1875	131	15	18:420	189.
July 4, 1884	180	Only	23:96	190.

Act of	Chapter	Section	Statue at Large	43 U.S. Code
		last paragraph of sec. 1.		
Mar. 1, 1933	160	1	47:1418	190a.
The following words only: "Provided, That no further allotments of lands to Indians on the public domain shall be made In San Joan County. Utah, nor shall further Indian homesteads be made in said county under the Act of July 4.1884 (23 Stat. 08; U.S.C. title 48, sec. 190)."				
Revised Statutes 2310. 2311				191.
June 13, 1902	1080		32:384	203.
Mar. 3, 1879	191		20:472	204.
July 1, 1879	60		21:46	205.
May 6,1886	88		24:22	206.
Aug.21, 1916	361		39:518	207.
June 3, 1924	240		43:357	208.

Act of	Chapter	Section	Statue at Large	43 U.S. Code
Revised statute 2298				211.
Aug. 30, 1890	837		26:391	212.
1. Mar. 2, 1895	174		28:74	176.
2. June 28, 1934	865	8	48:1272	315g.
June 26, 1936	842	3	49:1976, title I.	
June 19, 1948	548	1	62:533	
July 9, 1962	P.L. 87-524		76:140	315g-1.
3. Aug. 24, 1937	744		50:748	315p.
4. Mar. 3, 1909	271	2d proviso only.	35:845	772.
June 25, 1910	J. Res. 40		36:884	
5. June 21, 1934	689		48:1185	871a.
6. Revised Statute 2447				1151.

Act of	Chapter	Section	Statue at Large	43 U.S. Code
Revised Statute 2448				1152.
7. June 6, 1874	223		18:62	1153; 1154.
8. Jan. 28, 1879	30		20:274	1155.
9. May, 30, 1894	87		28:84	1156.
10. Revised Statute 2471				1191.
Revised Statute 2472				1192.
Revised Statute 2473				1193.
11. July 14, 1960	P.L. 86-649	101-202(a), 203-204(a), 301-303.	74:506	1361, 1362, 1363-1383.
12. Sept. 26, 1970	P.L. 91-429		84:885	1362a.
13. July 31, 1939	401	1, 2	53:1144	

REPEAL OK LAWS RELATING TO HIU1IT8-OF-WAY

SEC. 700. (a) Effective on and after the date of approval of this Effective Act, R.S. 2477 (43 U.S.C. 932) is repealed in its entirety and the following statutes or parts of statutes are repealed insofar as they apply to the issuance of rights-of-way over, upon, under, and through the public lands and lands in the National Forest System:
(Effective date.)

Act of	Chapter	Section	Statue at Large	43 U.S. Code
Revised Statutes 2339				661.
The following words only: "and the right-of-way for the construction of ditches and canals for the purpose herein specified is acknowledged and confirmed: but wherever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damages shall be liable to the party injured for such injury or damage."				
Revised Statures 2340				661.
The following words only: "or rights to ditches and reservoirs used in connection with such water rights."				

Act of	Chapter	Section	Statue at Large	43 U.S. Code
Feb. 26, 1897	335		29:599	664
Mar. 3, 1899	427	1	30:1233	665, 958, (16 U.S.C. 525).
The following words only: "that in the farm provided by existing law the Secretary of the Interior may file and approve surveys and plots of any right-of-way for a wagon road, railroad, or other highway over and across any forest reservation or reservoirs site when in his Judgment the public interests will not be injuriously effected thereby."				
Mar. 3, 1875	152		18:482	934-939.
May 14, 1898	299	2-9	30:409	942-1 to 942-9.
Feb. 27, 1901	614		31:815	943.
June 26, 1906	3548		34:481	944.
Mar. 3, 1891	561	18-21	26:1101	946-949
Mar. 4, 1917	184	1	39:1197	
May 28, 1926	409		44:668	
Mar. 1, 1921	93		41:1194	950

Act of	Chapter	Section	Statue at Large	43 U.S. Code
Jan. 13, 1897	11		20:484	952-955.
Mar. 3, 1923	219		42:1437	
Jan. 21, 1895	37		28:635	951, 956, 957
May 14, 1896	179		29:120	
May 11, 1898	292		30:404	
Mar. 4, 1917	184	2	39:1197	
Feb. 15, 1901	372		31:790	959, (16 U.S.C. 79, 522).
Mar. 4, 1911	238		36:1253	951 (16 U.S.C. 5, 420, 523).
Only the last two paragraphs under the subheading "Improvement of the National Forests" under the healing "Forest Service."				
May 27, 1952	338		66:95	
May 21, 1896	212		29:127	962-965.
Apr. 12, 1910	155		36:296	966-970.
June 4, 1897	2	1	30:35	16

Act of	Chapter	Section	Statue at Large	43 U.S. Code
				U.S.C. 551.
Only the eleventh paragraph under Surveying the public lands.				
July 22, 1937	517	31, 32	50:525	7 U.S.C. 1010-1012.
Sept. 3, 1954	1255	1	68:1146	931c.
July 7, 1960	Public Law 86-608		74:363	40 U.S.C. 345c.
Oct. 23, 1962	Public Law 87-852.	1-3	76:1129	40 U.S.C. 319-319c.
Feb. 1, 1905	288	4	33:628	16 U.S.C. 524.

(b) Nothing in section 706(a), except as it pertains to rights-of-way, may be construed as affecting the authority of the Secretary of Agriculture under the Act of June 4, 1897 (30 Stat. 35, as amended, 16 U.S.C. 551); the Act of July 22, 1937 (50 Stat. 525, as amended,

7 U.S.C. 1010-1212); or the Act of September 3, 1954 (68 Stat. 1146, 43 U.S.C. 931c).
(43 USC 1701 note)

SEVERABILITY

SEC, 707. If any provision of this Act or the application thereof is held invalid, the remainder of the Act and the application thereof shall not be affected thereby.
(43 USC 1701 note.)

Approved October 21, 1976.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 94-1163 accompanying H.R. 13777 (Comm. On Interior and Insular Affairs) and No. 94-1724 (Comm. Of Conference).
SENATE REPORT No. 94-583 (Comm. On Interior and Insular Affairs).
CONGRESSIONAL RECORD, Vol. 122 (1976):

Feb. 23, 25, considered and passed Senate.
July 22, considered and passed House, amended, in lieu of H.R. 13777.
Sept. 30, House agreed to conference report.
Oct. 1, Senate agreed to conference report.

CHAP. 2.—An Act Making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and the same are hereby, appropriated, for the objects hereinafter expressed, for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, namely;

UNDER THE TREASURY DEPARTMENT.

PUBLIC BUILDINGS.

For post-office at Allegheny, Pennsylvania: For completion of building under present limit, fifty-five thousand dollars.

For public building at Boise City, Idaho: For continuation of building under present limit, one hundred thousand dollars.

For post-office at-Boston, Massachusetts: For construction of a two-story money vault in the subtreasury portion of the post-office building, ten thousand dollars.

That the Secretary of the Treasury be, and he is hereby, authorized and directed to acquire, by purchase, condemnation, or otherwise, such additional land as he may deem necessary, and to cause to be erected an addition or extension to the United States custom-house and post-office building at Bridgeport, Connecticut, for the use and accommodation of the Government offices, the cost of said additional laud and extension or addition not to exceed one hundred

thousand dollars.

For post-office at Buffalo, New York: For continuation of building under present limit, five hundred thousand dollars.

For post-office at Brockton, Massachusetts: For completion of building under present limit, fifty thousand dollars.

For post-office and custom-house at Camden. New Jersey: That the sum of five thousand dollars, or so much of the appropriation as may be necessary, is hereby reappropriated and made available, out of the amounts heretofore appropriated for the erection of the building, to enable the Secretary of the Treasury to acquire, by purchase, condemnation, or otherwise, such land additional to the present site as in his judgment is necessary to accommodate properly a building of the character contemplated by the increased limit of cost authorized by the Act of Congress approved June eleventh, eighteen hundred and ninety-six; and the Secretary of the Treasury is hereby authorized to enter into contracts for work on said building in advance of appropriations yet to be made under the present limit of cost.

