Articles

Clear & Convincing: The Proper Evidentiary Standard for R.S. 2477 Claims

Blake Busse*

* J.D. 2015, University of Colorado Law. Mr. Busse consults on natural resource and public lands issues in the West.

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I. INTRODUCTION

Since the enactment of the Wilderness Act in 1964, some western states and counties have become involved in protracted battles over the federal designation of Wilderness within their jurisdictions. Many of these states and counties are composed of significant amounts of federally controlled land - for example, 64.5 percent of the State of Utah is owned and managed by the federal government.[1] For many of these communities, Wilderness is viewed as a threat because it restricts certain revenue-generating activities (e.g. oil or gas development) and methods of access (e.g. motorized vehicles and bicycles). As a result, the fight over Wilderness has become emblematic of the longstanding federal-local tug-of-war over the management of western public lands. One tool available to states and counties seeking to prevent Wilderness designations is Revised Statute 2477 ("R.S. 2477"), an 1866 mining statute that grants public rights-of-way across the unreserved public domain.[2] By obtaining recognition of rights-of-way under that provision, Wilderness opponents can render the lands unsuitable for Wilderness designation.

In such an effort, in 2012, the State of Utah filed twenty-one lawsuits in federal district court seeking recognition of thousands of R.S. 2477 rights-of-way across the state.[3] According to the conservation group Southern Utah Wilderness Alliance ("SUWA"), the claimed rights-of-way in these suits amount to approximately 36,000 miles of roads.[4] The lawsuits have resulted in significant litigation, as the state

1. JAN ELISE STAMBRO, ET AL., AN ANALYSIS OF TRANSFER OF FEDERAL LANDS TO THE STATE OF UTAH 11 (2014).

2. "The problem is largely a political one, not a legal one. The opponents of wilderness designation have adroitly seized on an ancient, but not dead, law in order to bolster their position in the battle over appropriate uses of the public lands." Sarah Krakoff, *Settling the Wilderness*, 75 U. COLO. L. REV. 1159, 1175, 1178 (2004).

3. Heidi McIntosh, *State of Utah Drops RS 2477 Litigation Bombshell*, SOUTHERN UTAH WILDERNESS ALLIANCE (2012), http://suwa.org/state-of-utah-drops-rs-2477-litigation-bomb/. While the State of Utah may publically deny that Wilderness was a consideration in its filing of its R.S. 2477 lawsuits, *see* John E. Swallow & Anthony L. Rampton, *Utah Deserves Title to Thousands of Roads*, SALT LAKE TRIBUNE (May 12, 2012) (Swallow is the Chief Deputy (Civil Division) at the Utah Attorney General's Office, and Rampton is an Assistant Attorney General at the Utah Attorney General's Office and the state's lead litigation counsel for its R.S. 2477 lawsuits), not only does Utah have a long history of fighting Wilderness designation, recent protests and actions against federal control of public lands in Utah suggest otherwise. Examples include the state legislature's public lands transfers bill and the illegal ORV ride into Recapture Canyon led by a San Juan County Commissioner.

4. *Hoax Highways (RS 2477)*, SOUTHERN UTAH WILDERNESS ALLIANCE, http://suwa.org/issues/phantom-roads-r-s-2477/ (last visited Apr. 8, 2015).

and its county allies seek recognition of these claims, while groups like SUWA seek to impede their progress.

Throughout the protracted litigation over R.S. 2477, many legal questions have been raised and many have been answered, but a few remain unresolved. One question of law that remains unsettled is the proper evidentiary standard that applies to a R.S. 2477 claim.[5] Must a proponent demonstrate the elements of their claim by a preponderance of the evidence or by clear and convincing evidence? Utah and the counties, in order to more easily facilitate recognition of their R.S. 2477 claims, have argued for a preponderance standard. To their dislike, the District Court of Utah has applied the stricter clear and convincing standard.[6] In two separate appeals to the Tenth Circuit in 2014, the circuit court resolved the appeals on other grounds and therefore declined to reach the evidentiary-standard issue.

This Article argues that clear and convincing is the proper evidentiary standard for R.S. 2477 claims in Utah on two grounds: (1) under the test for validating R.S. 2477 claims, as developed by the Tenth Circuit in *SUWA v. BLM*, clear and convincing is the applicable standard for public rights-of-way under Utah state law and it is therefore the proper standard for these federally-granted rights-of-way, and (2) the higher showing required by a clear and convincing standard is consistent with other areas of federal jurisprudence and the policy rationales that support them—i.e. whenever the American public stands to lose something to a private individual or entity, the onus is on that individual or entity to demonstrate the validity of their claim because they are seeking something in their private capacity that, until now, belonged to all Americans.

In order to facilitate this discussion, this Article proceeds as follows: Section I provides the background information necessary for understanding this issue's context, including a description of the R.S. 2477 statute, the Quiet Title Act, and the Tenth Circuit's decision in *SUWA v. BLM*. Section II provides a brief background on evidentiary standards in general, and reviews the arguments and discussion of evidentiary standard in the two Tenth Circuit opinions from 2014 to see how the law arrived at its current state. Finally, Section III presents the arguments for adopting the clear and convincing standard, as described above.

5. San Juan Cty., Utah v. United States, 754 F.3d 787, 801 (10th Cir. 2014); Kane Cty., Utah v. United States, 772 F.3d 1205, 1222–23 (10th Cir. 2014).

6. GEORGE CAMERON COGGINS AND ROBERT L. GLICKSMAN, PUB. NAT. RESOURCES L. § 15:19 (2nd ed.) (2015) [hereinafter PNRL] ("Some district courts have applied a clear and convincing standard.").

II. LEGAL BACKGROUND – R.S. 2477, THE QUIET TITLE ACT, AND *SUWA V. BLM*

A. R.S. 2477 – Its Origins and Repeal

R.S. 2477 is the common reference to a provision of an 1866 mining statute that granted rights-of-way across unreserved public domain land.[7] The provision states, in its entirety: "*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."[8] Presumably, Congress intended this provision, and the parallel provision in that act granting rights-of-way for canals, as means of facilitating mineral development, as that was the primary subject of the act; however, there is no legislative history that sheds light on the specific legislative intent behind the provision.[9] Whatever Congress' original intent, this understated statutory provision remained the law for 110 years until it was repealed by the Federal Lands Policy and Management Act ("FLPMA") of 1976.[10] However, an un-codified savings provision in FLPMA stated that rights-of-way in existence on October 21, 1976 were not terminated.[11] This "grandfather" provision for valid existing rights-of-way set the stage for the R.S. 2477 litigation we see today.

