VOLUME NO. 45 OPINION NO. 13

HIGHWAYS - Scope of R.S. 2477 public right-of-way;
PUBLIC LANDS - Authority of U.S. Fish and Wildlife Service to regulate R.S. 2477 public right-of-way passing across National Wildlife Refuge;
CODE OF FEDERAL REGULATIONS - 50 C.F.R. § 25.11(b) (1992);
UNITED STATES CODE - 16 U.S.C. § 460k, 43 U.S.C. § 932.

HELD: The United States Fish and Wildlife Service has the authority to regulate use of an R.S. 2477 public right-of-way within the boundaries of a wildlife refuge and public recreational use of that right-of-way may be permitted only to the extent that is practicable and not inconsistent with the primary objectives for which the refuge was established.

August 24, 1993

Mr. Thomas R. Scott
Beaverhead County Attorney
Beaverhead County Courthouse
2 South Pacific, CL #2
Dillon, MT 59725-2713

Dear Mr. Scott:

You have requested my opinion concerning the following question:

> May the Beaverhead County Commission authorize and establish a snowmobile trail on a county road which passes through the Red Rock Lakes National Wildlife Refuge?

The focus of your opinion request and accompanying memorandum of law is the creation and scope of the right-of-way on the Centennial Road and whether the county's proposed snowmobile trail falls within the lawful permitted uses of that highway. While there is merit in this discussion, my analysis has concluded that the controlling issue concerns the authority the United States Fish and Wildlife Service may exercise over a National Wildlife Refuge under the Property Clause of the United States Constitution. For purposes of clarifying these issues, I will briefly review the facts surrounding this controversy, discuss the nature of the public right-of-way, and then address the Property Clause issue.

FACTUAL BACKGROUND

In the winter of 1989-90, a group of residents of the Centennial Valley approached the Montana Department of Fish, Wildlife, and Parks with a proposal to groom the Centennial Road during winter months for snowmobiling. The Centennial Road stretches from Monida on Interstate 15 approximately 44 miles east to Red Rock Pass on the Montana/Idaho border. This road, also known as the Red Rock Pass road, is generally regarded as a county road.[1] From a point in Lakeview, Montana, proceeding to the east at Red Rock Pass and beyond into Idaho, the road is not plowed in winter. This section of the Centennial Road runs directly through the Red Rock Lakes National Wildlife Refuge [hereinafter refuge]. Snowmobiles have traveled this road in the absence of winter grooming for several years for both recreational and other purposes.

The present refuge was created through the action of two Executive Orders of the President in 1935. In Exec. Order No. 7023, dated April 22, 1935, public lands in the Centennial Valley were withdrawn from entry and reservation, subject to existing rights, and set aside for use "as a refuge and breeding ground for wild birds and animals" and "to effectuate further the purposes of the Migratory Bird Conservation Act." On September 4, 1935, Exec. Order No. 7172 was issued which declares that private lands in the Centennial Valley, "acquired or to be acquired by the United States," are similarly reserved for purposes of the refuge.

Refuge authorities have opposed the proposal to groom the Centennial Road from its inception. Concern has been expressed that an increase in recreational snowmobile use will disrupt winter wildlife habitat and increase refuge management responsibilities. A Centennial Valley snowmobile club obtained the permission of the Beaverhead County Commissioners to groom the Centennial Road for snowmobiling in May 1990. The club attempted to secure state

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[1]Technically, up until 1991 the Centennial Road, from the interchange on Interstate 15 at Monida, for 37 miles east through Lakeview to the junction with the Elk Lake road, was a state secondary highway within the federal-aid secondary highway system. Such designation was made in 1961 at the request of the Beaverhead County Board of Commissioners. The original Montana highway map, published in 1914, depicts the Centennial Road as a "state road," and thus the road may have had prior recognition as a state road under Montana law. The federal highway bill recently enacted by Congress, the Intermodal Surface Transportation Efficiency Act of 1991, has abolished the federal-aid secondary system. The exact effect of the new highway bill on state road designations is uncertain and such distinctions are not germane to the legal issues presented by your opinion request. Questions concerning this subject may be addressed to the Legal Division Administrator for the Montana Department of Transportation.

gasoline tax monies earmarked for grooming which are allocated by the Montana Department of Fish, Wildlife, and Parks. Following the preparation of an environmental assessment on the grooming proposal, the department declined to release funds because of the unresolved legal question whether the county or the refuge has jurisdiction over the road. At this point both jurisdictions--the United States Fish and Wildlife Service and Beaverhead County--assert authority to regulate snowmobile use of the right-of-way, the existence of which is discussed below.