For post-office and court house at Charleston, South Carolina: For completing the approaches and grounds around the building, fourteen thousand dollars.

For rental of quarters at Chicago, Illinois: For annual rental of temporary quarters for the accommodation of certain Government officials, for the year ending March twenty-eighth, eighteen hundred and ninety-eight, including not exceeding five hundred dollars for necessary shelving and pigeon holes, nineteen thousand three hundred and forty- five dollars and twenty-two cents.

For court-house and post-office at Cumberland, Maryland: For completion of building under present

limit, fifty thousand dollars.

For public building at Cheyenne, Wyoming: For continuation of budding under present limit, one hundred thousand dollars.

For mint building at Denver, Colorado: For continuation of building under present limit, two hundred thousand dollars.

For public building at Helena, Montana: For continuation of building under present limit, one hundred thousand dollars, and not to exceed twenty thousand dollars of this sum may, in the discretion of the Secretary of the Treasury, be used to purchase, by condemnation the Interior: *Provided further*, That the plats and field notes thereof prepared shall be approved and certified to by the Director of the Geological Survey, and three copies thereof shall be returned, one for filing in the surveyor-general's office of Idaho, one in the surveyor-general's office of Montana, and the original in the General Land Office.

And such surveys, field notes, and plats shall have the same legal force and effect as heretofore given to the acts of surveyors-general: *Provided further*, That all law inconsistent with the provisions hereof are declared to be inoperative as respects such survey.

For the survey of the public lands that have been or may hereafter be designated as forest reserves by Executive proclamation, under section twenty-four of the Act of Congress approved March third, eighteen hundred and ninety-one, entitled "An Act to repeal timber-culture laws, and for other purposes," and including public lands adjacent thereto, which may be designated for survey by the Secretary of the Interior, one hundred and fifty thousand dollars, to be immediately available: *Provided*, That, to remove any doubt which may exist pertaining to the authority of the President thereunto, the President of the United

States is hereby authorized and empowered to revoke, modify, or suspend any and all such Executive orders and proclamations, or any part thereof, from time to time as he shall deem best for the public interests: *Provided*, That the Executive orders and proclamations dated February twenty-second, eighteen hundred and ninety-seven, setting apart and reserving certain lands in the States of Wyoming, Utah, Montana, Washington, Idaho, and South Dakota as forest reservations, be, and they are hereby, suspended, and the lands embraced therein restored to the public domain the same as though said orders and proclamations had not been issued: *Provided further*, That lands embraced in such reservations not otherwise disposed of before March first, eighteen hundred and ninety-eight, shall again become subject to the operations of said orders and proclamations as now existing or hereafter modified by the President.

The surveys herein provided for shall be made, under the supervision of the Director of the Geological Survey, by such person or persons as may be employed by or under him for that purpose, and shall be executed under instructions issued by the Secretary of the Interior; and if subdivision surveys shall be found to be necessary, they shall be executed under the rectangular system, as now provided by law. The plats and field notes prepared shall be approved and certified to by the Director of the Geological Survey, and two copies of the field notes shall be returned, one for the tiles in the United States surveyor-general's office of the State in which the reserve is situated, the other in the General Land Office; and twenty photolithographic copies of the plats shall be returned, one copy for the files in the United States surveyor-general's office of the State in which the reserve is situated; the original plat and the other copies shall be filed in the General Land Office,

and shall have the facsimile signature of the Director of the Survey attached.

Such surveys, field notes, and plats thus returned shall have the same legal force and effect as heretofore given the surveys, field notes, and plats returned through the surveyors general; and such surveys, which include subdivision surveys under the rectangular system, shall be approved by the Commissioner of the General Land Office as in other cases, and properly certified copies thereof shall be filed in the respective land offices of the districts in which such lands are situated, as in other cases. All laws inconsistent with the provisions hereof are hereby declared inoperative as respects such survey: *Provided, however,* That a copy of every topographic map and other maps showing the distribution of the forests, together with such field notes as may be taken relating thereto, shall be certified thereto by the Director of the Survey and filed in the General Land Office.

All public lands heretofore designated and reserved by the President of the United States under the provisions of the Act approved March third, eighteen hundred and ninety-one, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as public forest reserves under said Act, shall be as far as practicable controlled and administered in accordance with the following provisions:

No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the Act providing for such

reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said Act of March third, eighteen hundred and ninety-one, and which maybe continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this Act or such rules and regulations shall be punished as is provided for in the Act of June fourth, eighteen hundred and eighty-eight, amending section fifty-three hundred and eighty-eight of the Revised Statutes of the United States.

For the purpose of preserving the living and growing timber and promoting the younger growth on forest reservations, the Secretary of the Interior, under such rules and regulations as he shall prescribe, may cause to be designated and appraised so much of the dead, matured, or large growth of trees found upon such forest reservations as may be compatible with the utilization of the forests thereon, and may sell the same for not less than the appraised value in such quantities to each purchaser as he shall prescribe, to be used in the State or Territory in which such timber reservation may be situated, respectively, but not for export therefrom. Before such sale shall take place, notice thereof shall be given by the Commissioner of the General Land Office, for not less than sixty days, by publication in a newspaper of general circulation, published in the county in which the timber is situated,

if any is therein published, and if not, then in a newspaper of general circulation published nearest to the reservation, and also in a newspaper of general circulation published at the capital of the State or Territory where such reservation exists; payments for such timber to be made to the receiver of the local land office of the district wherein said timber may be sold, under such rules and regulations as the Secretary of the Interior may prescribe; and the moneys arising therefrom shall be accounted for by the receiver of such land office to the Commissioner of the General Land Office, in a separate account, and shall be covered into the Treasury. Such timber, before being sold, shall be marked and designated, and shall be cut and removed under the supervision of some person appointed for that purpose by the Secretary of the Interior, not interested in the purchase or removal of such timber nor in the employment of the purchaser thereof. Such supervisor shall make report in writing to the Commissioner of the General Land Office and to the receiver in the land office in which such reservation shall be located of his doings in the premises.

The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by bona fide settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such, reservations may be located.

Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be

constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of the Interior. Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering such forest reservations.

That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

The settlers residing within the exterior boundaries of such forest reservations, or in the vicinity thereof, may maintain schools and churches within such reservation, and for that purpose may occupy any part of the said forest reservation, not exceeding two acres for each schoolhouse and one acre for a church.

The jurisdiction, both civil and criminal, over persons within such reservations shall not be affected or changed by reason of the existence of such reservations, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the

State wherein any such reservation is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State.

All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder.

Upon the recommendation of the Secretary of the Interior, with the approval of the President, after sixty days' notice thereof, published in two papers of general circulation in the State or Territory wherein any forest reservation is situated, and near the said reservation, any public lands embraced within the limits of any forest reservation which, after due examination by personal inspection of a competent person appointed for that purpose by the Secretary of the Interior, shall be found better adapted for mining or for agricultural purposes than for forest usage, may be restored to the public domain. And any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained.

The President is hereby authorized at any time to modify any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve.

UNITED STATES GEOLOGICAL SURVERY

FOR SALLARIES OF THE SCIENTIFIC ASSISTANTS OF THE GEOLOGICAL SURVEY: For two geologists, at four thousand dollars each;

Public Law 96-487
96th Congress

An Act

To provide for the designation and conservation of certain public lands in the State of Alaska, including the designation of units of the National Park. National Wildlife Refuge, National Forest, National Wild and Scenic Rivers, and National Wilderness Preservation Systems, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. This Act may be cited as the "Alaska National Interest Lands Conservation Act".