For many years, a basic question existed in relation to R.S. 2477 claims: whether state or federal law governed under the statute. The statute does not indicate whether state law should define the establishment of a right-of-way or whether federal courts can fill in the statutory gap with federal definitions. Without an answer to this preliminary question, the standard for determining the validity of a claimed R.S. 2477 right-of-way was a topic of hot debate. A 2003 report from the Congressional Research Service suggested that a valid claim

7. This subsection draws heavily on the work of Krakoff, *supra* note 2, at 1175–78.

8. Act of July 16, 1866, ch. 262, 14 Stat. 251, Rev. Stat. 2477, codified at 43 U.S.C. § 932 (repealed 1976).

9. PAMELA BALDWIN, CONG. RESEARCH SERV., RL32142, HIGHWAY RIGHTS OF WAY ON PUBLIC LANDS: R.S. 2477 AND DISCLAIMERS OF INTEREST 26 (2003) ("There is no legislative history that sheds light on why Congress included the highway grant as section 8 of the Mining Act of 1866.") What little legislative history that does exist is summarized in the U.S. Bureau of Indian Affairs, REPORT TO CONGRESS ON R.S. 2477: THE HISTORY AND MANAGEMENT OF R.S. 2477 RIGHTS-OF-WAY CLAIMS ON FEDERAL AND OTHER LANDS 9–10 (1993).

10. 43 U.S.C. §§ 1761-1770 (2012) (outlining procedures under FLPMA for processing rights-of-way and repealing all inconsistent legislation).

11. *See* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 701(a), 90 Stat. 2786–87.

under R.S. 2477 is one that meets the requirements of both state and federal law and noted that areas of conflict between the two appeared to be few.[12] Despite this suggestion, in 2005, the Tenth Circuit held that validation of R.S. 2477 claims is a matter of federal law, but federal law "borrows" from long-established common law and principles of state law to the extent that they are useful in effectuating congressional intent.[13] Section II discusses this "borrowing" in much greater detail.

Additionally, determining whether a valid R.S. 2477 right-of-way exists depends in large part on the interpretation of the statutory terms "construction" and "highway." With no definitions included in the statute and no legislative history on point, proponents and opponents of R.S. 2477 claims have wide latitude to assert their varying interpretations of these important terms. After much litigation, some settled meaning has begun to be recognized.[14] However, while some clarity has been brought to R.S. 2477 claims on these particular issues, questions such as the proper evidentiary standard remain unanswered.

B. The Quiet Title Act – Providing a Federal Cause of Action for Resolving R.S. 2477 Claims

While R.S. 2477 may grant the right-of-way in dispute, it is the Quiet Title Act that allows a claimant to pursue that claim against the federal government. As a sovereign, the federal government has absolute immunity from any legal claims brought against it.[15] Immunity from suit restricts claims brought by states, just like suits brought by any other entity.[16] Recognizing the difficulties that this situation created for the effective resolution of land title claims against the federal government, Congress enacted the Quiet Title Act in 1972.[17] Subject to some exceptions, the Quiet Title Act provides "the United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States

12. BALDWIN, *supra* note 9, at 41–45.

13. *See* S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735, 768 (10th Cir. 2005).

14. S*ee* San Juan Cty., Utah v. United States, 754 F.3d 787 (10th Cir. 2014); Kane Cty., Utah v. United States, 772 F.3d 1205 (10th Cir. 2014). Both cases are discussed, *infra* Section III.

15. *See* 77 AM. JUR. 2D *United States* § 59 (2015).

16. Block v. North Dakota *ex rel.* Bd. of Univ. & Sch. Lands, 461 U.S. 273, 280 (1983) (discussing states limited avenues for obtaining resolution to land title disputes with the federal government prior to enactment of the Quiet Title Act).

17. Quiet Title Act, Pub. L. No. 92-562, § 3(a), 86 Stat. 1176 (1972) (codified as amended at 28 U.S.C. § 2409a (2012)).

claims an interest…."[18] As a limited waiver of sovereign immunity, a number of courts have held that the terms of the statute must be strictly construed.[19] In *Block v. North Dakota*, the U.S. Supreme Court held that the Quiet Title Act was the exclusive means by which adverse claims to the United State's title to real property may be brought.[20] Exclusive original jurisdiction under the Quiet Title Act is in federal district court for the district where the disputed real property is located.[21] Claims brought under the Quiet Title Act are tried by the court, without a jury.[22]

In addition to the statutory limitations placed on the scope of real property claims that may be brought under the act and the jurisdictional and venue specifications described above, the Quiet Title Act has several other important restrictions for states or counties to consider when seeking to quiet title to a R.S. 2477 right-of-way. First, the statutory language and subsequent judicial interpretation make clear that only claims that are "adverse" to the United States' interest in the real property may be brought under the Act.[23] Therefore, for a district court to have jurisdiction over a claim brought under the Quiet Title Act, the claimant must establish that: (1) the United States "claims an interest" in the property at issue, and (2) title to the property is "disputed."[24] Second, the Quiet Title Act also contains a general twelve-year statute of limitations.[25] Claims brought after the period has run are barred. These restrictions have limited the ability of states and counties to bring quiet title actions for adjudication of claimed R.S. 2477 rights-of-way.

C. A Landmark Decision: SUWA v. BLM - Setting the Stage for Subsequent R.S. 2477 Litigation

In *SUWA v. BLM*, the Tenth Circuit finally articulated the process for and some of the standards by which R.S. 2477 claims brought under the Quiet Title Act would be adjudicated. The circuit court noted that R.S. 2477 required no administrative formalities for the perfection of a

18. 28 U.S.C. § 2409a(a) (2012). The Quiet Title Act does not waive immunity for suits challenging federal title to security interests, water rights, or trust or restricted Indian lands, or affect certain other actions as specifically identified in the statute.

19. Martin M. Heit, Annotation, *Real Property Quiet-Title Actions Against United States Under Quiet Title Act, 28 U.S.C.A. § 2409(a),* 60 A.L.R. Fed. 645 § 2 (1982).

20. *Block*, 461 U.S. at 286.

21. 28 U.S.C. §§ 1346, 1402 (2012) (enacted simultaneously with §2409a).

22. 28 U.S.C. § 2409a(f) (2012).

23. *See* 28 U.S.C. § 2409a(k).

24. Kane Cty., Utah v. United States, 772 F.3d 1205, 1211–12 (10th Cir. 2014), *following* Leisnoi, Inc. v. United States, 267 F.3d 1019, 1023 (9th Cir. 2001).

