ENCLOSURE

B-300912

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

In 2003, the Department of the Interior (the Department or DOI) took two major actions relating to so-called R.S. 2477 rights-of-way that have generated considerable attention and are the subject of this opinion. First, on January 6, 2003, the Department issued revisions to its existing regulations, originally promulgated in 1984, implementing section 315 of the Federal Land Policy and Management Act (FLPMA) (2003 Disclaimer Rule). FLPMA § 315, 43 U.S.C. § 1745, authorizes the Department to issue recordable disclaimers of U.S. interests in lands in certain circumstances, and DOI's FLPMA § 315 regulations establish a process by which to apply for such disclaimers. In the preamble to the 2003 Disclaimer Rule, DOI formally announced for the first time that it might use this FLPMA disclaimer process to evaluate the validity of rights-of-way across public lands for the construction of highways, granted by an 1866 mining law now known as Revised Statute 2477 (R.S. 2477). Although R.S. 2477 was repealed by FLPMA in 1976, Congress expressly preserved rights-of-way that already had been established. The self-executing nature of these rights-of-way has led to considerable uncertainty about whether particular rights-of-way have in fact been established, and DOI's 2003 preamble statement announced a new approach to resolving this uncertainty—the use of FLPMA § 315.

Second, following on to this preamble announcement, on April 9, 2003, the Department signed a Memorandum of Understanding with the State of Utah (Utah MOU). 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 Bureau of Land Management [BLM] land within the State of Utah," and the process DOI will use to make these acknowledgements is the FLPMA § 315 disclaimer process. Under the Utah MOU, the State or any Utah county may request initiation of this acknowledgment/disclaimer process for "eligible roads"; such roads must meet certain standards including "meet[ing] the legal requirements of a right-of-way granted under R.S. 2477." On January 14, 2004, the Governor of Utah submitted the first application under the Utah MOU for acknowledgement and a recordable disclaimer of interest for specific R.S. 2477 rights-of-way.

Two principal legal concerns have been raised with respect to these recent actions by the Department. The first is whether either the 2003 Disclaimer Rule or the Utah MOU violates a statutory prohibition contained in section 108 of the Department of the Interior and Related Agencies Appropriations Act, 1997 (Section 108). Section

108 prohibits any final rule or regulation "pertaining to the recognition, management, or validity" of R.S. 2477 rights-of-way from taking effect without express congressional authorization, and the question is whether the 2003 Disclaimer Rule or the Utah MOU constitutes a final rule or regulation covered by Section 108. The second legal concern is whether, apart from this Section 108 prohibition, the Department may use the authority of FLPMA § 315 to disclaim interests in R.S. 2477 rights-of-way.

These concerns raise 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 discussed below, 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.

FACTUAL AND LEGAL 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.[1] In 1976, Congress enacted FLPMA, which reflected a shift from Congress' historic approach of encouraging disposition and settlement of federal public domain lands to an approach favoring retention and management of public lands. As part of this new approach, FLPMA repealed R.S. 2477, along with other federal statutory rights-of-way, but R.S. 2477 rights-of-way that already had been established were expressly preserved. *See* 43 U.S.C. §§ 1701 note, 1769(a). 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."

In the words of one court, R.S. 2477 made "an open-ended and self-executing grant." *Sierra Club v. Hodel*, 848 F.2d 1068, 1078 (10th Cir. 1988). R.S. 2477 did not require government approval, issuance of an identifying record such as a land patent, or public recording of title. A state or county needed only to satisfy the requirements set forth in R.S. 2477—namely, to engage in some form of "construction" of a "highway" over non-reserved public lands —in order to establish a valid R.S. 2477 right-of-way. *See Southern Utah Wilderness Alliance v. BLM*, 147 F. Supp. 2d 1130, 1140 (D. Utah 2001), *appeal dismissed,* 2003 WL 21480689 (10th Cir. 2003).

As a result of this lack of formal approval and public documentation, uncertainty arose regarding whether particular R.S. 2477 rights-of-way had in fact been established. In an effort to resolve some of this uncertainty, the Department has issued a series of policy and other documents over the years, discussing methods of

[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).

administratively recognizing or validating R.S. 2477 rights-of-way. In 1988, for example, DOI Secretary Hodel issued the so-called Hodel Policy, stating that that although R.S. 2477 did not authorize the Department to "adjudicate" applications for R.S. 2477 rights-of-way, it could "administratively recogniz[e]" and record them on DOI land records.[2] The Hodel Policy directed DOI land management bureaus to develop internal procedures for issuing such administrative recognitions and laid out the criteria by which recognitions should be made. In a 1993 report to Congress on R.S. 2477 issues, DOI stated that its R.S. 2477 administrative decisions were intended to facilitate practical resolutions of R.S. 2477 disputes but were not legally binding. As the Department explained:

> "Administrative recognitions [of R.S. 2477 rights-of-way under the Hodel Policy] are not intended to be binding, or a final agency action. Rather, they are recognitions of 'claims' and are useful only for limited purposes. Courts must ultimately determine the validity of such claims . . . An administrative determination is an agency recognition that an R.S. 2477 right-of-way probably exists. The process used to make an administrative determination has been developed in response to claims filed and provides an administrative alternative to litigating each and every potential right-of-way. [It] is not intended to be binding or final agency action, but simply a 'recognition' of 'claims' for land-use planning purposes."

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 Claims on Federal and Other Lands* (June 1993) (*DOI Report to Congress*) at 25-26. According to the Department, as of 1993, DOI and the courts together had recognized about 1,453 R.S. 2477 rights-of-way across BLM lands, with about 5,600 claims remaining, primarily in Utah, and an unknown number of unasserted potential claims. *Id.* at 29.

The following year, in 1994, the Department attempted to create a more formal administrative process for adjudicating R.S. 2477 claims. It proposed a regulatory process that it said would result in "binding determinations of [the] existence and validity" of R.S. 2477 rights-of-way. *See* "Revised Statute 2477 Rights-of-Way," 59 Fed. Reg. 39216, 39216 (Aug. 1, 1994). Congress was concerned with this regulatory proposal, however, as it had been with some of the Department's earlier approaches to validating R.S. 2477 rights-of-way, and responded by enacting temporary moratoria[3] and, in 1996, a permanent prohibition on certain R.S. 2477-related activity. The 1996 prohibition provided that:

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[2] Memorandum from the Acting Assistant Secretary for Fish and Wildlife and Parks and the Assistant Secretary for Land and Minerals Management to the Secretary of the Interior, approved by Secretary Hodel, "Departmental Policy on Section 8 of the Act of July 26, 1866, Revised Statute 2477 (Repealed), Grant of Right-of-Way for Public Highways (RS2477)" (Dec. 9, 1988).

[3] *See* National Highway System Designation Act of 1995, Pub. L. No. 104-59, § 349(a)(1)-(2), 109 Stat. 568 (1995); Department of the Interior and Related Agencies Appropriations Act, 1996, § 110, as enacted by the Omnibus Consolidated Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996).

> "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."