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PART B—OTHER RELATED PROVISIONS

TITLE I—PURPOSES, DEFINITIONS. AND MAPS

PURPOSES

SEC. 101. (a) In order to preserve for the benefit, use, education, and inspiration of present and future generations certain lands and waters in the State of Alaska that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values, the units described in the following titles are hereby established.

(b) It is the intent of Congress in this Act to preserve unrivaled scenic and geological values associated with natural landscapes; to provide for the maintenance of sound populations of, and habitat for, wildlife species of inestimable value to the citizens of

Alaska and the Nation, including those species dependent on vast relatively undeveloped areas; to preserve in their natural state extensive unaltered arctic tundra, boreal forest, and coastal rainforest ecosystems; to protect the resources related to subsistence needs; to protect and preserve historic and archeological sites, rivers, and lands, and to preserve wilderness resource values and related recreational opportunities including but not limited to hiking, canoeing, fishing, and sport hunting, within large arctic and subarctic wildlands and on freeflowing rivers; and to maintain opportunities for scientific research and undisturbed ecosystems.

(c) It is further the intent and purpose of this Act consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for which each conservation system unit is established, designated, or expanded by or pursuant to this Act, to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so.

(d) This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people; accordingly, the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition, and thus Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby.

DEFINITIONS

SEC. 102. As used in this Act (except that in titles IX and XIV the following terms shall have the same meaning as they have in the Alaska Native Claims Settlement Act, and the Alaska Statehood Act)—

(1) The term "land" means lands, waters, and interests therein.

(2) The term "Federal land" means lands the title to which is in the United States after the date of enactment of this Act.

(3) The term "public lands" means land situated in Alaska which, after the date of enactment of this Act, are Federal lands, except—

(A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;

(B) land selections of a Native Corporation made under the Alaska Native Claims Settlement Act which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and

(C) lands referred to in section 19(b) of the Alaska Native Claims Settlement Act.

(4) The term "conservation system unit" means any unit in Alaska of the National Park

System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument including existing units, units established, designated, or expanded by or under the provisions of this Act, additions to such units, and any such unit established, designated, or expanded hereafter.

(5) The term "Alaska Native Claims Settlement Act" means "An Act to provide for the settlement of certain land claims of Alaska Natives, and for other purposes", approved December 18, 1971 (85 Stat. 688), as amended.

ACCESS

SEC. 1323. (a) Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Agriculture may prescribe, the Secretary shall provide such access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: *Provided,* That such owner comply with rules and regulations applicable to ingress and egress to or from the National Forest System.

(b) Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of the Interior may prescribe, the Secretary shall provide such access to nonfederally owned land surrounded by public lands managed by the Secretary under the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701-82) as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: *Provided,* That such owner comply

with rules and regulations applicable to access across public lands.

YUKON FLATS NATIONAL WILDLIFE REFUGE AGRICULTURAL USE

SEC. 1324. Nothing in this Act or other existing law shall be construed as necessarily prohibiting or mandating the development of agricultural potential within the Yukon Flats National Wildlife Refuge pursuant to existing law. The permissibility of such development shall be determined by the Secretary on a case-by-case basis under existing law. Any such development permitted within the Yukon Flats National Wildlife Refuge shall be designed and conducted in such a manner as to minimize to the maximum extent possible any adverse effects of the natural values of the unit.

TERROR LAKE HYDROELECTRIC PROJECT IN KODIAK NATIONAL WILDLIFE REFUGE

SEC. 1325. Nothing in this Act or the National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd) shall be construed as necessarily prohibiting or mandating the construction of the Terror Lake Hydroelectric Project within the Kodiak National Wildlife Refuge. The permissibility of such development shall be determined by the Secretary on a case-by-case basis under existing law.

FUTURE EXECUTIVE ACTIONS

SEC. 1326. (a) No future executive branch action which withdraws more than five thousand acres, in the aggregate, of public lands within the State of Alaska

shall be effective except by compliance with this subsection. To the extent authorized by existing law, the President or the Secretary may withdraw public lands in the State of Alaska exceeding five thousand acres in the aggregate, which withdrawal shall not become effective until notice is provided in the Federal Register and to both Houses of Congress. Such withdrawal shall terminate unless Congress passes a joint resolution of approved within one year after the notice of such withdrawal has been submitted to Congress.

(b) No further studies of Federal lands in the State of Alaska for the single purpose of considering the establishment of a conservation system unit, national recreation area, national conservation area, or for related or similar purposes shall be conducted unless authorized by this Act or further Act of Congress.

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fied person: Provided, That all the persons availing themselves of the provisions of this section shall be required to pay, and there shall be collected from them, at the time of making payment for their land, interest on the total amounts paid by them, respectively, at the rate of five per centum per annum, from the date at which they would have been required to make payment under the act of duly fifteenth, eighteen hundred and seventy, until the date of actual payment: Provided further, That the twelfth section of said act of July sixteenth, eighteen hundred and seventy, is hereby so amended that the aggregate amount of the proceeds of sale received prior to the first day of March of each year shall be the amount upon which the payment of interest shall be based.

Sec. 3. That the sale or transfer of his or her claim upon any portion of these lands by any settler prior to the issue of the commissioner's instructions of April. twenty-sixth, eighteen hundred and seventy-one, shall not operate to preclude the right of entry, under .the provisions of this act, upon another tract settled. upon subsequent to such sale or transfer: Provided, That satisfactory proof of good faith be furnished upon such subsequent settlement: Provided farther, That the restrictions of the preemption laws relating to previous enjoyment of the pre-emption right, to removal from one's own land in the same State, or the ownership of over three hundred and twenty acres, shall not apply to any settler actually residing on his or her claim at the date of the passage of this act.

APPROVED, May 9, 1872.

CHAP. CLII - An Act to promote the Development of the mining Resources of the United States.

Be it enacted by the, Senate and House of Representatives of the United States of America in Congress assembled, That all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners, in the several mining-districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Sec 2. That mining-claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force

at the date of their location. A mining-claim located after the passage of this act, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode ; but no location of a mining-clairn shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the, middle of the vein at the surface, except where adverse rights existing at the passage of this act shall render such limitation necessary. The end-lines of each claim shall be parallel to each other.

Sec. 3. That the locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse 'v claim exists at the passage of this act, so long as, they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with said laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of . such surface-lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of said surface locations: Provided, That their right of possession to such outside parts of said veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as aforesaid, through the end lines of their locations, so continued in their own direction that

such, planes will intersect such exterior parts of said veins or ledges: And provided further, That nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

Sec. 4. That where a tunnel is run for- the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins -or lode's not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undis-covered veins on the line of said tunnel.

Sec. 5. That the miners of each mining district may make rules, and regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mini mining-claim, subject to the following requirements: The, location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining-claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the passage of this act, and until a patent

shall have been issued therefor, not less than one hundred dollars worth of labor shall be performed or improvements made during each year. On all claims located prior to the passage of this act, ten dollars worth of labor shall be performed or improvements made each year for each one hundred feet in length along the vein until a patent shall have been issued therefor; but where such claims are held in common such expenditure may be, made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made: Provided, That the, original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after such failure and before such location.

Upon the failure of any. one of several co-owners to contribute his proportion of the expenditures required by this act, the co-owners who have, performed the labor or made the improvements may, at the expiration of the year, give such delinquent, co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion to comply with this act, his interest in the claim shall become the property of his co-owners who have made the required expenditures.

SEC. 6. That a patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this act, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this act,

may file in the proper land-office an application for a patent, under oath, showing such compliance together with a plat and field-notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted as aforesaid, and shall file a copy of said notice in such land-office, and shall thereupon be entitled to a patent for said land, in the manner following: The register of the land-office, upon the filing of such application, plat, field-notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to said claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made. upon the claim by himself or grantors ; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the, claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during said period of publication. If no adverse claim shall have been filed

with the register and the receiver of the proper land-office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with this act.

Sec. 7. That where an adverse claim shall be filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim.