25. *See* 28 U.S.C. § 2409a(g) (the Quiet Title Act does contain some special statute of limitations provisions that are unique to states as claimants).

right under the statute, making it unique from other federal land statutes. The absence of any required administrative formalities resulted in few records relating to claims under the statute and much confusion when it came time to validate claimed R.S. 2477 rights-of-way.[26]

At issue in *SUWA v. BLM* were sixteen claimed R.S. 2477 rights-of-way across lands managed by the Bureau of Land Management ("BLM") in the southern Utah counties of San Juan, Kane, and Garfield. In 1996, without notice to the BLM, county road crews entered upon and graded these roads. While it appeared that none had ever been graded before, the counties claimed these roads as right-of-ways under R.S. 2477. Six of the roads were in Wilderness Study Areas and nine were in Grand Staircase-Escalante National Monument. SUWA subsequently filed suit against the counties and BLM, alleging that the counties' road construction activities were illegal and that the BLM had violated its duties under FLPMA, the Antiquities Act, and the National Environmental Policy Act by not taking action. The BLM cross-claimed against the counties alleging the grading activities constituted trespass and degradation of federal property in violation of FLPMA. The counties defended on the ground that the grading activities were lawful because they took place within valid R.S. 2477 rights-of-way. As the existence of valid R.S. 2477 rights-of-way were essential to the determination of the claims before the district court, the BLM first sought to administratively determine the validity of the claimed rights-of-way and concluded that fifteen of the sixteen claims were invalid. On SUWA's motion, the district court affirmed the agency's findings and determinations in their entirety. The counties appealed.

On appeal to the Tenth Circuit, the counties successfully argued that the BLM does not have primary jurisdiction to determine the validity of R.S. 2477 claims.[27] Considering the BLM's longstanding reluctance to regulate R.S. 2477 rights-of-way and in light of a congressional appropriations rider that prohibited the BLM from issuing regulations pertaining to the recognition, management, or validity of a R.S. 2477 right-of-way, the Tenth Circuit held that the BLM did not have the authority to make binding decisions as to the validity of R.S. 2477 rights-of-way.[28] As a result, the Tenth Circuit remanded the case to the district court to conduct a plenary review and to resolve the R.S. 2477 claims at

26. S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735, 741 (10th Cir. 2005).

27. *Id.* at 756.

28. *Id.* at 754–56. *See also* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104–208, 110 Stat. 3009 (1996) (enacting U.S. Department of the Interior and Related Agencies' Appropriations Act of 1997, § 108, 43 U.S.C. § 1734).

issue.[29] Recognizing the substantial burden that its ruling placed on the district court, the Tenth Circuit proceeded to address some of the significant legal issues that were briefed by the parties and ruled on by the district court.

The first of these issues was the question of whether state or federal law governs the perfection of a R.S. 2477 right-of-way. At common law, there are two elements for the dedication of a public right-of-way: (1) the landowner must objectively manifest their intent to dedicate property to the public as a right-of-way, and (2) the public must accept the offer.[30] Should state or federal law decide these two elements? In a sense, the court "split the baby" on the issue. The counties argued for state law, BLM argued for federal law, and the Congressional Research Service had suggested the simultaneous application of both. Instead, the Tenth Circuit held that both federal and state law played their respective roles:

> We therefore conclude that federal law governs the interpretation of R.S. 2477, but that in determining what is required for acceptance of a right-of-way under the statute, federal law "borrows" from long-established principles of state law, to the extent that state law provides convenient and appropriate principles for effectuating congressional intent. The applicable law in this case is that of the State of Utah, supplemented where appropriate by precedent from other states with similar principles of law.[31]

In regards to the first element, the Tenth Circuit would later recognize that R.S. 2477 constituted a standing offer by the federal government for right-of-way across the public lands.[32] In other words, federal law governs the first element while the second element is largely a matter of state law. In reaching this conclusion, the Tenth Circuit relied on the text of the statute and the U.S. Supreme Court's decision in *Wilson v. Omaha Indian Tribe* for factors used to determine when to borrow from state law for the interpretation of a federal statute.[33]

After resolving that issue, the Tenth Circuit went on to address the burden of proof (but not the standard of proof) and the applicable substantive common law standards in Utah. The court quickly dispatched with the question concerning the burden of proof by affirming the district court's ruling that the burden was on the counties (i.e. the party seeking

29. *S. Utah Wilderness Alliance,* 425 F.3d at 768.

30. PNRL, *supra* note 6, at § 15:19.

31. *S. Utah Wilderness Alliance,* 425 F.3d at 768.

32. *Id.* at 741, 754.

33. *Id.* at 761–768 (discussing the text of R.S. 2477 and Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979)).

to enforce the rights-of-way against the federal government).[34] "This allocation of the burden of proof to the R.S. 2477 claimant is consonant with federal law and federal interests."[35] The Tenth Circuit also elaborated on several substantive standards not directly relevant to the argument advanced in this Article, and which are therefore not discussed, such as the public use standard, the mechanical construction standard, and the definition of "highway." Consistent with its holding for "borrowing" state law on this element, the Tenth Circuit's discussion focused heavily on the leading Utah Supreme Court decision interpreting R.S. 2477, *Lindsay Land & Live Stock Co. v. Churnos*.[36] In *Lindsay*, the Utah Supreme Court looked to the state statutes in force at the time the right-of-way was claimed to have been accepted and held that acceptance in Utah required "continuous public use of a period of ten years." Despite the Tenth Circuit's discussion of these many important legal issues, the circuit court did not address that standard of proof that the claimant must satisfy for recognition of a valid R.S. 2477 right-of-way.

D. Summary: Adjudication of R.S. 2477 Claims

As evidenced by the preceding discussion, the law pertaining to R.S. 2477 claims is both complex and expansive. While there are other important issues related to the adjudication of R.S. 2477 claims, those issues are not directly relevant to the goals of this Article and have therefore been omitted. In contrast, for this Article's purposes, the most relevant points of law related to R.S. 2477 law, as summarized from the preceding discussion, are that:

- Valid public rights-of-way require an offer of the right-of-way by the grantor and acceptance of that offer by the public.
- For the period that it was in effect, R.S. 2477 was a standing offer by the federal government.
- Federal law governs R.S. 2477 claims, but acceptance by the public is determined by looking to state-law standards.
- Utah state law requires ten years of continuous public use for a right-of-way to be considered accepted.
- The burden of proof is on the R.S. 2477 claimant.

34. *Id.* at 768–769.

35. *Id.* at 769.

36. *See id.* at 770 (discussing Lindsay Land & Livestock Co. v. Churnos, 285 P. 646 (Utah 1929)).

- The Quiet Title Act allows claimants to bring R.S. 2477 suits in federal district court, subject to the limitations contained in the Quiet Title Act.

With these settled points of law in mind, we turn to the major unresolved question in R.S. 2477 law—the standard of proof a claimant is required to satisfy.

III. WHAT EVIDENTIARY STANDARD? – AN UNRESOLVED QUESTION

Some nine years after the Tenth Circuit's opinion in *SUWA v. BLM*, the evidentiary standard applicable to R.S. 2477 remains unresolved. The following subsections provide a general description of evidentiary standards and discuss the relevant portions of the two 2014 Tenth Circuit opinions that declined to reach the evidentiary-standard issue. While lengthy, the descriptions of these two cases are necessary to serve two important purposes. First, they ultimately help to underscore the importance of the evidentiary-standard question by demonstrating the factual complexities that are at play in R.S. 2477 adjudications. Second, these descriptions present the various arguments that have been advanced for and against the clear and convincing standard. An important goal of this section, related to the latter purpose behind these case descriptions, is to demonstrate the inadequacies of the arguments advanced by the State of Utah and the Utah counties for the application of the preponderance standard. While the Tenth Circuit did not have to directly address those arguments, this Article does so here.