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, 3009-200 (1996) (Section 108).[4]

In response to the Section 108 prohibition, DOI Secretary Babbitt issued the so-called Babbitt Policy in 1997.[5] The Babbitt Policy, revoking the Hodel Policy, states that until any R.S. 2477 rules become effective, and as an alternative to litigation in federal court, the Department will continue to "process" and "give its views" on "assertions" of R.S. 2477 rights-of-way, but only in cases where there is a "demonstrated, compelling, and immediate need" to do so. In such cases, DOI will issue "determinations" that "recognize" those rights-of-way meeting the R.S. 2477 statutory criteria.[6]

Finally, in 2003 and still mindful of the restrictions of Section 108, DOI took the two actions that are the focus of this opinion. First, as noted above, it issued the 2003 Disclaimer Rule on January 6, 2003, revising its existing regulatory process for issuance of recordable disclaimers of U.S. interests in lands under FLPMA § 315. *See* "Conveyances, Disclaimers and Correction Documents," 68 Fed. Reg. 494 (Jan. 6, 2003), amending 43 C.F.R. subpart 1864. As pertinent here, FLPMA § 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

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[4] We have previously determined that the prohibitions of Section 108 are permanent. *See* B-277719, Aug. 20, 1997. The Department recently suggested that Section 108 might have expired at the end of fiscal year 1997, *see, e.g.*, "Conveyances, Disclaimers and Correction Documents," 68 Fed. Reg. 494, 496 (Jan. 6, 2003), but it has previously acknowledged that Section 108 is, in fact, permanent legislation. *See* "Wilderness Management," 65 Fed. Reg. 78358, 78370 (Dec. 14, 2000) ("BLM is forestalled by a 1997 statute from promulgating regulations on R.S. 2477 rights-of-way without Congressional consent."). Although language in annual appropriations acts generally applies only during the fiscal year to which the statute pertains, appropriations act provisions are considered permanent if the statutory language or the nature of the provision makes it clear that Congress intended the provision to be permanent. One clear indicator of permanency is use of so-called "words of futurity," such as "hereafter" or, as in Section 108, "subsequent to the date of enactment." *See, e.g., United States v. Vulte*, 233 U.S. 509, 512 (1914); *Norcross v. United States*, 142 Ct. Cl. 767, 768 (1958); 70 Comp. Gen. 351, 353 (1991). The permanency of Section 108 also is demonstrated by the fact that it is a substantive provision, rather than merely a restriction on the use of appropriations. *See, e.g., United States v. Vulte*, above, 233 U.S. at 513; *Cella v. United States*, 208 F.2d 778 (7th Cir. 1953).

[5] Memorandum from the Secretary of the Interior to the Assistant Secretaries for Fish and Wildlife and Parks, Land and Minerals Management, and Water and Science, "Interim Departmental Policy on Revised Statute 2477 Right-of-Way for Public Highways; Revocation of December 7, 1988 Policy" (Jan. 22, 1997).

[6] Babbitt Policy at 1-2. DOI had previously articulated these fundamental aspects of the Babbitt Policy in 1993. *See DOI Report to Congress*, above, at 5 and App. II, Ex. A.

> will help remove a cloud on the title of such lands and where [the Department] determines (1) a record interest of the United States in lands has terminated by operation of law or is otherwise invalid; or (2) the lands lying between the meander line shown on a plat of survey approved by [BLM] or its predecessors and the actual shoreline of a body of water are not lands of the United States; or (3) accreted, relicted, or avulsed lands are not lands of the United States."

FLPMA § 315(a), 43 U.S.C. § 1745(a). The 2003 Disclaimer Rule expanded the circumstances under which disclaimer applications could be filed. As amended, the regulations now: (a) allow state and local governments to apply for a disclaimer at any time, removing the deadline applicable to other entities (who must file within 12 years of the time they knew or should have known of a possible U.S. claim); (b) allow "any entity claiming title to lands," not just current owners of record, to apply for a disclaimer; and (c) provide that disclaimers will not be issued if a federal land management agency other than BLM with jurisdiction over the affected lands makes a "valid objection" to issuance of the disclaimer. *See* 68 Fed. Reg. at 502-03.

In addition to issuing the revisions themselves, DOI formally announced for the first time, in the preamble to the 2003 Disclaimer Rule, that the agency might use the FLPMA § 315 disclaimer process to validate R.S. 2477 rights-of-way. According to DOI, FLPMA § 315 and the agency's 1984 implementing regulations had always authorized this approach:

> "Recordable disclaimers may be issued [under FLPMA § 315] where applicants assert title previously created under now expired authorities. For example, after adjudicating [an R.S. 2477] claim, BLM may issue a recordable disclaimer of interest to disclaim the United States' interest in a highway right-of-way under R.S. 2477 . . . BLM may issue recordable disclaimers relating to valid R.S. 2477 rights-of-way under the existing 1984 regulations, and this capability will continue under today's rule."

68 Fed. Reg. at 496-97. The Department also stated in the 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 so did not run afoul of the restrictions of Section 108. *Id.* at 497.

The Department identified such "specific standards" for recognizing R.S. 2477 rights-of-way three months later when it signed the Utah MOU, its second major R.S. 2477-related action of 2003. *See* Memorandum of Understanding Between the State of Utah and the Department of the Interior on State and County Road Acknowledgment (Apr. 9, 2003). As noted above, 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 acknowledgements is the FLPMA § 315 disclaimer process. Utah MOU at 2-3. The State or any Utah county may request initiation of this process—for which it must reimburse BLM its processing costs—with regard to "eligible roads," the standards for which include the following:

- The road must have existed prior to enactment of FLPMA in 1976 and be in current use;
- The road must be identifiable by centerline description or other appropriate legal description;
- The existence of the road prior to FLPMA must be sufficiently documented to show that the road meets the legal requirements of an R.S. 2477 right-of-way; and
- The road was and must continue to be public and capable of accommodating four-wheel cars or trucks and must have been subject to some type of periodic maintenance.

Id. at 3. The Utah MOU also provides that the State and Utah counties will not assert rights-of-way under the MOU for roads within the National Park System, the National Wildlife Refuge System, or designated Wilderness Areas or Wilderness Study Areas designated before October 1993, or lands administered by agencies other than DOI except by their consent. *Id.* at 2-3. In order to "facilitate" the Utah MOU Acknowledgment Process, the MOU provides that the 1997 Babbitt Policy's requirements for R.S. 2477 determinations will not apply to such requests but will continue to apply to all other requests for R.S. 2477 recognitions. *Id.* at 4.

In June 2003, the Department issued additional guidance (Utah MOU Guidance) regarding how applications will be processed under the Utah MOU.[7] Reflecting DOI's FLPMA § 315 disclaimer application regulations, the Utah MOU Guidance explains that: (1) applicants must pay BLM's administrative costs of processing applications (*see* 43 C.F.R. §§ 1864.1-2 and -3); (2) at least 90 days before BLM makes a decision on an application, it will publish a notice in the *Federal Register* summarizing the application and noting an opportunity for public comment (*see* 43 C.F.R. § 1864.2); and (3) adverse decisions can be appealed by the applicant or any adverse claimant (*see* 43 C.F.R. § 1864.4).

During the summer of 2003, various riders were proposed to the House Department of Interior Appropriations bill for FY 2004 that would have prohibited DOI from using appropriated funds to implement the 2003 Disclaimer Rule under certain circumstances. None of these riders was enacted.

Finally, on January 14, 2004, the Governor of Utah submitted the first application under the Utah MOU for acknowledgement and a recordable disclaimer of interest of specific R.S. 2477 rights-of-way. As of the date of this opinion, BLM has not yet published a *Federal Register* notice regarding this application.

[7] Memorandum from the BLM Deputy Director to the BLM State Director for Utah, "Processing Applications for Recordable Disclaimers of Interest-Acknowledgement of R.S. 2477 Rights-of-Way Pursuant to the Memorandum of Understanding (MOU) of April 9, 2003" (June 25, 2003).