After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving farther notice, file a certified copy of the judgment-roll with the register of the land-office, together with the certificate, of the surveyor-general that the requisite amount of labor has been expended, or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the commissioner of the general land office, and a patent

shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it shall appear from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor-general whereupon the register shall certify the proceedings and judgment-roll to the commissioner of the general and office, as in the preceding me, and patents shall issue to the several parties according to their respective rights. Proof of citizenship under this act, or the acts of July twenty-sixth, eighteen hundred and sixty-six, and July ninth, eighteen hundred and seventy, in the me of an individual, may consist of his own affidavit thereof, and in case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his. own knowledge or upon information and belief, and in case of a corporation organized under the laws of the United States, or of any State or Territory of the United States, by, the filing of a certified copy of their charter or certificate of incorporation; and nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining-claim to any person whatever.

SEC. 8. That the description of vein or lode claims, upon surveyed lands, shall designate the location of the claim with reference to the lines of the public surveys, but need not conform therewith but where a patent shall be issued as aforesaid for claims upon unsurveyed lands, the surveyor genera , in extending the surveys, shall adjust the same to the boundaries of such patented claim, according to the plat or description thereof, but so as in no cue to interfere with or change the, location of any such patented claim.

Sec. 9. That sections one, two, three, four, and six of an act entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," approved duly twenty-sixth, eighteen hundred and sixty-six, are hereby repealed, but such repeal shall not affect existing rights. Applications for patents for mining-claims now pending may be prosecuted to a final decision in the general land office; but in such cases where adverse rights are not affected thereby, patents may issue, in pursuance of the provisions of this act; and all patents for mining claims heretofore issued under the act of duly twenty-sixth, eighteen hundred and sixty-six, shall convey all the rights and privileges conferred by this act where no adverse rights exist at the time of the passage of this act.

Sec 10. That the act entitled "An act to amend an act granting the right of way to ditch and canal owners over the public lands, and for other purposes," approved July ninth, eighteen hundred and seventy, shall be and remain in full force, except as to the proceedings to obtain a patent, which shall be similar to the proceedings prescribed by sections six and seven of this act for obtaining patents to vein or lode claims; but where said placer-claims shall be upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining-claim's hereafter located shall conform as near as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres, for each individual claimant, but where placer-claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands: Provided, That proceedings now pending may be prosecuted to their final

determination under existing laws; but the provision of this act, when not in conflict with existing laws, shall apply to such cases: And provided also, That where by the segregation of mineral land in any legal subdivision a quantity of agricultural land less than forty acres remains, said fractional portion of agricultural land may be entered by any party qualified by law, for homestead or pre-emption purposes.

Sec. 11. That where the same person, association, or corporation is in possession of a placer-claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer-claim, with the statement that it includes such vein or lode, and in such case (subject to the provisions of this act and the act entitled "An act to amend an act granting the right of way to ditch -and canal owners over the public lands, and for other purposes," approved July ninth, eighteen hundred and seventy) a patent shall issue for the placer-claim, including such vein or lode, upon the payment of five dollars per acre for such ,vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer-claim, or any placer-claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in the second section of this act, is known to exist within the boundaries of a placer-claim, an application for a patent for such placer-claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer-claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode ina placer-claim is not known, a patent for the placer-claim shall convey all

valuable mineral and other deposits within the boundaries thereof.

Sec. 12. That the surveyor-general of the United. States may appoint in each land district containing mineral lands as many competent surveyors as, shall apply for appointment to survey mining-claims. The expenses of the survey of vein or lode claims, and the survey and subdivision of placer-claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey. The commissioner of the general land office shall also have power to establish the maximum charges for surveys and publication of notices under this act; and, in case of excessive charges for publication, he may, designate any newspaper published in a land district where mines are situated for the publication of mining-notices in such district, and fix the rates to be charged by such paper; and, to the end that the commissioner may be fully informed on the, subject, each applicant shall file with the register a sworn statement of all charges and fees paid by said applicant for publication and surveys, together with all fees and money paid the register and the receiver, of the land-office, which statement shall be. transmitted, with the other papers in the case, to the commissioner of the general land office. The fees of the register and the receiver shall be five dollars each for filing and acting upon each application for patent or adverse claim filed, and they shall be allowed the amount fixed by, law for reducing testimony to writing, when done in the land-office, such fees and allowances to be paid by the respective I parties; and no other fees shall be charged by them in such cases. Nothing in this act

shall be construed to enlarge or affect the rights of either party in regard to any property in controversy at the time of the passage of this act, or of the act entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," approved July twenty-sixth, eighteen hundred and sixty-six, nor shall this act affect any right acquired under said act; and nothing in this act shall be construed to repeal, impair, or in any way affect the provisions of the act entitled "An act granting to A. Sutro the right of way, and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada," approved July twenty-fifth, eighteen hundred and sixty-six.

Sec. 13. That all affidavits required to be made under this act, or the act of which it is amendatory, may be verified before any officer authorized to administer oaths within the land-district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land-office. In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may taken as herein provided on on personal notice of at least ten days to the.opposing party; or if said party cannot be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land-office as published nearest to the location of such land; and the register shall require proof that such notice has been given.

Sec. 14. That where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral

contained within the space, of intersection: Provided, however, That the subsequent location shall have the right of way through said space of intersection for the purposes of the convenient working of the said mine: And provided also, That where two or more veins unite, the oldest or prior .location shall take the vein below the point of union, including all the space of intersection.

Sec. 15. That where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable under this act to veins or lodes: Provided, That no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the safe rate as fixed by this act for the superficies, of the lode. The owner of a quartz-mill or reduction-works not owning a mine in connection therewith, may also "receive a patent for his mill-site, as provided in this section.

Sm. 16. That all acts and parts of acts inconsistent herewith are hereby repealed: Provided, That nothing contained in this act shall be construed to impair, in any rights or interests in mining property acquired under existing laws.

APPROVED, May 10, 1872.

CHAP. CLIII.-An Act authorizing the Secretary of War to correct an Army Officer's Record.

Whereas in December, eighteen hundred and seventy, Major Samuel Ross, United States army, unassigned, was examined by a retiring board at San Francisco, California, and found disabled for active duty on

account of wounds received in battle; and whereas no official action having been taken to retire from active service the said Ross on the proceedings of said retiring board, and the said Ross being a supernumerary officer was honorably mustered out of service as such on or about January second, eighteen hundred and seventy-one; and whereas on or about March second, eighteen hundred and seventy-two, the said Ross was re-appointed an officer of the United States army, as second lieutenant, with a -view of being retired from active service on account of said disability: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the secretary of War is hereby. authorized to place the name of said Samuel Ross on the list of officers retired from active service, according to the proceedings and report of said retiring board, to take effect for rank and pay from the first day of January, eighteen hundred and seventy-one, and to correct the army records and register so that the name of said Ross will appear as continuously in service; Provided, That any and all moneys as pay or emoluments received by said Ross, on account of being declared mustered out as aforesaid, shall be deducted from his pay as such retired officer, accruing from, on, and after the said first day of January, eighteen hundred and seventy-one.

APPROVED. May 10,1872.