DISCUSSION

I. Creation and Existence of the Public Right-of-way

Neither Beaverhead County nor the federal government disputes the legal existence of a public right-of-way upon the Centennial Road. The right-of-way was created by action of a federal land grant statute of the mid-Nineteenth Century. By Act of July 26, 1866, 43 U.S.C. § 932 (section 2477 of the Revised Statutes, hereinafter R.S. 2477), Congress declared at section 8:

> The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

This language has been construed by numerous courts as an offer of a right-of-way which must be accepted by a state under its particular laws for the right-of-way to be lawfully created. Vieux v. East Bay Regional Park Dist., 906 F.2d 1330 (9th Cir. 1990); Standage Ventures, Inc. v. State of Ariz., 499 F.2d 248 (9th Cir. 1974); Wilkenson v. Dep't of Interior of United States, 634 F. Supp. 1265 (D. Colo. 1986); State v. Nolan, 58 Mont. 167, 191 P. 150 (1920). It is assumed by all parties to this controversy that the offer represented by R.S. 2477 was in fact accepted with respect to the Centennial Road by action of the Madison County Commission on September 3, 1890.[2] On that date the Madison County Commissioners' journal reflects recognition of the Centennial Road

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[2]All parties have also assumed that the lands at issue were "public lands, not reserved for public uses" at the time of the acceptance of the R.S. 2477 right-of-way grant by Madison County. I make the identical assumption for purposes of analysis, but note that such assumptions have been shown very late in litigation to be erroneous in similar controversies. See Humboldt County v. United States, 684 F.2d 1276 (9th Cir. 1982) (establishment of grazing district encompassing the area in which road was located precluded county from acquiring right-of-way under R.S. 2477). In Montana, the date of the acceptance of an R.S. 2477 grant has been found to relate back to the date of the grant. City of Butte v. Mikosowitz, 39 Mont. 350, 102 P. 593 (1909).

as a public road. By act of the Montana Legislature in 1911, the Centennial Valley later became part of Beaverhead County.

Montana law governing the acceptance of an R.S. 2477 grant prior to 1895 is succinctly set forth in Nolan. Acceptance could be accomplished via act of the proper authorities or by use by the public. Since there is documentation of the recognition of the public road by the Madison County authorities it is unnecessary to examine historic use of the Centennial Road to determine whether the right-of-way grant was lawfully accepted through public use. Following the lawful creation of the public right-of-way, the right-of-way represented by the Centennial Road had continued in existence up to the present day. The acquisition of private properties by the federal government in the 1930's for purposes of establishing the refuge did not affect the continuing existence of the underlying right-of-way or easement. While the existence of an R.S. 2477 public right-of-way for the Centennial Road is not controverted, the present scope of that right-of-way is disputed.

II. Scope of the Centennial Road Right-of-way

Generally questions concerning permitted uses on a public right-of-way involve a determination of the scope of the particular right-of-way. Such analysis in this situation would involve a choice of law determination between state or federal law, consideration of the nature of the resulting easement, and a conclusion as to whether the contemplated use is within the scope of that easement.

However, for reasons discussed below, even if winter grooming of the Centennial Road were found to be within the scope of the R.S. 2477 public right-of-way, application of the federal Property Clause renders such conclusion moot.[3]

III. Federal Constitutional Principles

The issue presented by consideration of federal constitutional principles is whether a National Wildlife Refuge may regulate snowmobile use upon a road within its boundaries that is recognized as a county or state public right-of-way. While this precise issue in the context of a wildlife refuge has never been addressed in a reported judicial decision, three analogous decisions uniformly hold that the National Park Service may regulate such a highway

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[3]Article IV, section 3 of the United States Constitution provides in relevant part:

> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States[.]

Such provision is generally known as the Property Clause.

under the reach of the Property Clause of the United States Constitution. United States v. Vogler, 859 F.2d 638 (9th Cir. 1988), cert. denied, 488 U.S. 1006 (1989); Robbins v. United States, 284 F. 39 (8th Cir. 1922); Wilkenson v. Dep't of Interior, 634 F. Supp. 1265 (D. Colo. 1986). Each of these opinions specifically addresses the authority of the Park Service to regulate the type of R.S. 2477 public right-of-way at issue in the Centennial Valley.

In Robbins the Eighth Circuit was confronted with an action in which the United States, as plaintiff, sought to enjoin an individual from transporting passengers for hire in Rocky Mountain National Park, Colorado. The case is arguably distinguishable from the present situation in Beaverhead County, as the court found that the State of Colorado and Larimer County had ceded jurisdiction and control over the park highways to the federal government.[4] Nevertheless, the conclusion of the Eighth Circuit extends beyond the circumstances presented to the court:

> But we are of the opinion that the power of the government to regulate the traffic on those highways, as it has done by congressional enactment and rules thereby authorized, rests on the secure footing that it is a valid exercise of control over the property of the government, even though it is of the nature of police power, and that it is sustained by section 3, art. 4, of the federal Constitution, which entitles the government to make all needful regulations respecting its territory and property.
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> Neither grants of rights of way on the public lands, accepted by user or statute, nor state ownership of highways derived from the government or otherwise effect any abdication of such constitutional authority. Both the power of Congress to grant easements in favor of the public for travel and transportation and its power to legislate concerning territory and property are and must be consistently exercised, and the latter is accomplished by regulations to the end of devoting the adjacent domain owned by the government to the lawful purposes and objects for which a national park is granted. We therefore hold that the [federal] regulations here involved cannot be successfully assailed because of

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[4]A factual question existed in Robbins concerning the validity of the jurisdictional cession of the road upon which the defendant was cited. Because the driver had to travel a ceded road to reach the unceded road, the court of appeals did not find that resolution of the question was necessary to reach its decision. Robbins, 284 F. at 45.