A. Evidentiary Standards in General

Because lawsuits under the Quiet Title Act are civil proceedings in federal court, they are governed by the Federal Rules of Civil Procedure and the Federal Rules of Evidence.[37] Evidentiary standards define how far the party that bears the burden of proof on a particular element of a claim must carry their burden of persuasion.[38] The typical standard in civil cases is the preponderance of the evidence standard.[39] Under a preponderance standard (the lowest of the standards), the party bearing

37. FED. R. CIV. P. 1; FED. R. EVID. 101.

38. *See* 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 3:5 (4th ed.).

39. *Id.*

the burden of proof succeeds when a factfinder is "persuaded (acting as reasonable persons) that the points to be proved are more probably so than not."[40] While preponderance is the default standard in civil cases, a "clear and convincing" standard may apply where there is some special reason to prefer a standard that requires more persuasive proof.[41] As a higher standard, clear and convincing evidence "indicat[es] that the thing to be proved is highly probable or reasonably certain."[42] Determining which standard applies to R.S. 2477 claims will likely have an appreciable impact on the likelihood of success for such claims.

B. San Juan County, Utah v. United States – District Court Applies the "Clear and Convincing" Standard

San Juan County reached the Tenth Circuit as an appeal from the District Court of Utah's denial of a R.S. 2477 right-of-way that was claimed by San Juan County and the intervenor-claimant State of Utah. [43] The right-of-way at issue lay along Salt Creek in Canyonlands National Park and had been used by motor vehicles to access a popular geologic formation known as Angel Arch. In 2004, the National Park Service closed Salt Creek Canyon to motor vehicles beyond Peekaboo Springs (approximately 8.8 miles from Angel Arch) due to the ecological impacts resulting from such use and by so doing, significantly limited the public's ability to access the remote arch.[44]

On September 12, 1964, President Lyndon B. Johnson signed

40. *Id.*

41. *Id. See* Grogan v. Garner, 498 U.S. 279 (1991) (preponderance standard applies "in civil actions between private litigants" unless especially important individual interests or rights are at stake) (applying preponderance standard to question of discharge in bankruptcy). For examples of where a higher standard than the preponderance standard has been applied, *see* Santosky v. Kramer, 455 U.S. 745 (1982) (termination of parental rights); Addington v. Texas, 441 U.S. 418 (1979) (civil commitment proceedings); Schneiderman v. U.S., 320 U.S. 118 (1943) (denaturalization); Woodby v. Immigration and Naturalization Service, 385 U.S. 276 (1966) (deportation); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (defamation of public figure). A common thread throughout these cases is the Court's due process concerns.

42. *Clear and Convincing Evidence*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("This is a greater burden than preponderance of the evidence, the standard applicable in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials").

43. San Juan Cty., Utah v. United States, Civil No. 2:04-CV-0552BDJ, 2011 WL 2144762, at *36 (D. Utah May 27, 2011).

44. *Id.*; *see also Access, Control Argued in Canyonlands, Salt Creek Road Appellate Hearing*, DESERET NEWS (Sept. 19, 2012), http://www.deseretnews.com/article/765605264/Federal-court-to-hear-appeal-on-Canyonlands-park.html.

Public Law 88-590, thereby establishing Canyonlands National Park and reserving the park from operation of R.S. 2477.[45] Therefore, the county and state claimants were required to demonstrate ten years of continuous public use, prior to the date of reservation, in order to establish a valid R.S. 2477 right-of-way along Salt Creek. After a nine-day bench trial, the district court held that the claimants failed to prove by clear and convincing evidence the requisite ten years of continuous public use.[46] To determine the proper evidentiary standard against which the evidence presented was to be measured, the district court looked to Utah state law, as instructed by the Tenth Circuit in *SUWA v. BLM*:

> Utah appellate courts have noted that because "the ownership of property should be granted a high degree of sanctity and respect," *Draper City v. Bernardo,* 888 P.2d 1097, 1099 (Utah 1995), "dedication of property to public use should not be lightly presumed," *Thurman v. Byram,* 626 P.2d 447, 448 (Utah 1981). In consideration of this policy, the Utah Supreme Court has placed the burden of proving the existence of a public road by clear and convincing evidence on the party seeking to establish the dedication. *See Draper City,* 888 P.2d at 1099 ("This higher standard of proof is demanded since the ownership of property should be granted a high degree of sanctity and respect.") (citing *Thomson v. Condas,* 493 P.2d 639, 639 (Utah 1972); *Petersen v. Combe,* 20 Utah 2d 376, 377–78, 438 P.2d 545, 548 (1968)); *see Wasatch County v. Okelberry*, 179 P.3d 768, 773 (Utah 2008) (reaffirming that "a party seeking to establish dedication and abandonment under [Utah Code Ann. § 72–5–104(1)] bears the burden of doing so by clear and convincing evidence"). Having borrowed the Utah law standard in determining what is required for public acceptance of the grant of a right-of-way under R.S. 2477, we likewise borrow the corresponding Utah law standard of proof: *clear and convincing evidence*.[47]

In a footnote, the district court dismissed the claimants' assertion that *SUWA v. BLM* compelled a preponderance standard by distinguishing the forms of relief sought in that case from the form sought here.[48] In *SUWA v. BLM*, SUWA sought declaratory and injunctive relief against the defendant counties for civil trespass on BLM-managed lands. Here, in stark contrast, the county and state were seeking to quiet title to real property against the federal government. The

45. *San Juan Cty.*, 2011 WL 2144762 at *12-13.

46. *Id.* at *1, 35.

47. *Id.* at *5 (emphasis in the original).

48. *Id.* at *36, n. 106 (citing Watt v. W. Nuclear, Inc., 462 U.S. 36, 59 (1983); United States v. Union Pac. R.R. Co., 353 U.S. 112, 116 (1957)) (for the idea that grants of federal lands should be strictly construed). The broader applicability of those cases is discussed, *infra* Section IV(B).

district court cited the U.S. Supreme Court's opinion in *Watt v. Western Nuclear* where the Supreme Court stated that "the established rule [is] that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it."[49] The district court further noted that even if the preponderance standard did apply, the claimants would have still failed to meet that lower evidentiary bar on the present record.

On appeal to the Tenth Circuit, the county and state claimants asserted that the district court had erred in its application of the clear and convincing standard and that it had presented sufficient evidence in support of its R.S. 2477 claim.[50] San Juan County contended that "the law and policies supporting a heightened burden of proof do not apply to R.S. 2477 suits."[51] The county's arguments to the Tenth Circuit proceeded along three lines of reasoning.