CHAP. CCLIII. - An Act to grade East Capitol Street and establish Lincoln Square. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the commissioner of public buildings be, and he hereby is, authorized and directed, in such manner as he may deem most proper, to cause East Capitol street to be

graded, from Third Street east to Eleventh Street east, and to cause the square at the intersection of said street with Massachusetts, forth Carolina, Tennessee, and Kentucky avenues, between eleventh and Thirteenth streets east, to be enclosed with a wooden fence; and the same shall be known as Lincoln Square. And the sum of fifteen thousand dollars is hereby appropriated out of any money in the treasury not otherwise appropriated, to enable the said improvement to be made.
APPROVED. July 25, 1866.
CHAP. CCLIV. - An Act in Relation to the unlawful Tapping of Government Water Pipes.
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the unlawful tapping of any water pipe laid down in the District of Columbia by authority of the United States is hereby declared to be a misdemeanor and an indictable offence; and any person who may be indicted for and convicted of such offence in the criminal court of the District of Columbia shall be subject to such fine as the court may think proper to impose, not exceeding five hundred dollars, or to imprisonment for a term not exceeding, one year. And it is hereby made the special duty of the commissioner of public buildings to bring to the notice of the attorney of the United States for the District of Columbia, or to the grand jury, any infraction of this law. APPROVED. July 25, 1866.
CHAP. CCLV. - An Ad to authorize the Entry and Clearance of Vessels at the Port of Calais, Maine.
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, from and after the passage of this act, the Secretary of the Treasury may authorize, under such regulations as he shall deem

necessary, the deputy collector of customs at the port of Calais, in the State of Maine, to enter and clear vessels, and to perform such other official acts a& the said Secretary shall think advisable.

APPROVED. July 25, 1866.

CHAP. CCLXIL -An Act granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration n and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts,I so far as the same may not be in conflict with the laws of the. United States.

Sec.. 2. And be it further enacted, That whenever any person or association of persons claim a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper, having previously occupied and improved the same according to the local custom or rules of miners in the district where the same is situated, and having expended in actual labor and improvements thereon an amount of not less than one thousand dollars, and in regard to whose possesion there is no controversy or opposing claim, it shall and may be lawful for said claimant or association of claimants to file in the local land office a diagram of the same, so extended laterally or otherwise as to conform to the local laws, customs, and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow

such vein or lode with its dips, angles, and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition.

Sec. 3. And be it further enacted, That upon the filing of the diagram as provided in the second section of this act, and posting the same in a conspicuous place on the claim, together with a notice of intention to apply for a patent, the register of the land office shall publish a notice of the same in a newspaper published nearest to the location of said claim, and shall also post such notice in his office for the period of ninety days; and after the expiration of said period, if no adverse claim shall have been filed, it shall be the duty of the surveyor-general, upon application of the party, to survey the premises and make a plat thereof, indorsed with his approval, designating the number and description of the location, the value of the labor and improvements and the character of the vein exposed; and upon the payment to the proper officer of five dollars per acre, together with the cost of such survey, plat, and notice, and giving satisfactory evidence that said diagram and notice have been posted on the claim during said period of ninety days, the register of -the land office shall transmit to the general land office said plat, survey, and description; and a patent shall issue for the same thereupon. But said plat, survey, or description shall in no case cover more than one vein or lode, and no patent shall issue for more than one vein or lode, which shall be expressed in the patent issued.

Sec 4. And be it further enacted, That when such location and entry of a mine shall be upon unsurveyed lands, it shall and may be lawful, after the extension thereto of the public surveys, to adjust the surveys to the limits of the premises according to the location and

possession and plat aforesaid, and the surveyor-general may, in extending the surveys vary the same from a rectangular form to suit the circumstances of the country and the local rules, laws, and customs of miners: Provided, That no location hereafter made shall exceed two hundred feet in length along the vein for each locator, with an additional claim for discovery to the discoveror of the lode, with the right to follow such vein to any depth, with all its dips, variations and angles, together with a reasonable quantity of surface for the convenient working of the same as fixed by local rules: And provided further, That no person may make more than one location on the same lode, and not more than three thousand feet shall be. taken in any one claim by any association of persons.

SEC. 5. And be it further enacted, That as a further condition of sale in the absence of necessary legislation by Congress, the local legislature of any state or Territory may provide rules for working mines involving easements, drainage, and other necessary means to their complete development and those conditions shall be fully expressed in the patent.

SEC. 6. And be it further enacted, That whenever any adverse claim. ants to any mine located and claimed as aforesaid shall appear before the approval of the survey, as provided in the third section of this act, all proceedings shall be stayed until a final settlement and adjudication in the courts of competent jurisdiction of the rights of possession to such claim, when a patent may issue as in other cases.

Sm. 7. And be it further enacted, That the President of the United States be, and is hereby, authorized to establish additional land districts and to appoint the necessary officers under existing laws, wherever lie may deem the same necessary for the public convenience in executing the provisions of this act.

Sec 8. And be it further enacted, That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

Sec. 9. And be it further enacted, That whenever, by priority of passes to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are, recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: Provided, however, That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

Sec. 10. And be it further enacted, That wherever, prior to the passage of this act, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, the said settlers or owners of such homesteads shall have a right of pre-emption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents, per acre, and in quantity not to exceed one hundred and sixty-acres; or said parties may avail themselves of the provisions of the act of Congress approved day twenty, eighteen

hundred and sixty-two, entitled "An act to secure homesteads to actual settlers on the public domain," and acts amendatory thereof.

SEC. 11. And be it further enacted, That upon the survey of the lands aforesaid, the Secretary of the Interior may designate and set apart such portions of the said lands as are clearly agricultural lands, which lands shall thereafter be subject to pre-emption and sale as other public lands of the United States, and subject to all the laws and regulations applicable to the same.

APPROVED, JULY 26, 1866.

(c) Any person who wishes to enter upon the lands within the watershed for purposes other than those listed in paragraph (b) must obtain a permit that has been signed by the appropriate city official and countersigned by the District Ranger.

(d) Unauthorized entrance upon lands within the watershed is subject to punishment as provided in 36 CFR 261.1b.

(e) The Forest Supervisor of the Stikine Area of the Tongass National Forest may authorize the removal of timber from the watershed under the regulations governing disposal of National Forest timber (36 CFR part 223). In any removal of timber from the watershed, the Forest Supervisor shall provide adequate safeguards for the protection of the Petersburg municipal water supply.

[53 FR 26595, July 14, 1988]

Subpart B-Special Uses AUTHORITY: 16 U.S.C. 4601-6a, 4601-6d, 472, 497b, 497c, 551, 5804, 1134, 3210; 30 U.S.C. 185; 43 U.S.C. 1740,1761-1771.

SOURCE: 45 FR 38327, June 6, 1980, unless otherwise noted.

§ 251.50 Scope.

(a) All uses of National Forest System lands, improvements, and resources, except those authorized by the regulations governing sharing use of roads (§ 212.9); grazing and livestock use (part 222); the sale and disposal of timber and special forest products, such as greens, mushrooms, and medicinal plants (part 223); and minerals (part 228) are designated "special uses." Before conducting a special use, individuals or entities must submit a proposal to the authorized officer and must obtain a special use authorization from the authorized officer, unless that requirement is waived by paragraphs (c) through (e)(3) of this section.

(b) Nothing in this section prohibits the temporary occupancy of National Forest System lands without a special use authorization when necessary for the protection of life and property in emergencies, if a special use authorization is applied for and obtained at the earliest opportunity, unless waived pursuant to paragraphs (c) through
(e)(3) of this section. The authorized officer may, pursuant to §251.56 of this subpart, impose in that authorization such terms and conditions as are deemed necessary or appropriate and may require changes to the temporary occupancy to conform to those terms and conditions. Those temporarily occupying National Forest System lands without a special use authorization assume liability, and must indemnify the United States, for all injury, loss, or damage arising in connection with the temporary occupancy.

(c) A special use authorization is not required for noncommercial recreational activities, such as camping, picnicking, hiking, fishing, boating, hunting, and horseback riding, or for noncommercial activities involving the expression of views, such as assemblies, meetings, demonstrations, and parades, unless:

(1) The proposed use is a noncommercial group use as defined in § 251.51 of this subpart;

(2) The proposed use is still photography as defined in §251.51 of this subpart; or

(3) Authorization of that use is required by an order issued under §261.50 or by a regulation issued under §261.70 of this chapter.

