

final rule or regulation pertaining to the "recognition, management, or validity" of a right-of-way pursuant to R.S. 2477. In 1997, the General Counsel of the General Accounting Office (GAO) issued an opinion concluding that section 108 is permanent law and did not expire at the end of the 1997 fiscal year (Letter of Robert P. Murphy, General Counsel, GAO, B-277719, at 1 (Aug. 20, 1997)).

Even if section 108 is permanent legislation, it only applies to "final rules or regulations" relating to the "recognition, management, or validity of a right-of-way" pursuant to R.S. 2477. Because today's final rule merely amends BLM's existing regulations, which define the administrative process by which an entity can apply for a recordable disclaimer of interest under section 315 of FLPMA, the section 108 moratorium does not apply to this final rule.

If section 108 were interpreted to prevent BLM from promulgating a regulation relating to recordable disclaimers of interest, section 108 would, in essence, partially repeal sections 310 and 315 of FLPMA (43 U.S.C. 1740, 1745). Under section 310, BLM is authorized to "promulgate rules and regulations to carry out the purposes of this Act and of other laws applicable to the public lands." Section 315 is the specific substantive authority for BLM's disclaimer regulations (43 U.S.C. 1745(c)). As a general rule, courts do not favor repeals by implication. In *Morton v. Mancari* (417 U.S. 535, 550 (1974)), the Supreme Court stated: "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." In *Tennessee Valley Authority v. Hill* (437 U.S. 153, 190 (1978)), the Supreme Court stated that the doctrine disfavoring repeals by implication applies with even greater force when the claimed repeal rests solely on an appropriations act.

Although repeals by implication are especially disfavored in the appropriations context, Congress nonetheless may amend substantive law in an appropriations statute if Congress does so clearly. (*Robertson v. Seattle Audubon Society*, 503 U.S. 429, 440 (1992)). The question depends on the intention of Congress as expressed in the statute. See *United States v. Mitchell*, 109 U.S. 146, 150 (1883). Therefore, unless Congress clearly intended to amend sections 310 and 315 of FLPMA, section 108 of the Interior Appropriations Act, 1997, and sections 310 and 315 of FLPMA are all effective.

Section 108 contains broad language and does not indicate which final rules or regulations are encompassed by the words "pertaining to the recognition, management, or validity of a right of way pursuant to Revised Statute 2477." The legislative history, however, indicates that Congress enacted section 108 to prevent the Department of the Interior from promulgating final rules and regulations setting out specific standards for R.S. 2477 rights-of-way. (See H.R. Rep. No. 104-625, at 58 (1996)). Instead, Congress itself wanted to enact legislation defining the key terms and scope of grants for R.S. 2477 rights-of-way. The House Committee on Appropriations stated that:

[T]he public interest will be better served if these grants [for highway rights-of-way across Federal land] to States and their political subdivisions are not put in jeopardy by the Department pending Congressional clarification of these issues. Section 109 does not limit the ability of the Department to acknowledge or deny the validity of claims under RS 2477 or limit the right of grantees to litigate their claims in any court.

Section 109 of H.R. 3662, the Department of the Interior and Related Agencies Appropriations Bill, 1997, was renumbered section 108 after the Senate Appropriations Committee deleted section 107, an unrelated section of H.R. 3662, in its entirety (S. Rep. No. 104-319, at 56 (July 16, 1996)). The Appropriations Committee reported the bill to the Senate and recommended it pass, as amended. Accordingly, when Congress enacted section 108, it did not intend to prohibit the promulgation of all final rules and regulations that may, directly or indirectly, address R.S. 2477 rights-of-way but, rather, those that provide standards for recognizing, managing or validating an R.S. 2477 right-of-way.

Today's rule on recordable disclaimers does not provide standards for recognizing managing, or validating an R.S. 2477 right-of-way. Rather, BLM's rule merely makes technical changes to the existing regulations under which an applicant may submit an application to remove a cloud on title to lands to which the United States asserts no ownership or interest. First, the rule amends the existing regulations to allow any entity claiming title, as opposed to only present owners of record, to apply for a recordable disclaimer of interest. This change eliminates inconsistent administrative interpretations of the owner-of-record requirement, a term that is not defined in the existing 1984 regulations. Second, the final rule eliminates the application deadline in

section 1864.1-3, as it applies to states. This change conforms the regulations to the Quiet Title Act, 28 U.S.C. 2409a(g), which exempts states, in most instances, from the twelve-year statute of limitations under that Act. These changes to the existing regulations do not expand the kinds of circumstances in which a disclaimer could be issued, expand or modify any rights created, or create any new rights 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 final rule.

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 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)) The legislative history of section 108 expressly states that Congress "does not limit the ability of the Department to acknowledge or deny the validity of claims under RS 2477 or limit the right of grantees to litigate their claims in any court." (H.R. Rep. No. 104-625, at 58 (1996)). Because BLM's rule is not a final rule or regulation relating to the "recognition, management, or validity of a right-of-way pursuant to Revised Statute 2477," this rule is not subject to the moratorium in section 108 of the 1997 Interior Appropriations Act.

Several commenters expressed concerns that today's rule will enable states to make "illegal" R.S. 2477 claims on "cow paths" and "foot trails" and turn them into major thoroughfares in sensitive areas.

We disagree that the changes to the existing rule will allow illegal claims. If an applicant does not have a valid, legal title, BLM will reject the disclaimer application. The existing 1984 rule and today's final rule are the same in this regard.

The Southern Utah Wilderness Alliance (SUWA) opposed the rulemaking because it did not mention any case law, particularly *SUWA and Sierra Club v. BLM*, (96-CV-836C (D. Utah); appeal pending, No. 01-4173 (10th Cir.)). SUWA believes this omission invites attempts to evade application of this case and others in an effort to validate R.S. 2477 claims which could never meet the legal prerequisites. The group also asserted that the proposed rule did not describe the standards BLM would apply in determining whether to grant recordable disclaimers.

This rulemaking pertains only to disclaimers and not to any assertions