The claimants first argued that the district court's strict-construction-of-land-grants analysis, and resultant application of the clear and convincing standard, would frustrate the congressional purpose behind Congress' enactment of R.S. 2477. The claimants postulated the provision's purpose to be the promotion of development on unreserved public lands as part of a larger, prevailing pro-development public lands policy of the time.[52] San Juan County, quoting from the U.S. Supreme Court opinion in *Denver & Rio Grande Railway Co.*, in its opening brief asserted that this would violate an "equally 'well-settled rule' that public land grants 'are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication'"[53] However, excluded from the county's brief was the Supreme Court's language before and following "well settled," which states: "It is undoubtedly, as urged by plaintiffs in error, the well-settled rule of this court that public grants are construed strictly against the grantees…."[54] When read in full, the well-settled rule is in line with the district court's holding. The caveat expressed by the *Denver & Rio Grande* Court is not a co-equal rule, but an interpretive tool for courts to use in aide of statutory interpretation. The general lands policy of the country in 1866 may certainly have been pro-development in general, but

49. *Watt*, 462 U.S. at 59.

50. Appellant San Juan Cty.'s Opening Brief at *31, San Juan Cty. v. United States, 754 F.3d 787 (10th Cir. 2014) (Nos. 11-4146, 11-4149).

51. *Id.* at *21.

52. *Id.* at *22–23.

53. *Id.* at *32–33 ([mis-]quoting United States v. Denver & Rio Grande Ry. Co., 150 U.S. 1, 14 (1893)).

54. Denver & Rio Grande Ry. Co., 150 U.S. at 14.

the policies motivating the enactment of the Mining Law of 1866, and its constituent provision R.S. 2477, were specifically pro-mining, not pro-roads. In other words, reading the act as a whole, the intent of the R.S. 2477 provision was to support access to minerals on public lands, not to further a policy for road construction generally. Therefore, the claimants' abstraction of a broader national policy from a mining-focused statute was justifiably rejected by the district court.[55] Determination of the scope of Congress' intent in enacting R.S. 2477 is properly a question of law within the competence of the court to decide.

The county's second line of argument concerned the applicability of Utah's dedication statute to R.S. 2477 claims.[56] The county did not dispute the evidentiary standard under the state statute, but attempted to distinguish the policies behind the state statute from those of R.S. 2477 by noting that state statute involves the transfer of private property to public use. As a result, the county asserted that the Utah Supreme Court's holding in *Okelberry* is inapplicable to R.S. 2477 because the same concern for property rights does not apply to public lands.[57] It is unclear, however, why the status of the entity owning property should impact the legal standard by which that property owner may be disposed of their property. The *Okelberry* court's high regard for property rights, and its subsequent application of the clear and convincing standard to the Utah dedication statute, should apply regardless of whether the state, the federal government, or a private entity owns the property in question. Constitutional protections do not vary along such a spectrum. Rather than *Okelberry*, the county posits that the Utah Supreme Court's 1901 decision in *Schettler v. Lynch* provides the applicable evidentiary standard.[58] But that case discusses specific instances where affirmative acts of the landowner are "calculated to induce the people to believe that the land was devoted to the purpose of a street" and in such instances a preponderance standard applies.[59] *Schettler* is inapplicable for two obvious reasons: (1) R.S. 2477 was a general offer to the public, not a specific affirmative action related to any individually identifiable piece of property, and (2) the case conflates offer and acceptance, which are two distinct elements for establishing a public right-of-way under *SUWA v. BLM*.

55. Perhaps, then, with the facilitation of mining as the statute's motivating purpose, the claimants would have been better served to have presented more than mere evidence of "some uranium mining and oil exploration in the mid- to late-1950s." *San Juan County*, 754 F.3d at 791.

56. San Juan County Opening Brief, *supra* note 50, at *39.

57. *Id*. at *37–38.

58. *Id.* at *38 (describing Schettler v. Lynch, 64 P. 955 (Utah 1901)).

59. *Schettler*, 64 P. at 957.

As a third and final argument, the county attempted to persuade the Tenth Circuit to adopt the preponderance standard that the Ninth Circuit applied in *Adams*, a quiet title action for a ditch right-of-way under the same 1866 statute that contained R.S. 2477.[60] However, the Ninth Circuit in *Adams* neglected to describe any of its rationale for applying the preponderance standard (presumably because the Ninth Circuit ultimately determined that the claimant's suit was barred by the statute of limitations).[61] Furthermore, the provision regarding ditch rights-of-way is inapplicable to a consideration of R.S. 2477 rights-of-way, because the former is controlled by explicit statutory standards, while the latter has been left solely to judicial interpretation.[62]

As the appeal to the Tenth Circuit in *San Juan County* was from a bench trial, the circuit court's review of the district court's application of the law was *de novo*, and its review of factual determinations was governed by the "clearly erroneous" standard.[63] After reviewing the district court's findings of fact and conclusions of law, the circuit court held:

> Because the judge correctly concluded the evidence of the existence of a public thoroughfare failed to satisfy either the more lenient "preponderance of the evidence" standard or the more stringent "clear and convincing evidence" standard, we need not resolve the dispute over the proper standard.[64]

Thus, while the Tenth Circuit did not affirm the district court's determination of the proper evidentiary standard, the district court's reasoning was a straightforward application of *SUWA v. BLM* and clearly articulated standards under Utah state law. Thereby, the district court made a solid case for the "clear and convincing" standard to govern the

60. Appellant San Juan Cty.'s Opening Brief at *39–40, San Juan Cty. v. United States, 754 F.3d 787 (10th Cir. 2014) (Nos. 11-4146, 11-4149) (discussing Adams v. United States, 3 F.3d 1254 (9th Cir. 1993)).

61. *Adams*, 3 F.3d at 1260.

62. Act of July 16, 1866, ch. 262, 14 Stat. 251, Rev. Stat. 2339-40, 43 U.S.C. § 661(repealed 1976). In its original form: "*And be it further enacted***,** That whenever, by priority of possession, rights 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.**"**

63. *San Juan Cty.*, 754 F.3d at 796.

64. *Id.* at 801.

acceptance of R.S. 2477 rights-of-way. Despite the outcome of the appeal, the claimants did not seek review of the circuit court's decision.