ANALYSIS

I. Applicability of the Section 108 Prohibition to the 2003 Disclaimer Rule and the Utah MOU

A. Applicability of Section 108 to the 2003 Disclaimer Rule

As discussed above, Section 108 prohibits any "final rule or regulation . . . pertaining to the recognition, management, or validity of a right-of-way pursuant to [R.S. 2477]" from taking effect unless expressly authorized by an Act of Congress, but does not define the phrase "final rule or regulation." For the reasons discussed below, we believe Congress intended Section 108 to apply only to substantive rules under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-706, the statute generally governing agency rulemaking and adjudications.

The APA defines a "rule" as:

> "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ."

5 U.S.C. § 551(4). There are different types of APA rules, the principal distinction being "between 'substantive rules' on the one hand and 'interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice' on the other." *Chrysler Corp. v. Brown*, 441 U.S. 281, 315 (1979). Substantive rules, also called legislative rules, affect individual rights and obligations and must be published for notice and comment under 5 U.S.C. § 553(b). They are the only rules that can have a "binding effect" or the "force and effect of law." *Chrysler Corp.*, 441 U.S. at 315. As the D.C. Circuit Court of Appeals explained in *Troy Corp v. Browner,* 120 F.3d 277, 287 (D.C. Cir. 1997)(citation omitted), "[a] legislative rule . . . is one that: (1) 'supplements' a statute; (2) 'effect[s] a change in existing law or policy'; or (3) 'grant[s] rights, impose[s] obligations, or produce[s] other significant effects on private interests.'" By contrast, interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice are not subject to notice and comment requirements and lack enforceable legal effect. *See, e.g., Davidson v. Glickman*, 169 F.3d 996, 998 (5th Cir. 1999) ("Interpretive rules state what the administrative officer thinks the statute or regulation means while legislative rules affect individual rights and obligations and create law.") (internal quotation and citation omitted).[8]

We believe that by using the language "final rule or regulation," Congress intended the restrictions of Section 108 to apply only to APA substantive rules. First, Section

[8] *See also Syncor v. Shalala*, 127 F.3d 90 (D.C. Cir. 1997) (only legislative rules can create law that binds the agency, courts, and third parties); *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974) ("A properly adopted substantive rule establishes a standard of conduct which has the force of law . . . a general statement of policy, on the other hand, does not establish a 'binding norm.'").

108 refers to no final rule or regulation "tak[ing] effect" and only substantive rules have a "binding effect" and the "force and effect of law." Similarly, the legislative history of Section 108 indicates that Congress intended to bar only the implementation of final, substantive regulations, not, as did the earlier temporary moratoria, agency activity preliminary to implementation of final rules.[9] Finally, Congress and courts often equate the terms "final rule" and "regulation" with an agency rule subject to notice and comment, that is, an APA substantive rule. *See, e.g.,* 5 U.S.C. § 604 ("When an agency promulgates a final rule under section 553 of [Title 5, U.S.C.], after being required by that section or any other law to publish a general notice of proposed rulemaking . . . the agency shall prepare a final regulatory flexibility analysis."); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 127, 145 (2000) (referring to FDA and FTC substantive rules as FDA and FTC "final rules").[10]

Consistent with the above, in determining whether particular agency statements constitute APA substantive rules, courts have focused on three basic factors: (1) how the agency characterizes its own statement; (2) whether the statement was published for notice and comment; and (3) whether the statement binds private parties or the agency. *See, e.g., Molycorp Inc. v. EPA*, 197 F.3d 543 (D.C. Cir. 1999). Of these factors, the third—a statement's binding effect—is the most critical. As the D.C. Circuit Court of Appeals explained in *Molycorp,* "[t]he first two criteria serve to illuminate the third, for the ultimate focus of the inquiry is whether the agency action partakes of the fundamental characteristic of a regulation, *i.e.,* that it has the force of law." 197 F.3d at 545. *See also Ctr. for Auto Safety v. NHTSA*, 710 F.2d 842, 846 (D.C. Cir. 1983) ("The mere fact that NHTSA did not denominate its withdrawal of the January Notice a 'rule' is not determinative of whether it did, in fact, issue a rule within the meaning of the statute. It is the substance of what the agency has purported to do and has done which is decisive.") (internal quotations and citations omitted).

Applying these three factors, the 2003 Disclaimer Rule is clearly a substantive APA rule and thus potentially—if it pertains to the recognition, management, or validity of a R.S. 2477 right-of-way—subject to Section 108. First, the Department itself has characterized the 2003 Disclaimer Rule as a "final rule" in publishing it in the *Federal Register. See* 68 Fed. Reg. at 494; *see also* Letter from DOI Associate Solicitor, Division of Land and Water Resources, to GAO Associate General Counsel (Jul. 15, 2003) (DOI Response to GAO) at 4 (referring to 2003 Disclaimer Rule as a "rule" and "final rule"). Second, the 2003 Disclaimer Rule is clearly a rule promulgated under APA notice and comment procedures. Third and most critically, it has a binding effect and the force of law. As the preamble to the 2003 Disclaimer Rule states at the

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[9] *See, e.g.*, S. Rep. No. 104-261 (1996) at 1-2 ("Resolution of R.S. 2477 right-of-way claims has been a very complex and contentious process" and the provision that ultimately became Section 108 "will allow the Department to proceed with the development of new regulations, while prohibiting their implementation until expressly approved by an Act of Congress.").

[10] *See also Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 682-83 (1987) (equating final rules and regulations with substantive rules promulgated after notice and comment); *Franklin Assoc. Fisheries of Maine*, 989 F.2d 54, 59 (1st Cir. 1993) (same); *Alabama Tissue Ctr. v. Sullivan*, 975 F.2d 373, 377 (7th Cir. 1992) (same); *NRDC v. EPA*, 683 F.2d 752 (3d Cir. 1982) (same).

outset, "This rule is effective February 5, 2003. Any application for a recordable disclaimer pending on the effective date of this final rule will be subject to this final rule." 68 Fed. Reg. at 495. The 2003 Disclaimer Rule also, under *Troy Corp. v. Browner,* above, "'effect[s] a change in existing law or policy' . . . and 'grant[s] rights, impose[s] obligations, or produce[s] other significant effects on private interests.'" As noted above, it expanded both the entities that may apply for a FLPMA § 315 disclaimer and the time period in which they may do so.

The remaining issue concerning the applicability of Section 108 to the 2003 Disclaimer Rule is whether it "pertain[s] to the recognition, management, or validity" of R.S. 2477 rights-of-way. In our view, it does not. Nothing in language of the Disclaimer Rule itself discusses or refers in any way to R.S. 2477 rights-of-way. This is consistent with the fact, emphasized by the Department, that the disclaimer regulations are not designed to deal just with R.S. 2477 recognitions but instead are a "'catch-all' provision of [FLPMA] that allows the BLM to 'help remove a cloud on the title' to Federal land . . .."[11] The only mention of R.S. 2477 is in the preamble to the Rule, where DOI discusses how it may use the FLPMA § 315 disclaimer process as a means of recognizing R.S. 2477 rights-of-way. We do not believe the preamble is a Section 108 "final rule or regulation," however. Preambles generally are treated as non-binding agency policy statements, not as substantive rules as required by Section 108,[12] and there is nothing in the 2003 Disclaimer Rule preamble indicating the Department intends to be bound by its pronouncements regarding R.S. 2477. At most, therefore, the preamble might be deemed to be an interpretive rule,[13] which would not fall within Section 108. Moreover, we do not believe the preamble pertains to the recognition, validity, or management of R.S. 2477 rights-of-way in the manner contemplated by Section 108. The plain language and legislative history of Section 108 indicate that it was intended to prevent the Department from creating and applying substantive standards for validating the existence of R.S. 2477 rights-of-way or prescribing how they should be managed, because Congress itself wanted to define the key standards and scope of R.S. 2477 grants or at least maintain the status quo.[14]

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[11] Letter from Assistant Secretary of the Interior for Land and Minerals Management to the Honorable Jeff Bingaman (June 19, 2003) (DOI Response to Sen. Bingaman) at 1.