(d) Travel on any National Forest System road shall comply with all Federal and State laws governing the road to be used and does not require a special use authorization, unless:

(1) The travel is for the purpose of engaging in a noncommercial group use, outfitting or guiding, a

recreation event, commercial filming, or still photography, as defined in §251.51 of this subpart, or for a landowner's ingress or egress across National Forest System lands that requires travel on a National Forest System road that is not authorized for general public use under §251.110(d) of this part; or

(2) Authorization of that use is required by an order issued under §261.50 or by a regulation issued under §261.70 of this chapter.

(e) For proposed uses other than a noncommercial group use, a special use authorization is not required if, based
upon review of a proposal, the authorized officer determines that the proposed use has one or more of the following characteristics:

(1) The proposed use will have such nominal effects on National Forest System lands, resources, or programs that it is not necessary to establish terms and conditions in a special use authorization to protect National Forest System lands and resources or to avoid conflict with National Forest System programs or operations;

(2) The proposed use is regulated by a State agency or another Federal agency in a manner that is adequate to protect National Forest System lands and resources and to avoid conflict with National Forest System programs or operations; or

(3) The proposed use is not situated in a congressionally designated wilderness area, and is a routine operation or maintenance activity within the scope of a statutory right-of-way for a highway pursuant to R.S. 2477 (43 U.S.C. 932, repealed Oct. 21, 1976) or for a ditch or canal pursuant to R. S. 2339 (43 U.S.C. 661, as amended), or the proposed use is a routine operation or maintenance activity within the express scope of a documented linear right-of-way.

[69 FR 41964, July 13, 2004] § 251.51 Definitions.

Applicant-any individual or entity that applies for a special use authorization.

Authorized officer-any employee of the Forest Service to whom has been delegated the authority to perform the duties described in this part.

Chief-the Chief of the Forest Service.

Commercial filming-use of motion picture, videotaping, sound recording, or any other moving image or audio recording equipment on National Forest System lands that involves the advertisement of a product or service, the creation of a product for sale, or the use of models, actors, sets, or props, but not including activities associated with broadcasting breaking news, as defined in FSH 2709.11, chapter 40.

Commercial use or activity-any use or activity on National Forest System lands (a) where an entry or participation fee is charged, or (b) where the primary purpose is the sale of a good or service, and in either case, regardless of whether the use or activity is intended to produce a profit.

Easement-a type of special use authorization (usually granted for linear rights-of-way) that is utilized in those situations where a conveyance of a limited and transferable interest in National Forest System land is necessary or desirable to serve or facilitate authorized long-term uses, and that may be compensable according to its terms.

Forest road or trail. A road or trail wholly or partly within or adjacent to and serving the National Forest System that the Forest Service determines is necessary for the protection, administration, and utilization of the National Forest System and the use and development of its resources.

Group use-an activity conducted on National Forest System lands that involves a group of 75 or more people, either as participants or spectators.

Guiding-providing services or assistance (such as supervision, protection, education, training, packing, touring, subsistence, transporting people, or interpretation) for pecuniary remuneration or other gain to individuals or groups on National Forest System lands.

Holder-an individual or entity that holds a valid special use authorization. *Lease-a type* of special use authorization (usually granted for uses other than linear rights-of-way) that is used when substantial capital investment is required and when conveyance of a conditional and transferable interest in National Forest System lands is necessary or desirable to serve or facilitate authorized long-term uses, and that may be revocable and compensable according to its terms.

Linear right-of-way-a right-of-way for a linear facility, such as a road, trail, pipeline, electronic transmission line, fence, water transmission facility, or fiber optic cable.

Major category-A processing or monitoring category requiring more than 50 hours of agency time to process an application for a special use authorization (processing category 6 and, in certain situations, processing category 5) or more than 50 hours of agency time

§ 251.112 Application requirements.

(a) A landowner shall apply for access across National Forest System lands in accordance with the application requirements of §251.54 of this part. Such application shall specifically include a statement of the intended mode of access to, and uses of, the non-Federal land for which the special-use authorization is requested.

(b) The application shall disclose the historic access to the landowner's property and any rights of access which may exist over non-federally owned land and shall provide reasons why these means of access do not provide adequate access to the landowners property.

(c) The information required to apply for access across National Forest lands under this subpart is approved for use under subpart B of this part and assigned OMB control number 0596-0082.

§ 251.113 Instrument of authorization. To grant authority to construct and/ or use facilities and structures on National Forest System lands for access to non-Federal lands, the authorized officer shall issue a special-use authorization in conformance with the provisions of subpart B of this part or a road-use permit. In cases where Road Rights-of-way Construction And Use Agreements are in effect, the authorized officer may grant an easement in accordance with the provisions of part 212 of this chapter.

§251.114 Criteria, terms and conditions.

(a) In issuing a special-use authorization for access to non-Federal lands, the authorized officer shall authorize only those access facilities or modes of access that are needed for the reasonable use and enjoyment of the land and that minimize the impacts on the Federal resources. The authorizing officer shall determine what constitutes reasonable use and enjoyment of the lands based on contemporaneous uses made of similarly situated lands in the area and any other relevant criteria.

(b) Landowners must pay an appropriate fee for the authorized use of National Forest System lands in accordance with § 251.57 of this part.

(c) A landowner may be required to provide a reciprocal grant of access to the United States across

the landowner's property where such reciprocal right is deemed by the authorized officer to be necessary for the management of adjacent Federal land. In such case, the landowner shall receive the fair market value of the rights-of-way granted to the United States. If the value of the rights-of-way obtained by the Government exceeds the value of the rights-of-way granted, the difference in value will be paid to the landowner. If the value of the rights-of-way across Government land exceeds the value of the rights-of-way across the private land, an appropriate adjustment will be made in the fee charged for the special-use authorization as provided in § 251.57(b) (5) of this part.

(d) For access across National Forest System lands that will have significant non-Forest user traffic, a landowner may be required to construct new roads or reconstruct existing roads to bring the roads to a safe and adequate standard. A landowner also may be required to provide for the operation and maintenance of the road. This may be done by arranging for such road to be made part of the local public road system, or formation of a local improvement district to assume the responsibilities for the operation and maintenance of the road as either a private road or as a public road, as determined to be appropriate by the authorizing officer.

(e) When access is tributary to or dependent on forest development roads, and traffic over these roads arising from the use of landowner's lands exceeds their safe capacity or will cause damage to the roadway, the landowner(s) may be required to obtain a road-use permit and to perform such reconstruction as necessary to bring the road to a safe and adequate standard to accommodate such traffic in addition to the Government's traffic. In such case, the landowner(s)

also shall enter into a cooperative maintenance arrangement with the Forest Service to ensure that the landowner's commensurate maintenance responsibilities are met or shall make arrangements to have the jurisdiction and maintenance responsibility for the

No. 2017-2224

In the

United States Court of Appeals
for the Federal Circuit

HUGH MARTIN, SANDRA KNOX-MARTIN, KIRKLAND JONES, and THERON AND SHERILYN MALOY,
Plaintiff-Appellants,
v.
UNITED STATES,
Defendant-Appellee.

Appeal from the United States Court Of Federal Claims,
No. 1:16-cv-01159
The Honorable **Patricia Campbell-Smith**, Judge Presiding.

PLAINTIFFS-APPELLANTS REPLY BRIEF

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

17-2224
Martin v. United States
CERTIFICATE OF INTEREST

Counsel for the: Appellant

Western Agriculture, Resource and Business Advocates, LLP (A. Blair Dunn and Marshall J. Ray)

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me

Hugh Martin
Sandra Knox
Kirkland Jones
Theron Maloy
Sherilyn Maloy

2. Name of Real Party in interest (Please only include any real party
in interest NOT identified in Question 3) represented by me is:

Hugh Martin
Sandra Knox
Kirkland Jones
Theron Maloy
Sherilyn Maloy

3. Parent corporations and publicly held companies that own 10 % or more of stock in the party:

None
None
None
None
None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

Date: July 10, 2017
Signature of counsel: s/ A. Blair Dunn
Printed name of counsel: A. Blair Dunn

Please Note: All questions must be answered

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INTRODUCTION

The United States' Response Brief suffers three glaring omissions. First, they fail to acknowledge the impact of permanent law prohibiting any Federal agency from determining the validity of a RS 2477[1] right-of-way such as is claimed as a part of the compensable property interest seized by the U.S. government under threat of criminal and civil prosecution. Second, the United States refuses to acknowledge and offers no analysis regarding why the only located federal district court case deciding and analyzing the issue of private rights of way under RS 2477 either does not apply or is incorrect. And finally, the United States ignores relevant Supreme Court precedent finding that a government demand of the surrender or abandonment of a real property interest in exchange for a permit to continue to use the remainder of a person's real property is a compensable taking under the 5th Amendment. These omissions by the United States are significant and should be addressed.