C. Kane County, Utah v. United States – Circuit Court Declines to Address the Evidentiary Standard

In this case, the claimant Kane County and intervenor-claimant State of Utah brought suit in 2008 to quiet title against the United States on fifteen claimed R.S. 2477 rights-of-way in southern Utah.[65] While all of the claimed rights-of-way traverse federally owned land (many are located within Grand Staircase-Escalante National Monument), some traverse portions of privately held lands. After a long series of motions, hearings, site visits, more motions, and a bench trial, the district court held that the claimants' had proven R.S. 2477 rights-of-way on twelve of the fifteen roads.[66] Both the claimants and the United States appealed numerous portions of the district court's decision.[67] Relevant to this Article, the claimants contended that the district court erred by requiring the R.S. 2477 rights-of-way to be proved by clear and convincing evidence.[68]

In addressing the proper evidentiary standard by which the R.S. 2477 claims should be judged, the district court noted and addressed many of the same concerns that were before the district court and Tenth Circuit in *San Juan County*, including the applicability of the Utah dedication statute to R.S. 2477 claims, congressional intent in enacting R.S. 2477, and the proper construction of federal grants under U.S. Supreme Court's jurisprudence in cases like *Watt v. Western Nuclear*.[69] In summarizing these issues, the district court stated:

> Requiring a heighted burden of proof to establish that a grant was accepted, arguably, could defeat congressional intent if the standard is placed too high. Consequently, were all R.S. 2477 claims strictly against the United States for roads across federal land, one might conclude the "preponderance of the evidence" standard is most appropriate to give effect to the congressional grant.[70]

65. Kane Cty., Utah v. United States, Civil No. 2:08-CV-00315, 2013 WL 1180764, *1 (D. Utah Mar. 23, 2013).

66. Kane Cty., Utah v. United States, 772 F.3d 1205, 1209 (10th Cir. 2014).

67. In addition to the appeals raised by the parties, amici SUWA, The Wilderness Society, and the Sierra Club argued that the district court lacked jurisdiction over one of the claimed rights-of-way, because the statute of limitations for Quiet Title Act claims had already run. *Id.* at 1210.

68. *Id.*

69. *Kane Cty.*, 2013 WL 1180764, at *43–44.

70. *Id.* at *44.

However, an additional factor was at issue in regard to these claims that was not at issue in *San Juan County*—R.S. 2477 rights-of-way across *private* lands.[71] Due to the "significant burden" a public right-of-way would impose on a private landowner, the district court held that the heightened clear and convincing standard would be appropriate under such circumstances.[72] Recognizing that this result would require the application of two different evidentiary standards for a claimant seeking to quiet title along the entire length of a R.S. 2477 right-of-way that traversed both private and public lands, the district court found that situation to be "unworkable."[73] As a result, the district court concluded:

> [W]hile the clear and convincing evidence standard does impose greater burden, the court concludes that the burden is not so high as to defeat congressional intent. Finally, prior case law supports that the appropriate burden of proof in an R.S. 2477 case is by clear and convincing evidence. [Citing the district court opinion in *San Juan County*.] Accordingly, the court concludes that Kane County must prove its R.S. 2477 claims by clear and convincing evidence.[74]

Despite the district court's imposition of the clear and convincing standard, the county and state claimants were still able to satisfy the evidentiary standard as to twelve of its fifteen claimed rights-of-way.

As to the state and county's three unsuccessful claims (the Cave Lake roads), the claimants argued in their briefs to the circuit court that the preponderance standard was the appropriate evidentiary standard but presented two separate rationales in support. Kane County asserted that "there is no reason to apply the higher clear and convincing burden of proof in this case where the landowner's dedication is unequivocal."[75] As with San Juan County in their brief to the circuit court, this argument inappropriately conflates the two distinct elements for valid public rights-of-way. The state primarily focused its argument on the congressional intent behind the enactment of R.S. 2477, positing a general pro-development public lands policy at the time of enactment.[76] This too is similar to an argument put forth by San Juan County to the circuit court in its appellate brief. The state argued that the higher

71. *Id.* at *44–45. Such situations arise where a R.S. 2477 right-of-way is properly established across public lands and then that underlying public land is later transferred into private ownership.

72. *Id*. *44.

73. *Id.* at *45.

74. *Id*.

75. Response and Reply Brief for Appellant-Appellee Kane Cty at *24, Kane Cty., Utah v. United States, 772 F.3d 1205 (10th Cir. 2014) (Nos. 13-4108, 13-4109, 13-4110).

76. Response and Reply Brief of the State of Utah at *37; Kane Cty., Utah, 772 F.3d 1205 (10th Cir. 2014) (Nos. 13-4108, 13-4109, 13-4110).

evidentiary standard would frustrate congressional intent, and it was thus inappropriate to "borrow" this element of Utah state law.[77]

Further, the state argued the debate over congressional intent had been resolved by the U.S. Supreme Court in *Central Pacific Railway Co. v. Alameda County*, where the Court described a liberal policy in 1866 toward the use of western public lands.[78] Again, even granting the claimants the pro-development policy, this does not resolve the issue of acceptance. The state, like Kane County, conflates the two distinct elements for public rights-of-way. A pro-development policy speaks to the first element—was there an offer by the landowner? The courts have interpreted this element, very much in line with the liberal public lands policies of 1866, to be answered as unequivocally "yes." The second element—acceptance—does not depend on the intent of the offeror. Rather, public acceptance is determined by borrowing principles of state law from the jurisdiction in which the R.S. 2477 right-of-way is located.[79]

Ultimately, as in *San Juan County*, the Tenth Circuit declined to decide the issue. The circuit court held that the district court improperly exercised jurisdiction over the Cave Lake roads so that the issue was moot.[80] Further, for the other twelve rights-of-way, the district court found the higher clear and convincing standard was satisfied, so the lower preponderance standard was also necessarily satisfied. Dissatisfied with the outcome of the case, the claimant's in *Kane County*, unlike the claimants in *San Juan County*, petitioned the U.S. Supreme Court for writ of certiorari—a petition that the Supreme Court denied.[81] Therefore, as a result of these decisions, the applicable evidentiary standard for R.S 2477 claims remains unsettled law in the Tenth Circuit.

IV. "CLEAR AND CONVINCING" - THE PROPER EVIDENTIARY STANDARD

Since the Tenth Circuit decisions in *San Juan County* and *Kane County*, this is where R.S. 2477 law in the circuit stands today. We know that R.S. 2477 was an open offer to create public rights-of-way across the unreserved public domain. We know that, in Utah at least, the public

77. *Id.* at *38.

78. *Id.* at *37 (describing *Alameda*, 284 U.S. 463 (1932)).

79. In response the district court's concerns about dual evidentiary standards when a claimed R.S. 2477 right-of-way crossed both private and public lands, the state argued that eminent domain was the proper mechanism for resolving that issue. *See Id.* at *38.

80. Kane Cty, 772 F.3d at 1222–23.

81. *Id.* at 1205, *cert. denied* 136 S. Ct. 318 (2015).

accepts the offer by continuous public use for a period of ten years. We also know that the party bringing the R.S. 2477 claim bears the burden of proving the claim's validity. But we still don't know how persuasive the evidence presented must be in order to support that claim. This fundamental and unresolved component of a R.S. 2477 suit deserves resolution.