[12] *See, e.g., Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1208 (D.C. Cir. 1998) ("It is doubtful that the preamble alone is definite and specific enough to be a binding statement of agency policy. For one thing, the statements concerning the permit shield were not published in the Code of Federal Regulations. For another, EPA has claimed that its statements were no more than "an interpretation" . . . and [the petitioner] has presented no evidence that the preamble has a direct and immediate effect on it.") (internal citations omitted); *City of Seabrook, Tex. v. EPA*, 659 F.2d 1349, 1365 (5th Cir. 1981) (two preamble statements referred to as "policy statements . . . not rules adopted in accordance with administrative rulemaking procedure; they are merely 'interpretive rules' or 'general statements of policy.'").

[13] *See, e.g., Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87 (1995) (agency manual advising how Medicare statutes and regulations would be applied to particular reimbursement claims was interpretive, not substantive, rule).

[14] *See, e.g., United States v. Garfield County*, 122 F. Supp. 2d 1201, 1236-37 (citing S. Rep. No. 104-261 (1996) at 2, court states that "Congress was concerned with rule-making concerning the process for deciding the validity of R.S. § 2477 claims"); 141 Cong. Rec. S17530-08 (1995) (statement of Sen. Hatch) (discussing DOI's 1994 proposed R.S. 2477 rule, court states that "[t]he Secretary's regulations are evidence that the task of achieving a solution that protects the intent and scope of the original statute

Nothing in the preamble identifies any such standards. In sum, we conclude that neither the 2003 Disclaimer Rule itself nor its preamble is a final rule or regulation subject to the restrictions of Section 108.

B. Applicability of Section 108 to the Utah MOU

We reach a different conclusion regarding the applicability of Section 108 to the Utah MOU. In contrast to our conclusion regarding the 2003 Disclaimer Rule, we believe Section 108 applies to the Utah MOU. As a threshold matter, there can be little doubt that the Utah MOU "pertains" to the "recognition, management, or validity" of R.S. 2477 rights-of-way. The purpose of the MOU was to address years of "unresolved conflicts" over these precise issues, which DOI had "traditionally approached . . . by trying to define the precise legal limits of the original [R.S. 2477] statutory grant," *see* Utah MOU at 1, and as discussed below, the MOU includes substantive provisions pertaining to all three issues. The remaining question is whether the Utah MOU is a "final rule or regulation," meaning, as discussed above, that it is both an APA rule and a substantive rule. We conclude that it is both.

1. The Utah MOU as an APA Rule

The Utah MOU meets the definition of an APA rule, that is, "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). Although the Utah MOU does not apply to all R.S. 2477 claimants in the United States, it applies to all claimants for certain locations in Utah; agency MOUs or other statements applicable to just one or a handful of entities, or just one individual, have been held to be APA rules of either "general or particular applicability."[15] In addition, courts sometimes look to whether the agency statement will also affect entities indirectly as well as directly, in determining the scope of its "applicability." In *Hercules Inc. v. EPA*, 598 F.2d 91, 118 (D.C. Cir. 1978), for example, the court noted that "even when only one manufacturer is subject to the standards, that manufacturer is not the only affected entity. The standards affect the multitude who fish, take drinking water, or otherwise, directly or indirectly, come in contact with waters containing the discharged toxic substance, all of whom may appear in proceedings. . . Rulemaking, not adjudication, is the appropriate, flexible procedural mechanism to accommodate the input of all concerned." Likewise, the Utah MOU will affect not only the Utah governmental

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while preserving the infrastructure of rural communities must involve Congress. . . [W]e are beyond a regulatory fix on this subject").

[15] For example, in *West Virginia Mining and Reclamation Ass'n v. Snyder*, 1991 WL 331482 (N.D. W. Va. 1991), involving DOI's Office of Surface Mining Reclamation and Enforcement (OSM), the court held that an MOU between OSM and the West Virginia Division of Energy was an APA rule where it established a policy under which OSM would "provide[] financial and technical assistance to West Virginia in exchange for direct involvement in regulation of the [Surface Mining Control and Reclamation Act]." *See also Mitchell Energy & Devt. Corp. v. Fain*, 311 F.3d 685 (5th Cir. 2002) (statement by Secretary of Labor was APA rule of "particular applicability" where it applied to certified states and implemented "methods of administration" required by the Social Security Act for the federal/state unemployment compensation system); *City of Alexandria v. Helms*, 728 F.2d 643 (4th Cir. 1984) (FAA order to implement scatter plan test at National Airport was APA rule of particular applicability designed to implement agency policy).

entities applying for R.S. 2477 acknowledgements/disclaimers, but also persons using the asserted rights-of-way, those who disfavor continued use, and those owning the underlying land where the federal government is no longer the owner. The Utah MOU thus is an "agency statement of general or particular applicability."

The Utah MOU also is an agency statement of "future effect." Courts have applied this requirement to mean statements having future legal consequences,[16] and the Utah MOU meets this test. It addresses how DOI will evaluate R.S. 2477 claims in the future, not rights-of-way that already have been recognized. Finally, the Utah MOU is "designed to implement, interpret, or prescribe law or policy." It prescribes and implements the law and policy by which Utah government entities will seek recognition of their asserted R.S. 2477 rights-of-way. *See, e.g., Lefevre v. Secretary, Dep't of Veterans Affairs*, 66 F.3d 1191, 1196-97 (Fed. Cir. 1995) ("The determination was a rule because . . . it prescribed the basis on which the Department would adjudicate every claim seeking disability or survivor benefits for specified diseases allegedly caused by exposure to herbicides in Vietnam."); *Hercules Inc.*, above, 598 F.2d at 117 ("The standards are designed to 'implement' and 'prescribe law' pursuant to the authority of the 1972 Act.").

The Department states that the Utah MOU is not a rule issued in violation of Section 108 but rather a voluntary agreement with the State of Utah.[17] The courts have rejected such arguments. Simply because an agency statement sets standards for participation in a "voluntary" program does not mean the standards are not "rules." As the D.C. Circuit held in *Sugar Cane Growers Coop. of Florida v. Veneman*, 289 F.3d 89, 96 n.6 (D.C. Cir. 2002), "[t] he government's suggestion that because participation in the program is 'voluntary' the announcement and accompanying documents should not be considered a rule is not worth a response." Similarly, in *Mitchell Energy & Devt. Corp. v. Fain*, 311 F.3d 685 (5th Cir. 2002), the Fifth Circuit held that a Labor Department statement establishing required methods of administration for a federal/state unemployment compensation system was a rule, even though states had the option of not participating in the system. Under the theory that standards for activities voluntarily entered into are not rules, the court observed, "many things in the Code of Federal Regulations [would not be] rules because the underlying conduct, from operating a nuclear reactor to listing on the New York Stock Exchange, is voluntary." *Id.* at 688.

The Department also asserts that Section 108 is not implicated by its recent actions because R.S. 2477 recognition decisions will result from an informal agency adjudication, not a rulemaking.[18] This may be correct but is beside the point. The

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[16] *See, e.g., Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 216 (1988) (Scalia, J., concurring) ("The only plausible reading of ["future effect"] is that rules have legal consequences only for the future."); *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 166 (D.C. Cir. 2002) (FCC local ownership rule dealt with the "future effect, not the past legal consequences of [local marketing agreements]").