Appellants have articulated a valid theory regarding why this lawsuit presented a ripe, compensable taking, and Appellee the United States has simply not confronted it.

I. THE DEPARTMENT OF INTERIOR AND RELATED AGENCIES APPROPRIATIONS ACT, 1997, § 108, 110 Stat. 3009 (1996), IS PERMANENT LAW THAT PROHIBITS THE U.S. FOREST SERVICE FROM DETERMINING THAT THE EASEMENT OWNED BY OPERATION OF LAW BY APPELLANTS IS NOT A VALID

COMPENSABLE PROPERTY INTEREST.

In order to promote settlement of the American West in the 1800s and provide access to mining deposits located under federal lands, Congress granted rights-of-way across public lands for the construction of highways by a provision of the Mining Law of 1866, now known as R.S. 2477. Congress repealed R.S. 2477 in 1976 as part of its enactment of FLPMA, along with the repeal of other federal statutory rights-of-way, but it expressly preserved R.S. 2477 rights-of-way that already had been established. In its entirety, R.S. 2477 provided that:

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

R.S. 2477 was self-executing and did not require government approval or public recording of title. As a result, uncertainty arose regarding whether particular rights-of-way had in fact been established. This uncertainty, which continues today, has implications for a wide range of entities, including the US Forest Service and other federal agencies, state and local governments or individuals who assert title to R.S. 2477 rights-of-way, and those who favor or oppose continued use of these rights-of-way.

To deal with this uncertainty and because of the controversial actions of the various federal land management agencies, Congress responded by enacting temporary moratoria and, in 1996, a permanent prohibition on certain R.S. 2477-related activity. The permanent prohibition, set forth in Section 108, states that:

> "No final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to [R.S. 2477] shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act."

The above legislation sets the stage for the instant case and the controversy of the United States Forest Service actions with regard to the roads in question as a compensable property interest. There is little question that the USFS action of closing the road and denying that private individuals hold a vested property interest in the right-of-way easement pertains to the "recognition, management, or validity" of R.S. 2477 rights-of-way. It is also beyond argument that the closing of the road and the denial of ownership of the easements both public and private is a substantive decision and thus a "final rule or regulation" under Section 108. The actions of the USFS both satisfies the APA's definition of "rule" - "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy," see 5 U.S.C. § 551(4)—and meets the key test by which courts have defined substantive rules—it has a binding effect on the agency and other parties and represents a change in law and policy. Thus, the actions of the US Forest Service to declare the road closed and to declare that Appellants' asserted compensable property interest in the road is not valid is prohibited by law. The Court of Claims must make the decision regarding the validity of the compensable property interest of Appellants and the Court of Claims erred in failing to proceed to that determination.

II. United States v. 9,947.71 Acres of Land, More or Less, in Clark Cty., State of Nev. SETS OUT UNCONTROVERTED VALID LEGAL PRECEDENT ESTABLISHING PRIVATE RIGHTS OF WAY AS CLAIMED BY APPELLANTS AS A COMPENSABLE PROPERTY INTEREST.

Appellees, in asserting both Kinscherff v. United States, 586 F.2d 159, 160 (10th Cir. 1978) and Southwest Four Wheel Drive Association v. Bureau of Land Management, 363 F.3d 1069 (10th Cir. 2004) for the proposition that a person or organization cannot assert an interest in a public right-of-way, overlook and fail to mention much less discuss the most applicable federal district court decision on the matter of a private person asserting a privately held easement. Nonetheless the rubric of Kinscherff and Southwest Four Wheel Drive are distinguishable from the current case in which Appellees seek to avoid the appropriate discussion of the compensable property interest being asserted. To be sure, in this bundle of sticks exist several public easement sticks. For instance, as the Appellees acknowledge, there are commonly public easements vested in the state of New Mexico and in fact the roads in question were recognized as County Roads held by Sandoval County. Nevertheless, there are also commonly multiple easements overlain or underlain on the same right-of-way. It is a fundamental principle of property law that there may be many holders of easements (dominant estates) that are real property rights coexisting on the same rights-of-way which also exist overlain on the top of the subservient fee property of the United States. Appellants are not alleging the compensable property interest vested in the state of New Mexico and the County of Sandoval, but are

instead alleging and asserting the private RS 2477 rights-of-way that existed prior to the forest reservation for private commercial mining use of the United States property which are held by Appellants as fee property owners served by a vested easement. These vested easements were previously granted to them by operation of law under the Mining Laws of 1866 and 1872, and no action of the United States or any other party has extinguished those easements. The United States, however, now seeks to deny their existence to treat Appellants as if they have no rights other than to seek a prohibitively expensive permit to fix a road on an easement that they own.

Contrary and distinguishable from the present case, in Kinscherff, the Plaintiffs did not assert a privately held property interest, but rather averred:

> [t]hat they have a real property interest in the Jemez Dam Road as members of the public entitled to use public roads pursuant to N.M.S.A. s 55-1-1 Et seq. (1953 Comp.), and as an owner of land abutting a public highway, and under 43 U.S.C. s 932. This "interest" in plaintiffs, we must hold, is not an interest in real property contemplated by 28 U.S.C. s 2409a. If it exists, it is vested in the public generally. The legislative history of section 2409a refers to the historical development of Quia timet suits in the courts of equity in England, and to quiet title suits as developed in this country. U.S.Code Cong. & Admin.News, 1972, Vol. 3, p. 4547. It thus must be assumed that Congress intended to permit to be brought against the United States the typical quiet title suit, as it has developed in the various states in this country through statutory and case

> law.
>
> The plaintiffs, on this point, do not assert that their interest is an easement or any similar right;

Kinscherff v. United States, 586 F.2d 159, 160 (10th Cir. 1978). In this case, on the other hand, Appellants are asserting a compensable property interest by virtue of the vested private easements for ingress and egress granted by the United States before the US Forest Service reservation of the Santa Fe National Forest in accordance with RS 2477, served to vest in them as private property owners of lands adjacent to the United States property across which the right-of-way must pass over to reach their fee properties. These vested easements exist in addition to the public easements vested in the state of New Mexico and Sandoval County. In short, Appellants, in their Complaint, are asserting that they had access to their property through the vested compensable property interest of an easement that has now been seized through threat of force and that the United States deprived them of not only the use of the road but of access to their fee patented mining properties.

The United States government has long argued against the notion that private vested easements across public ground for rights-of-way exist, but good grounds and at least one federal judicial precedent exist to support just that outcome. Plaintiff will admit to the Court that the only case secured deciding private vested easements existing across federal lands is United States v. 9,947.71 Acres of Land, More or Less, in Clark Cty., State of Nev., 220 F. Supp. 328, (D. Nev. 1963) in which the Court observes "there is a paucity of case authority on the precise question involved." Id. at 331. Yet in spite of the lack of case history, this is still the only case on this subject (no negative treatment

since the decision) in which United States Federal Court for the District of Nevada concluded:

> It follows by simple logic that, if the work done on making a roadway to a mining claim could be allowed as annual assessment work to the value of at least one hundred dollars, or a total of five hundred dollars on the mining claim, then the road or right-of-way had some value, and was property. But there are other authoritative cases which bear upon the proposition as to whether or not such a right-of-way is property and when it becomes such.