The preceding section demonstrated the inadequacies of the arguments put forth by the state and county claimants for the lower preponderance standard. By contrast, this section explains why the higher clear and convincing evidence standard is the proper standard. Two primary arguments motivate the conclusion that clear and convincing evidence is necessary to support a R.S. 2477 claim. First and foremost, under Utah state law, clear and convincing is the recognized legal standard for adjudicating grants of public rights-of-way. Second, the clear and convincing standard's application to potential rights-of-way under R.S. 2477 is supported by other analogous areas of the law and the public policy underpinnings that support them, such as the strict construction of limited waivers of sovereign immunity and the strict construction of grants by the federal government.

A. Clear and Convincing is the Proper Evidentiary Standard under Utah State Law

Under the R.S. 2477 analysis set forth by the Tenth Circuit in *SUWA v. BLM*, acceptance of a public right-of-way is determined by "borrowing" principles of state law that are "convenient and appropriate." The question then becomes, what constitutes a principle that is both "convenient" and "appropriate"? If the court identifies such principles of state law, then it is those principles that should govern the question of public acceptance.

While subsequent case law has yet to flesh out the meaning of *SUWA v. BLM*'s "convenient and appropriate" language, a consideration of these terms' plain meanings is an appropriate interpretive tool. Dictionary definitions are helpful for determining plain meaning by providing commonly accepted understandings of terms. This approach is now taken to elucidate both terms.

"Convenient" is defined in the dictionary as "allowing you to do something easily or without trouble."[82] Therefore, as used by the Tenth Circuit in *SUWA v. BLM*, the "convenient" principles of state law can be

82. *Convenient*, MERRIAM-WEBSTER DICTIONARY, www.merriam-webster.com/dictionary/convenient (last visited May 5, 2015).

understood to be those principles of state law that are readily available and easily accessible to the federal courts. In other words, if the state law in question has clear supreme court precedent that is directly on point, then that precedent is "convenient" for the federal courts to apply in the case at bar. A contrasting situation would be where a state's law on a particular issue had only been addressed at the trial court level or where appellate-level review of the issue was in conflict.[83] As recognized by the district courts in the *San Juan County* and *Kane County* cases, Utah does in fact have state supreme court precedent that is directly on point. In *Draper City*, the Utah Supreme Court held that under the state dedication statute for public rights-of-way that clear and convincing evidence is required.[84] As a result, the *Draper City* opinion provides a "convenient" principle of state law for federal courts to apply.

However, the inquiry for the borrowing of state law does not end with convenience, for the principle to be borrowed must also be "appropriate." The dictionary defines "appropriate" as "right or suited for some purpose or situation." [85] Therefore, the appropriateness of a state principle of law is to be judged by the context in which it is being employed. Here, in the context of R.S. 2477 rights-of-way, the federal government (as a representative of all American citizens) loses some degree of control over the manner in which it is able to manage public property, if the right-of-way is recognized. While the public would obtain access to that right-of-way, it would lose the ability to choose whether that location was suitable for a right-of-way in light of all of the other competing interests that inform public lands management decisions. In essence, the American public loses a property right every time a R.S. 2477 claim is validated. Accordingly, the *Draper City* court recognized the high "degree of sanctity and respect" that property ownership should be afforded as support for its application of the higher clear and convincing standard as the evidentiary bar.[86] Given the contextual similarities between the Utah dedication statute and R.S. 2477, *Draper City* provides an appropriate principle of state law for federal courts to apply in their review of R.S. 2477 claims.

The State of Utah and San Juan and Kane Counties have attempted to assert that *Draper City* should not be borrowed from state law, because it is not reflective of Congress' 1866 intent in enacting R.S.

83. This is not to say that trial court opinions would be irrelevant to a federal court's consideration, but rather, as along a spectrum of convenience, state supreme court precedent that is directly on point would likely be the most convenient.

84. Draper City v. Estate of Bernardo, 888 P.2d 1097, 1099 (Utah 1995).

85. *Appropriate*, MERRIAM-WEBSTER DICTIONARY, www.merriam-webster.com/dictionary/appropriate (last visited May 5, 2015).

86. *Estate of Bernardo*, 888 P.2d at 1099.

2477. In other words, they argue that *Draper City* is not an "appropriate" principle. As discussed earlier, this argument by the state and counties misses the point. Congressional intent is an important factor for determining whether Congress intended R.S. 2477 to be a standing offer of public rights-of-way, not whether the public actually accepted any offer there under. Therefore, clear and convincing evidence, as established by the Utah Supreme Court in *Draper City*, is a convenient and appropriate principle of state law that federal courts should borrow when reviewing the sufficiency of the evidence supporting the public's acceptance of a claimed R.S. 2477 right-of-way.

B. R.S. 2477 Rights-of-Way are Analogous to Other Areas of the Law Where Heightened Standards Apply

As discussed in the preceding subsection, the validation of a R.S. 2477 right-of-way is really a loss to the American public. The loss from the recognition of a R.S. 2477 right-of-way comes in the form of the restricted ability of the nation to manage its public lands in a manner that it deems appropriate in light of the myriad interests that desire use of our public lands. Congress has recognized a desire for the balancing of these interests in the management of our public lands in several statutes as the principle of "multiple use."[87]

In other areas of the law where the American public is at risk of losing something, the U.S. Supreme Court has longstanding jurisprudence that seeks to protect the public in such situations. A similar rationale should be applied in the context of R.S. 2477 claims, in which the public stands to lose its managerial discretion. An effective mechanism for protection is the application of the clear and convincing standard as the evidentiary bar that a R.S. 2477 claimant must satisfy. Two examples are provided to demonstrate the analogy between the Supreme Court's strict construction and the clear and convincing evidence standard and the common public policy rationales that underlie these two examples and R.S. 2477.

1. Limited Waivers of Federal Sovereign Immunity are Strictly Construed

As a sovereign, the federal government has absolute immunity from lawsuits brought against it. Only by explicitly waiving that immunity

87. *See e.g.* FLPMA, 43 U.S.C. § 1701(7) (2012); National Forest Management Act of 1976, 16 U.S.C. § 1600(3) (2012); Multiple Use-Sustained Yield Act of 1960, 16 U.S.C. §§ 528–531 (2012).

may the federal government be made party to a suit. The federal government has not provided a blanket waiver of its immunity but has granted limited waivers for particular purposes. The Quiet Title Act, under which R.S. 2477 claims are brought, is one such limited waiver. Every time the federal government waives its immunity, it exposes the American public to the potential loss of national assets—be those monetary assets under the Federal Tort Claims Act[88] or property assets under the Quiet Title Act.