[17] *See* DOI Response to GAO, above, at 6 ("The Utah MOU is not a rule. It was developed to avoid litigation threatened by Utah and its counties. It is an agreement concerning how Utah will present its applications for recordable disclaimers for R.S. 2477 rights-of-way for BLM's consideration.").

[18] DOI Response to Sen. Bingaman, above, at 4; *see also* 68 Fed. Reg. at 497 ("Even if BLM were to issue a disclaimer of the United States' interest in a valid right-of-way under R.S. 2477, the recognition

subject of Congress' concern in Section 108 was DOI's establishment of the overall standards for recognizing, managing, and validating R.S. 2477 rights-of-way, not its decision in a particular case—in other words, it was concerned about the "rules of the game," not a particular game score. The Fifth Circuit rejected a similar argument by the Department in *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622 (5th Cir. 2001). The court in *Babbitt* found that although DOI had issued a decision in a particular adjudication, the decision was governed by a policy change that was a substantive rule. Similarly, in *Hercules Inc. v. EPA*, 598 F.2d 91, 118 (D.C. Cir. 1978), the D.C. Circuit found that certain EPA water pollution standards were rules, not orders, because the "inquiries are the same whether the [toxic] substance is discharged by one manufacturer or one thousand"; the determinations are "categorical, not individual or local. . .." Here, the Utah MOU sets uniform rules for how all R.S. 2477 claims to which the MOU applies will be decided. As the D.C. Circuit has noted, "rule making is not transformed into adjudication merely because the rule adopted may be determinative of specific situations arising in the future." *Logansport Broad. Corp. v. United States*, 210 F.2d 24, 27 (D.C. Cir. 1954).[19] In sum, the Utah MOU is an APA rule.

2. The Utah MOU as a Substantive Rule

We also find that the Utah MOU is a substantive rule. The Utah MOU does not meet two of the factors discussed above that courts apply in determining whether a rule is a substantive rule—characterization as such by the agency and publication for notice and comment in the *Federal Register*. According to DOI, the Utah MOU is not a rule but rather a cooperative agreement under FLPMA § 307(b).[20] Nor was the Utah MOU published for notice and comment. Nevertheless, as noted above, courts look beyond these first two factors to focus on the third: whether the agency statement has a binding effect and the "force and effect of law." In our view, there is little question that the Utah MOU has such an effect.

First, DOI itself acknowledges that "the Utah MOU . . . is binding . . . on the parties to the MOU, namely the Department and the State of Utah." DOI Response to GAO at 4. The fact that the Utah MOU incorporates the FLPMA § 315 disclaimer regulations by reference—which, as DOI also acknowledges, are also "are binding on both the BLM and the applicant"—underscores the binding nature of the Utah MOU. *Id.* Although the Utah MOU contains a standard clause asserting that it does not create a private

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of such right-of-way would not be the result of this notice-and-comment rulemaking but, rather, an informal agency adjudication resulting in a final decision. (See 5 U.S.C. 551(7) [of the APA]).")

[19] *See also Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994) ("[B]ecause adjudications involve concrete disputes, they have an immediate effect on specific individuals (those involved in the dispute). Rulemaking, in contrast, is prospective, and has a definitive effect on individuals only after the rule subsequently is applied."); Richard J. Pierce, Jr., *Administrative Law Treatise* 304 (4th ed. 2002) ("What distinguishes legislation from adjudication is that the former affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitively touched by it; while adjudication operates concretely upon individuals in their individual capacity.").

[20] FLPMA § 307(b), 43 U.S.C. § 1737(b), gives the Department general authority to enter into "contracts and cooperative agreements involving the management, protection, development, and sale of public lands."

cause of action in favor of third parties,[21] that provision does not diminish the substantive rights and responsibilities that the MOU imposes on DOI, the State of Utah, and Utah local government entities.

Second, in the words of *Troy Corp. v. Browner,* above, the Utah MOU is a substantive rule because it "'effect[s] a change in existing law or policy' . . . and 'grant[s] rights, impose[s] obligations, or produce[s] other significant effects on private interests.'" The Utah MOU is not like the MOU between the Korean War Veterans Memorial Advisory Board and the American Battle Monuments Commission in *Lucas v. United States Army Corps of Eng'rs*, 1991 WL 229941 at * 4 (D.D.C. 1991), for example, which the court found was "written to establish procedural guidelines rather than to impose limitations on the Board's statutory authority" and thus was not a substantive rule. Nor is the Utah MOU like the MOU in *Bragg v. Robertson*, 72 F. Supp. 2d 642 (S.D. W. Va. 1999), between DOI's Office of Surface Mining, EPA, the U.S. Army Corps of Engineers, and a state environmental agency. That MOU expressed the agencies' interpretation of certain regulations and was challenged as being a substantive rule that "initiate[d] a profound change in the [existing] regulatory program" without compliance with notice and comment requirements. *Id.* at 654. The court ruled that the MOU was an interpretive rule, not a substantive rule, because the MOU itself "disavow[ed] any substantive effect"[22] and because the court, deferring to the interpretation of the MOU agencies charged with administering the relevant statutes, found that the MOU simply codified the agencies' current practice and thus "merely reminds affected parties of existing duties . . .." *Id.* at 655.[23]

The Utah MOU stands in stark contrast to the MOUs in *Lucas* and *Bragg.* Unlike the MOUs in those cases, the Utah MOU does impose binding obligations—on DOI and Utah. And unlike those cases, the Utah MOU also works changes in existing law and policy—pertaining to the recognition, management, and validity of R.S. 2477 rights-of-way. In broadest terms, the Department will now recognize and validate R.S. 2477 rights-of-way by applying the substance and procedures applicable to FLPMA § 315 disclaimers, and R.S. 2477 rights-of-way acknowledged under this process will be given the same effect as lands or interests disclaimed under FLPMA § 315: the United States will be estopped from asserting a claim as to them. *See* 43 C.F.R. § 1864.0-2(b).

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[21] The Utah MOU states that it "shall not be construed as creating any right or benefit, substantive or procedural, enforceable at law or in equity, by a party against the State of Utah, Utah counties, the United States, its agencies, its officers, or any other person. This MOU shall not be construed to create any right to judicial review involving the compliance or noncompliance of the State of Utah, Utah counties, the United States, its agencies, its officers, or any other person with the provisions of this MOU." Utah MOU at 5.

[22] The MOU provided in part that "[t]he policy and procedures contained in this MOU are intended solely as guidance and do not create any rights, either substantive or procedural, enforceable by any party. *This document does not, and is not intended to, impose any legally binding requirements on Federal agencies, States, or the regulated public,* and does not restrict the authority of the employees of the signatory agencies to exercise their discretion in each case to make regulatory decisions based on their judgment about the specific facts and application of relevant statutes and regulations." 72 F.Supp 2d. at 654-55 (emphasis in original).

[23] The practice of judicial deference, in certain circumstances, to the statutory interpretation of an agency charged with administration of the statute is discussed in Part II of this opinion.