In Estes Park Toll-Road Co. v. Edwards, (1893) 3 Colo.App. 74, 32 P. 549, the appellant was resisting the efforts of the county to collect a tax on the right-of-way of the toll-road it had built for a distance of fourteen miles on public land, and had operated the same since its construction in 1876, contending that thus it could not be taxed for much the same reasons as advanced here by the United States, viz: that the road was across public lands and the only grant of 43 U.S.C. 932 was to the public, and that title to the ground occupied by the roadbed was in the United States, and that hence the roadbed could not be taxed. The court disagreed with the appellant. It pointed out that, 'The language used in regard to the right of way for highways (in 43 U.S.C. 932) is 'Is hereby granted.' The word 'grant,' in such connection, is very significant; in fact, seems to be a key for the solution of the question involved. 'Grant:' * * * 'A generic term, applicable to all transfers of real property' * * *. It is stipulated that in the year

1876 the grant was accepted, the road constructed, and has since been maintained. This grant and the acceptance were all that was necessary to pass the government title to the right of way, and vest it in the grantee permanently, subject to defeasance in case of abandonment. See Flint & P.M. Railroad Co. v. Gordon, 41 Mich. 420, 2 N.W.Rep. 648. After entry and appropriation of the right of way granted, and the proper designation of it, the way so appropriated ceased to be a portion of the public domain, was withdrawn from it; and the lands through which it passed were disposed of subject to the right of the road company, such right being reserved in the grant. The road company, as shown, became the owner of the right of way. By the use of its money it improved this right of way, making a highway over which the public could pass by the payment of tolls. Although the public became entitled to use the road, such right was only by compliance with the fixed regulations recognizing the ownership * * * it is clear that the road company could maintain trespass or other actions for any unwarranted interference with its possession and rights. * * * It is also clear that the company had such title as could be sold and transferred, and the successor invested with the right of possession. * * * Tested by these well-settled principles, it will readily be seen that the contention of plaintiff that it had no tangible, taxable property in *335 the road cannot be sustained. It had its granted right of way, together with its road, for the use of which it exacted dues. A toll road is very analogous to a railway to which congress grants the right of way over the public domain. * * *

> The fact that the county commissioners had supervisory control to regulate tolls can have no bearing whatever. * * * The right to so regulate * * *neither divests, defines, nor modifies ownership.'

United States v. 9,947.71 Acres of Land, More or Less, in Clark Cty., State of Nev., 220 F. Supp. 328, 334-35 (D. Nev. 1963). Similarly, as cited to in the foregoing case, in the Solicitor's opinion for Interior from 1959 in his opinion, the Solicitor expressed that "it has traditionally been customary for mining locators, homestead, and other public land entrymen to build and or use such roads across public lands other than granted rights-of-way as were necessary to provide ingress and egress to and from their entries or claims without charge, the question whether a fee may be charged for such use is not only of broad, general interest but to make such a charge now would change a long practice." 66 I.D. 361 (1959). The state of New Mexico has a public vested easement for the public right-of-way and by proxy Sandoval County may exert the same public easement. It is not exclusive, despite the arguments of the United States. Indeed, as discussed in the Solicitor's opinion of 1959 and in 9,947.71 acres, it may in fact be a private road or "granted rights-of-way":

> … providing for the payment by permittee for the use of a road "constructed" or "acquired" by the United States. There is also authority to charge for tram-road rights-of-way, granted pursuant to 43, CFR, 1954 Rev., 244.52, section 244.21. (Supp.). But both sections 115.171(b) and 244.21 pertain to granted rights-of-way. They do not apply to roads constructed by an entryman

> or locator solely to provide access for his entry or claim. The road was not built by the United States nor can it be deemed to have been acquired by it in the sense contemplated by section 115.17 (b). Even if the word "acquired" as there used is given its broadest possible meaning it is not believed that it would encompass an access road of the kind discussed here. It is true that the title to the land is in the United States but the road is in the nature of a "private road access" across another's land which is primarily used by one or more persons but which may used by anyone. The United States can no doubt use such a road or permit its permittees or licensees to do so, at least to the extent that it does not unduly interfere with its use for the legitimate purpose for which it was built.

United States v. 9,947.71 Acres of Land, More or Less, in Clark Cty., State of Nev., 220 F. Supp. 328, 334-35 (D. Nev. 1963). Much like 9947.71 acres, in this case "the terms of Section 8 of the Act of July 26, 1866 (14 Stat. 251 et seq., 43 U.S.C. § 932) was a grant in praesenti, which became effective upon the construction of the road in the 1800's; that, at that time the title of the United States to the right-of-way passed from the United States and vested in the defendants' predecessors and ceased to be a portion of the public domain, without any further action by either or by any public authority; that, any subsequent disposition of the fee title of the land over which it passed was subject to such right-of-way." United States v. 9,947.71 Acres of Land, More or Less, in Clark Cty., State of Nev., 220 F. Supp. 328, 335 (D. Nev. 1963).

The United States does not confront the analysis

of 9,947.71 Acres. Plaintiffs/Appellants recognize that the decision issued from a District Court, but submits that the analysis is sound and should at least be addressed in deciding the issues of this lawsuit. At bottom, the United States cannot invade the compensable property rights of Appellants' vested easements that exist in the same rights-of-way without running afoul of the Fifth Amendment, nor can they evade the logic and analysis of 9,947.71 Acres of Land.

III. KOONTZ V. ST. JOHNS RIVER WATER MGT. DIST. IS UNITED STATES SUPREME COURT PRECEDENT THAT IS DIRECTLY ON POINT AND CLEARLY ESTABLISHES HOW THE CLAIMS COURT ERRED

It is perhaps most important for this Court take note of the complete avoidance of relevant Supreme Court precedent by the Appellee United States in their Response Brief. It is audacious for the United States to argue that the case is not ripe because Appellants have failed to obtain a special use permit from the Forest Service for the continued use and enjoyment of their private property, then in virtually the same breath ignore the holding from Koontz that:

> [O]ur decisions in those cases reflect two realities of the permitting process. The first is that land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. By conditioning a building permit on the owner's deeding over a public right-of-way, for example,

> the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation."

Koontz v. St. Johns River Water Mgt. Dist., 133 S. Ct. 2586, 2594 (2013). This avoidance of clear, relevant precedent also marks the error of law committed by the Court of Claims in concluding that there had been no taking and the case was not ripe. Unfortunately, what was missed by both the Court of Claims and the Appellee in evaluating the applicability of Koontz and the other cases discussing physical and regulatory takings is the correct sequence of application of the laws. First, as noted above the Court of Claims missed the application of §108, 110 Stat. 3009 (1996) to prohibit the Forest Service from determining that the Appellants did not own a compensable R.S. 2477 property interest in the roads to their property. Missing that critical step, the Court of Claims commits the error of agreeing that the Forest Service threat of criminal and civil prosecution (which is a threat of physical force) does not constitute an act of physically seizing control of the property of Appellants. Thus, the assessment that the threat of physical force by the United States to induce Appellants to abandon their compensable property interest in exchange for a special use permit to access the remainder of their private property was in error and directly contradicts the holding from Koontz.

CONCLUSION

Thus, as much as the United States may seek to side-step, avoid, ignore or misdirect an analysis of the relevant law, it is clear that the Court of Claims erred

in following the government down the rabbit hole, to a wonder-land created to fit a reality where the government can seize and take compensable property without any analysis of the ownership of the property and without just compensation. This Court should reverse the lower court and allow the matter to proceed accordingly to full resolution.

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Footnotes

1 "An Act Granting Right of Way To Ditch and Canal Owners Over The Public Land, and for Other Purposes" (Mining Law of 1866), Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, codified at R.S. 2477, recodified at 43 U.S.C. § 932, repealed by Pub. L. No. 94-579, § 706(a), 90 Stat. 2793 (1976).