Because waivers of sovereign immunity create a risk to the public, the U.S. Supreme Court has held that the terms of limited waivers should be strictly construed. The leading precedent on this issue is the Court's opinion in *Block v. North Dakota*.[89] At issue in *Block* was the title to submerged lands underlying the Little Missouri River in North Dakota. The State of North Dakota brought a quiet title action under the Quiet Title Act to resolve the ownership dispute between it and the federal government.[90] Regarding the state's ability to bring the quiet title action against the federal government, the Court held:

> The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress. A necessary corollary of this rule is that when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied.[91]

In support of this assertion, the Court cited five previous decisions of the Court standing for the same principle. The oldest of these decisions was that of *United States v. Sherwood* from 1941. *Sherwood* concerned the ability of a judgment creditor of a third party to satisfy its claims by recovering against the federal government, who was in business with the third party.[92] The *Sherwood* Court held that the judgment creditor's claim against the government was barred because it was not within the class of suits to which the government had waived its immunity.[93]

Taken together, the Supreme Court's jurisprudence on limited waivers of sovereign immunity demonstrates that the court is reluctant to expose the public to litigation risk to which Congress has not explicitly consented. In order to protect the public, the Court strictly construes

88. 28 U.S.C. §1346(b) (2012).
89. Block v. North Dakota *ex rel.* Bd. of Univ. & Sch. Lands, 461 U.S. 273 (1983).
90. *Id.* at 277.
91. *Id.* at 287 (citations omitted).
92. United States v. Sherwood, 312 U.S. 584 (1941).
93. *Id.* at 591–92.

those limited waivers of immunity. In *Block*, as with any other claim under the Quiet Title Act, strict construction of the act's waiver is necessary for protection of the public.

2. Grants of Public Lands by the Federal Government are Strictly Construed

Another area of Supreme Court jurisprudence where the Court has sought to protect the public's interests is in cases of grants of public lands by the federal government to private entities. Throughout its history, the federal government has granted private entities huge tracts of previously public land. A striking example of such grants is the railroad land grants, and it is in this context that much of the litigation over the proper construction of such grants has taken place. Here, as with limited waivers of sovereign immunity, the Supreme Court has sought to protect the interests of the American public by strictly construing the terms of those land grants against the grantee. The Supreme Court decision in *Watt v. Western Nuclear* is a leading precedent standing for this proposition and was cited by the district courts in both the *San Juan County* and *Kane County* cases.

Watt concerned the federal government's reservation of "coal and other minerals" underlying lands patented under the Stock-Raising Homestead Act.[94] A mining company began removing gravel from the property and the BLM brought suit to enjoin the activity as a trespass against the government. In holding that gravel was a "mineral" reserved under the act, the *Watt* Court noted that its conclusion was "buttressed by the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it."[95] As in *Block*, the Court cited an extensive string of past Supreme Court cases for support of this "established rule," with cases stretching back as late as 1903. Despite the eighty years of precedent listed by the Court, a review of the cases cited by the *Watt* Court makes clear that the established rule is actually much older than 1903. For example, in its 1837 opinion in *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, the Supreme Court held, in discussing the scope of a franchise agreement granted to the bridge proprietors by the public:

> The rule of construction in such cases is well settled, both in England, and by the decisions of our own tribunals. In the case of the

94. *See* Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983).
95. *Id.* at 59 (citations and quotations omitted).

> *Proprietors of the Stourbridge Canal* v. *Wheeley and others*, 2 B. & Ad. 793, the court say, "the canal having been made under an act of parliament, the rights of the plaintiffs are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases, is now fully established to be this—that any ambiguity in the terms of the contract, must operate against the adventurers, and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the act."[96]

Together, the *Charles River Bridge* and *Watt* opinions illustrate the Supreme Court's longstanding concern for the public—older, in fact, than R.S. 2477 itself—when rights held by the public are being granted away. The Court has responded to this concern by strictly construing the grants of those rights. Although R.S. 2477 has been held to be a standing offer of public rights-of-way,[97] the Court's concern for the public can still be manifested through its review of public acceptance of the right-of-way.

3. Strict Construction & Clear and Convincing

The two areas of Supreme Court jurisprudence described above demonstrate the Court's concern when the public potentially stands to lose something. By strictly construing waivers of immunity and grants to private entities, the Court has sought to limit the public's exposure through that heightened degree of review. In regards to R.S. 2477 claims, federal courts can similarly limit the public's exposure to loss by applying the clear and convincing evidentiary standard to those claims. In a sense, this is somewhat analogous to what the Supreme Court did regarding waivers and grants. Requiring clear and convincing evidence requires the claimant to demonstrate by a higher standard that the elements of their claim have in fact been met. While this analogy may not be a sufficient basis on its own for a court to rule, it does provide important background considerations that should impact a court's decision making in close cases and lends additional support for borrowing the state law principles in *Draper City* by further demonstrating *Draper City*'s "appropriateness."

96. Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. 420, 544 (1837).

97. It could be argued that this is the opposite of strict construction, but given the language of R.S. 2477 it is probably a fair one.

V. CONCLUSION

Judicial determination of the proper evidentiary standard for adjudicating R.S. 2477 claims will benefit all parties to such cases and that standard should be the "clear and convincing" standard. States and counties seeking recognition of R.S. 2477 rights-of-way will be better equipped to determine which claims are likely to succeed, and thereby whether or not the claim is worth the time and expense of litigation. A resolution of the applicable evidentiary standard will also assist the United States and conservation-oriented groups in deciding how to respond to R.S. 2477 claims brought by states and counties. While litigation is always an uncertain endeavor, any light that can be shed on the process and standards by which a claim will be judged helps to lessen the burden on all parties. Determination of the proper evidentiary standard for R.S. 2477 claims is one such area where improved clarity is fully warranted.

While the adjudication of R.S. 2477 claims in the Tenth Circuit has become largely state-specific as a result of the circuit court's "borrowing" holding in *SUWA v. BLM*, the proper evidentiary standard, in Utah at least, is unmistakably that of clear and convincing. Utah state law is unambiguous as to its evidentiary standard for the recognition of public rights-of-way. As such, the clear and convincing standard was recognized and applied by the Utah District Court in both the *San Juan County* and *Kane County* cases described in this Article. The state and counties appealing these decisions have been left to resort to vain attempts to distinguish the Utah dedication statute and misplaced reliance on overly broad interpretations of the congressional intent behind R.S. 2477.

While the Tenth Circuit has yet to rule on this issue, the case for clear and convincing is strong. It is supported not only by a straightforward application of *SUWA v. BLM* and Utah state law but also by analogy to strong public policy concerns in other areas of the law and the rationale that underlies them. While Utah state law is obviously specific to Utah, the public policy analogies advanced in this Article apply equally to all jurisdictions within the United States. Should state law on acceptance of public rights-of-way prove ambiguous in other states, reviewing courts should resolve that ambiguity in light of the public policy concerns presented herein. Due to these policy concerns' strong heritage in U.S. Supreme Court jurisprudence, they provide appropriate background principles for resolving matters of importance to all U.S. citizens.