As the MOU recognizes, this represents a significant change from the Department's existing policy in recognizing R.S. 2477 rights-of-way—the Babbitt Policy—which will no longer apply to R.S. 2477 rights-of-way covered by the MOU. We identify below examples of some of the specific changes effected by the Utah MOU.

a. Changes in standards for recognition and validation of R.S. 2477 rights-of-way

As discussed above, the Utah MOU identifies the criteria for "roads" that will be considered "eligible" for "acknowledgment" as valid R.S. 2477 rights-of-way. While the Department states that the disclaimers it issues under the Utah MOU will "essentially preserve the status quo," in fact several of these criteria represent a departure from prior case law and/or longstanding Department policy—as the Department seems to recognize by stating that its new approach will only "essentially" preserve the status quo and that "[m]ost" but not all asserted R.S. 2477 claims in the West satisfy the R.S. 2477 "construction" and "highway" requirements under "almost" any statutory interpretation. *See* DOI Response to Sen. Bingaman at 1; Utah MOU at 1. For example, the Utah MOU criterion that a road have been in existence prior to FLPMA's enactment in 1976 and be in current use is equivalent to the "continuous use" standard for R.S. 2477 "construction" urged by Utah counties but rejected in *Southern Utah Wilderness Alliance v. Bureau of Land Management,* 147 F. Supp. 2d 1130 (D. Utah 2001), *appeal dismissed,* 2003 WL 21480689 (10th Cir. 2003) (*SUWA).* As BLM successfully argued in *SUWA,* the term "construction" in R.S. 2477 requires some form of purposeful, physical building or improvement, not simply continuous use. As the court explained, "[a] highway right-of-way cannot be established by haphazard, unintentional, or incomplete actions. . . . [T]he mere passage of vehicles across the land, in the absence of any other evidence, is not sufficient to meet the construction criteria of R.S. 2477 and to establish that a highway right-of-way was granted." *Id.* at 1138-39. *See also United States v. Garfield County*, 122 F. Supp. 2d 1201, 1227 n.5 (D. Utah 2000) (adopting Department's interpretation of "construction" as meaning actual building and more than mere use).

The Utah MOU also changes the meaning of the basic R.S. 2477 term "highway," by equating it with the term "road." Utah MOU at 1. Courts have not always equated the two terms. In *SUWA,* for example, the court disagreed that highways could be established by the mere passage of wagons, horses, or pedestrians and accepted the Department's definition of "highway" as "a road freely open to everyone; a public road." 147 F. Supp. 2d at 1143. The court also agreed with the Department that a road must be a significant one to be an R.S. 2477 highway: "It is unlikely that a route used by a single entity or used only a few times would qualify as a highway . . . a highway connects the public with identifiable destinations or places." *Id.*

Finally, the Utah MOU changes the terms under which R.S. 2477 rights-of-way claims will be processed. In order to obtain recognition of its R.S. 2477 right-of-way, the claimant must agree to reimburse BLM's costs of processing the application. As a neighboring state has objected to the Secretary of the Interior, "[a]n RS-2477 right-of-way arises from a statutory grant and is not a right-of-way permit for which [the

Department] is authorized to charge processing fees."[24] Whether or not such a fee is legally authorized, it represents a new prerequisite to obtaining recognition by the Department of an R.S. 2477 right-of-way and thus does not simply "remind" applicants of an "existing duty" in the way that an interpretive rule does. *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1307-08 (D.C. Cir. 1992); *see Five Flags Pipeline Co. v. United States Dep't of Transp.*, 1992 WL 78773 (D.D.C. 1992) (Department of Transportation fee schedule was legislative rule because it "did not merely 'remind' the pipeline companies of an 'existing duty.' Rather, the schedule created an entirely new obligation to pay fees in precise amounts based on a specific mathematical computation that did not previously exist.").

b. Changes in management standards for valid R.S. 2477 rights-of-way

The Utah MOU also sets standards for management of valid R.S. 2477 rights-of-way different from the standards set by at least some courts. As the Utah MOU explains, road management includes "road width and ongoing maintenance levels . . . ." Utah MOU at 3. Courts have found that the appropriate standard for determining what maintenance or improvements an R.S. 2477 holder may undertake to expand the scope of a right-of-way is a "reasonable and necessary" standard. *See, e.g., Sierra Club v. Lujan*, 949 F.2d 362, 364, 369 (10th Cir. 1991); *United States v. Garfield County*, 122 F. Supp. 2d 1201 (D. Utah 2000). By contrast, the Utah MOU adopts a ground-width disturbance standard, *see* Utah MOU at 3**,** which the *Garfield County* court explicitly rejected, stating that "[t]he law simply demands a more thoughtful standard than that." *Id.* at 1232. Further, courts have measured the extent of an R.S. 2477 right-of-way as of the the date of FLPMA's enactment or when the underlying lands were "reserved for public uses," whichever is earlier. *See Garfield County*, 122 F. Supp. 2d at 1228-29; *Sierra Club v. Hodel*, 848 F.2d 1068, 1084 (10th Cir. 1988). The Utah MOU, by contrast, measures as of the date of the MOU—April 9, 2003. Utah MOU at 3; *see also* Utah MOU Guidance at 5.

The Department asserts that the Utah MOU is not a substantive rule subject to the prohibitions in Section 108. It states that use of the FLPMA § 315 disclaimer process in concert with the MOU does nothing more than provide a procedure for acknowledging or denying the validity of R.S. 2477 claims, a procedure in lieu of litigation of quiet title claims or takings claims in court. *See* DOI Response to Sen. Bingaman at 1, 4. The Department appears to be asserting that the Utah MOU is a procedural rule under the APA —"rules of agency organization, procedure, or practice," *see* 5 U.S.C. § 553(b)(3)(A)—that would not be prohibited by Section 108. The Department is correct that procedural rules do not require notice and comment, are not substantive rules, and would not be covered by Section 108. However, as the court noted in *Public Citizen v. Department of State*, 276 F.3d 634, 640-41 (D.C. Cir. 2002), rules that "encode[] a substantive value judgment" are substantive and not procedural. The Utah MOU does considerably more than set procedural guidelines; it prescribes a process and substantive standards for recognizing and determining the

[24] Letter from Executive Director, Colorado Department of Natural Resources, to Secretary of the Interior (May 15, 2003) at 2.

validity of R.S. 2477 rights-of-way. As the Department itself emphasizes in its Utah MOU Guidance, the MOU establishes binding legal requirements by which it will review disclaimer applications and "prepare a draft decision that documents whether the claimed right-of-way *meets the legal requirements under* R.S. 2477 and *the provisions of the MOU . . ..*" *Id.* at 5.

Our conclusion that the Utah MOU is the type of "final rule or regulation" that Congress intended to cover in Section 108 is confirmed by its similarity to the 1994 DOI proposed rule that prompted Congress to enact Section 108 in the first instance. As the court observed in *Garfield County*, in passing Section 108, "Congress was concerned with rule-making concerning the *process* for deciding the validity of R.S. § 2477 claims." 122 F. Supp. 2d at 1237 (emphasis added). Like the Utah MOU, the 1994 proposed rule outlined a process for determining which R.S. 2477 rights-of-way were validly acquired. The rule was to put in place a "formal administrative process by which those who claim R.S. 2477 rights-of-way can have the Department make binding determinations of their existence and validity." *See* 59 Fed. Reg. at 39216. Like the Utah MOU, the proposed rule also defined the R.S. 2477 statutory terms "highway" and "construction," noting that these had "not been defined completely or consistently, resulting in uncertainty about the exact nature and extent of the grant." *Id.* at 39217. Finally, the Department has described the Utah MOU as "an important first step towards resolving decades of conflict over the status of roads in the State of Utah" and "a reasonable approach that will allow us to clarify ownership of some county roads." DOI Response to Sen. Bingaman at 1. These are the same sort of reasons Secretary Babbitt presented in support of the 1994 proposed rule that led to the Section 108 prohibition.[25]

In sum, we conclude that the Utah MOU is a final rule or regulation prohibited from taking effect by Section 108. It is a substantive rule under the APA and pertains to the recognition, management, and validity of R.S. 2477 rights-of-way. The Section 108 prohibition stemmed from congressional intent to prevent implementation of just such processes and standards.

II. Authority to Use FLPMA § 315 to Disclaim Interests in R.S. 2477 Rights-of-Way

The second major legal concern with respect to the Department's recent R.S. 2477 actions is whether, apart from the prohibition of Section 108, the Department may use the authority of FLPMA § 315 to disclaim U.S. interests in R.S. 2477 rights-of-way. No court has ruled on this question to date, and there are colorable arguments on both sides. Based on rules of statutory construction and deference, on balance, we conclude that FLPMA § 315 authorizes disclaimer of U.S. interests in R.S. 2477 rights-of-way.

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[25] *See* 59 Fed. Reg. at 39216-17. The stated purposes of the 1994 proposed rule are also similar to those for the Utah MOU. The proposed rule's purposes were to: "(a) Establish procedures for the orderly and timely processing of claims for rights-of-way pursuant to R.S. 2477 over lands managed by the Bureau of Land Management, National Park Service, and U.S. Fish and Wildlife Service; (b) Define key terms; (c) Establish public notice and appeal processes of claims for rights-of-way pursuant to R.S. 2477; and (d) Provide for the use of rights-of-way validly acquired pursuant to R.S. 2477, consistent with the management of adjacent and underlying Federal lands." 59 Fed. Reg. at 39224. *Cf.* Utah MOU at 1-2; Utah Guidance at 1.

As noted above, FLPMA § 315 authorizes the Department to issue a "disclaimer of interest or interests in any lands . . . where the disclaimer will help remove a cloud on the title of such lands" and one of three other conditions applies. Two of those conditions relate to riparian situations, *see* FLPMA §§ 315 (a)(2), (a)(3), and thus are not relevant to R.S. 2477 highway rights-of-way. The third condition is FLPMA § 315(a)(1), where "a record interest of the United States in lands has terminated by operation of law or is otherwise invalid." This is potentially applicable to creation of highway rights-of-way under R.S. 2477. Thus for the Department to be authorized to employ FLPMA § 315 to disclaim R.S. 2477 rights-of-way: (1) disclaimer must "help remove a cloud on the title of such lands"; and (2) "a record interest of the United States in lands [must have] terminated by operation of law or [be] otherwise invalid." The Department has interpreted the these requirements as applying to disclaim R.S. 2477 rights-of-way, and on balance, we conclude this is a reasonable interpretation that must be given considerable deference.

First, the Department asserts that disclaimer by the United States "will help remove a cloud on the title" of an R.S. 2477 right-of-way. Congress did not elaborate on the meaning of the phrase "cloud on the title" either in FLPMA § 315 or its legislative history. Under real property law, a "cloud on title" generally refers to an outstanding claim or encumbrance attached to real property that, if valid, would affect or impair the title of the owner of the property.[26] In this case, the Department posits, the "cloud" on title to a particular R.S. 2477 right-of way results from the uncertainty surrounding whether it was established prior to the repeal of R.S. 2477 in 1976. DOI Response to GAO at 7; 68 Fed. Reg. at 496. As discussed above, R.S. 2477 was self-executing, meaning that no government approvals were necessary and typically no recording was made in public land records when an R.S. 2477 right-of-way was perfected by fulfillment of the statutory elements—"construction" of a "highway" over non-reserved public lands. If an R.S. 2477 right-of-way was not established over public lands, then the U.S. retained its 100 percent fee simple title in the lands—including interests in using and transferring the lands, interests in excluding others from trespassing on the lands, any mineral rights in the lands, and all other property interests. On the other hand, if an R.S. 2477 right-of-way was established, then one of the United States' property interests—the right to exclusive use of the surface property covered by the right-of-way—was terminated by operation of law or became "invalid." The lack of certainty about which of these circumstances exists at a given site can create a cloud that disclaimer of the U.S. interest will "help remove." Although as DOI's FLPMA § 315 regulations make clear, a disclaimer does not literally "grant, convey, transfer, remise, quitclaim, release or renounce any title or interest in lands," it has the effect of a quitclaim deed in the sense that it acts as an estoppel against the United States asserting a competing claim to the property interest being disclaimed. *See* 43 C.F.R. § 1864.0-2(b). Thus issuance of a disclaimer for an R.S. 2477 right-of-way means the United States would no longer assert a competing claim to the right-of-way, removing a "cloud" on its "title."

Second, the Department asserts that the requirement for "a record interest of the United States in lands [to have] terminated by operation of law or [become]

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[26] *Black's Law Dictionary* 249 (7th ed. 1999).

otherwise invalid" is satisfied if the conditions of R.S. 2477 were satisfied—that is, if, at some time between 1866 and 1976, there was "construction" of a "highway" over non-reserved public lands. At this point, in the Department's view, the complete fee simple ownership of the United States in the land was altered to that of a holder of the servient estate. DOI Response to GAO at 10. In property law parlance, the land became "burdened" by the right-of-way or easement and the owner of the land—the United States—was required to abstain from acts that impermissibly interfered with or were inconsistent with use of the easement. *See United States v. Garfield County*, 122 F.Supp. 2d 1201, 1243 (D. Utah 2000). Thus the unburdened fee interest of the U.S. was terminated or invalidated by creation of the R.S. 2477 right-of-way. *See Estes Park Toll-Road Co. v. Edwards*, 32 P. 549 (1893)("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.").

There are certain objections to this analysis. Some have argued that the holder of an R.S. 2477 right-of-way does not have technical title to the right-of-way, but only a usufruct right in it—the right to use property owned by another party[27]—and therefore FLPMA § 315 cannot be used to remove a cloud on it. However, the Department points out, and we agree, that "title" is a term often used synonymously with various types of ownership. DOI Response to GAO at 8; *see, e.g., Garfield County*, above, 122 F. Supp. 2d at 1241-42 (discussing the county's ownership of an R.S. 2477 right-of-way while clarifying that R.S. 2477 did not grant the county fee simple title); *Dover Veterans Council v. City of Dover,* 407 A. 2d 1195, 1196 (S. Ct. N.H. 1979)("Title" can denote any estate or interest, including a leasehold or merely the right of possession.). Thus we find the view that disclaimer of U.S. interests in an R.S. 2477 right-of-way would remove a cloud on its "title" for purposes of FLPMA § 315 is reasonable.

The Department's interpretation has also been challenged by noting that, by its terms, FLPMA § 315 requires the "cloud " to be on title to "lands," not on an interest in lands such as a right-of-way. According to this argument, Congress referred to "lands" and "interests in lands" as distinct concepts in FLPMA § 315, and under traditional rules of statutory construction, should be viewed as reflecting different meanings. 2A *Sutherland Statutory Construction* § 46:06 at 193-94 (6th ed. 2000).[28] Because, in their view, a disclaimer of an R.S. 2477 right-of-way would not remove a cloud on the title to the land underlying the right-of-way, the Department's interpretation is inconsistent with FLPMA § 315.

In our view, the language of FLPMA § 315 does not clearly indicate that Congress used these different references to capture discrete, contrasting concepts. In this

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[27] *See Black's Law Dictionary* at 1542.

[28] It is also argued that the terms "lands" and "interests in lands" are used as distinct concepts in other provisions of FLPMA, as well as in other land management statutes. *See, e.g.,* FLPMA § 205, 43 U.S.C. § 1715(c) ("lands and interests in lands"); FLPMA § 206(a), 43 U.S.C. § 1716(a) ("a tract of land or interests therein"); FLPMA § 206(b), 43 U.S.C. § 1716(b) ("title to any non-Federal land or interests therein in exchange for such land, or interest therein"); 43 U.S.C. § 1716(i) ("exchange lands or interests in lands"); 16 U.S.C. § 79c; 16 U.S.C. § 271a; 16 U.S.C. § 396f note (e); 16 U.S.C. § 410hh-1 note (a)(6); 16 U.S.C. § 460uu-46; 16 U.S.C. § 521c.

regard, FLPMA § 315 authorizes the Department to disclaim an "interest or interests in any lands" where the disclaimer will help remove a cloud on the title of "such lands." Here, the reference to "such lands" potentially refers either just to the land itself or to both the land as well as lesser interests in the land. Since the Department promulgated its original 1984 regulations implementing FLPMA § 315, it has defined the term "lands" to include "lands and interests in lands . . ." 43 C.F.R. § 1864.0-5(e). Given that the terms "lands" and "interests in lands" are closely connected concepts, it is plausible to conclude, as the Department did when it promulgated the 1984 regulations and today, that "lands" in FLPMA § 315 means "lands and interests in lands." We are reluctant to conclude that the Department's statutory interpretation is impermissible.

The legislative history of FLPMA § 315 introduces some doubt on the Department's position. In the final analysis, however, it is inconclusive. The Department first proposed what became FLPMA § 315 in a draft public lands bill submitted to Congress, which Senator Jackson introduced by request on February 28, 1973.[29] Before FLPMA was enacted, the Secretary of the Interior had no express statutory authority to issue recordable documents disclaiming interests in land.[30] The General Land Office, BLM's predecessor, had a need to issue disclaimers as a kind of correction device, which it did even though it had no express authority. The purpose of § 315 was, as the Senate Committee on Interior and Insular Affairs reported to the Senate, to authorize the Secretary "to issue documents of disclaimer when the United States has no interest in certain lands…"[31] The Senate report states that the section authorizes the Secretary to issue such documents in "three specified instances where he finds no Federal interest and where there is a cloud on the title."[32] This authority is necessary, the report continues, to eliminate the need for judicial or legislative relief "in those cases where the United States asserts no ownership or interest."[33] The House report is to the same effect.[34] It is not clear from these statements, however, whether the Congress intended disclaimers to be issued when the United States has no remaining interests in the *interest* being disclaimed or whether there must be no

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[29] S. 1041, § 308, reprinted in Comm. on Energy and Natural Resources, 95th Cong., Legislative History of the Federal Land Policy and Management Act of 1976, at 1508-1509 (Comm. Print 1978). The language of section 315(a) was substantially the same as what later became law, but did not include the phrase "or is otherwise invalid."

[30] See H.R. Rep. No. 94-1163, at 11 (1976); S. Rep. No. 94-583, at 50 (1975); S. Rep. No. 93-873, at 42 (1974) ("[U]nder existing law, the Secretary of the Interior has no authority to issue any kind of document showing that the United States has no interest in certain lands."). *See also Soda Flat v. Hodel*, 670 F. Supp. 879, 887-889 (E.D. Cal. 1987).

[31] S. Rep. No. 94-583, at 25 (1975); S. Rep. No. 93-873, at 24 (1974).

[32] S. Rep. No. 94-583, at 50; S. Rep. No. 93-873, at 41. *See also* Letter from Acting Secretary of the Interior to Spiro Agnew, reprinted in Comm. on Energy and Natural Resources, 95th Cong., Legislative History of the Federal Land Policy and Management Act of 1976, at 1605 ("It would provide authority to issue a document of disclaimer of interest in land to which the United States no longer claims an interest.").

[33] S. Rep. No. 94-583, at 51.

[34] H.R. Rep. No. 94-1163, at 11 (1976).

remaining interests in the *land* at all. So viewed, the legislative history neither supports nor contradicts the Department's interpretation of § 315[35] as allowing it to disclaim R.S. 2477 rights-of-way even when some federal interest in the property at issue will remain.[36]

A final argument against the Department's interpretation is that no "record interest of the United States has terminated by operation of law," as required by the statutory language. This view asserts that when R.S. 2477 granted rights-of-way or easements over public land, dominant and servient estates were *created,* but no record interests of the U.S. were *terminated*. The Department states, however, and we agree, that the creation of an easement involves the creation of two separate interests in real property: 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. DOI Response to GAO at 10; *see, e.g., C/R TV v. Shannondale*, 27 F.3d 104, 107 (4th Cir. 1994). Under such circumstances, it follows that upon the creation of these two interests, a record interest of the United States terminated: its interest in exclusive use of the surface property over which the right-of-way ran.

We recognize that the Department's interpretation of FLPMA § 315, as potentially applying to R.S. 2477 rights-of-way, is a novel one. That fact alone, however, should not condemn it. It is not uncommon for the scope and application of a grant of remedial administrative authority such as FLPMA § 315 to evolve with changing factual circumstances. Moreover, in analyzing whether FLPMA § 315 authorizes the Department to do what it seeks to do under the Utah MOU, we are mindful of the considerable weight that should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. *United States v. Mead*, 533 U.S. 218 (2001); *Udall v. Tallman*, 380 U.S. 1 (1965). Indeed, under bedrock principles of statutory construction and judicial deference in cases involving agency action, where Congress has not spoken clearly to the precise question at issue—for example, where a statute is ambiguous or silent—courts defer to the interpretation of an agency charged with implementing the statute if the interpretation is not unreasonable, nor arbitrary or capricious. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). This rule applies even where a court believes that there is a more reasonable interpretation, and even where the agency's interpretation is a departure from past practice. *See, e.g., American Fed'n of Govt. Employees, Local 3884 v. FLRA*, 930 F.2d 1315, 1324 n. 12 (8th Cir. 1991).

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[35] Similarly, the Department's regulations, stating that "[t]he objective of the disclaimer is to eliminate the necessity for court action or private legislation in those instances where the United States asserts *no ownership or record interest*" are not conclusive on this point. 43 C.F.R. § 1864.0-2(a) (emphasis added).

[36] One final legislative history argument has been made in opposition to the Department's interpretation that § 315 authorizes it to disclaim R.S. 2477 rights-of-way. As noted above, Congress repealed R.S. 2477 in FLPMA while preserving already perfected R.S. 2477 rights-of-way. Congress also created Title V of FLPMA to establish a process for granting *new* rights-of-way over public land. It has been argued that in light of the considerable attention Congress focused on rights-of-way in FLPMA, if Congress had meant to allow the Department to disclaim R.S. 2477 rights-of-way through the use of § 315, it would have said so. While this view may have some merit, we find it just as plausible to conclude that Congress did not consider the issue at all, especially because no explicit statutory solution was provided in FLPMA for the resolution of R.S. 2477 claims.

As applied here, principles of statutory construction and deference firmly embedded in administrative law counsel substantial deference to DOI's interpretation of FLPMA § 315. As discussed above, a number of terms in FLPMA § 315 are ambiguous, notably, "lands," "interests in lands," and "cloud on title."[37] Although the Department's interpretation is not necessarily the only reasonable one, DOI is the agency responsible for management of the public lands and for administration of FLPMA. For the reasons discussed above, we find the Department's interpretations of these terms and of FLPMA § 315 as a whole to be reasonable.

CONCLUSION

In sum, we conclude that the 2003 Disclaimer Rule is not a final rule or regulation covered by the prohibition in Section 108, but that the Utah MOU is covered because it is a substantive rule under the APA that "pertain[s] to the recognition, management, and validity" of R.S. 2477 rights-of-way. We also conclude that, independent of this Section 108 prohibition, the Department has authority under FLPMA § 315 to disclaim interests in R.S. 2477 rights-of-way.

February 6, 2004

[37] To the extent that DOI has filled the statutory gaps through notice and comment rulemaking as it has with respect to the definition of "lands," we view such interpretation as conclusive under *Chevron* and *Mead*.