> interference with private right to use the highways in the Rocky Mountain National Park.

Robbins, 284 F. at 45 (citations omitted).[5]

The above quotation from Robbins was cited with approval by the federal district court in Wilkenson, a case which involved a disputed R.S. 2477 public right-of-way in Colorado National Monument. Mesa County, from which the monument had been created, had abandoned one county roadway, but had not ceded jurisdiction to other roads. The district court first found that the disputed monument roads were subject to a public right-of-way. The court then invalidated a fee requirement imposed on noncommercial through-traffic by the park system. Finally, the court addressed the authority of the Secretary of the Interior to regulate commercial traffic in the monument. Relying on Robbins, Kleppe v. New Mexico, 426 U.S. 529 (1976),[6] and the organic act for the

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[5]A few years following the Robbins decision the authority of the Park Service to implement regulations upon the highways of Rocky Mountain National Park was again challenged, this time by the State of Colorado. The action resulted in a United States Supreme Court decision which held that the state was entitled to attempt to prove that it had not surrendered legislative jurisdiction to the United States. Colorado v. Toll, 268 U.S. 228 (1925). The case has been relied upon as an affirmation of general state predominance over federal land in the absence of specific cession. In Kleppe v. New Mexico, 426 U.S. 529, 545, n.12 (1976), the Supreme Court disposed of this argument with the observation that "at most the case [Colorado v. Toll] stands for the proposition that where Congress does not purport to override state power over public lands under the Property Clause and where there has been no cession, a federal official lacks power to regulate contrary to state law." See also G. Coggins & C. Wilkenson, Federal Public Land and Resources Law, at 151-52 (1981). These cases indicate that while it is clear the State of Montana and Beaverhead County have not surrendered legislative jurisdiction over the Centennial Road right-of-way, the authority of local government to regulate use may be overridden by Congressional power over public lands under the Property Clause.

[6]Kleppe is the seminal modern case construing the reach of the Property Clause. The United States Supreme Court stated:

> [W]hile the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that "[t]he power over the public land thus entrusted to Congress is without limitations."

426 U.S. at 539 (citation omitted).

National Park Service, the Secretary's authority to ban commercial vehicles on the public highways was upheld.[7]

In Vogler, the appellant was a placer miner who appealed a federal district court decision granting a permanent injunction against his use of off-road vehicles in Alaska's Yukon-Charley Rivers National Preserve. Although Vogler alleged that the trail he was using was an R.S. 2477 right-of-way, the district court held that he was required to obtain a permit from the Park Service prior to using the trail. The Ninth Circuit Court of Appeals relied upon Wilkenson and Kleppe, and summarily dismissed the appellant's argument:

> Even if we assume that the trail is an established right of way, we do not accept Vogler's argument that the government is totally without authority to regulate the manner of its use.

Vogler, 859 F.2d at 642. See also National Wildlife Fed'n v. National Park Serv., 669 F. Supp. 384, 391 (D. Wyo. 1987) (Wilkenson and Robbins provide ample authority for the Park Service to develop Interim Management Plan).

IV. Management of the National Wildlife Refuge System Under the Power of the Property Clause

The cases discussed above indicate that the National Park Service clearly has the authority under the Property Clause to regulate R.S. 2477 public rights-of-way within park boundaries. In the absence of judicial precedent, the question arises whether the Fish and Wildlife Service would be found to have similar authority.

The National Wildlife Refuge System Administration Act of 1966 [hereinafter Refuge Act], 16 U.S.C. §§ 668dd-668ee, states, inter alia, that the purpose of the refuge system is the "conservation of fish and wildlife." 16 U.S.C. § 668dd(a)(1). "[T]he U.S. Fish and Wildlife Service has responsibility for management in all areas of the refuge system." S. Rep. No. 94-593, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S.C.C.A.N. 288, 292. Unlike the National Park Service, which is statutorily charged in part "to provide for the enjoyment of the [national parks and monuments] in such manner and by such means as will leave them unimpaired for the enjoyment of

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[7]The Secretary of the Interior is authorized by the organic act of the National Park Service to prescribe rules and regulations to "conserve the scenery and the natural and historic objects and the wild life [in the national parks and monuments] and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C § 1.

future generations," 16 U.S.C. § 1, the overriding duty of the Fish and Wildlife Service is wildlife management:

> All national wildlife refuges are maintained for the primary purpose of developing a national program of wildlife and ecological conservation and rehabilitation. These refuges are established for the restoration, preservation, development and management of wildlife and wildlands habitat; for the protection and preservation of endangered or threatened species and their habitat; and for the management of wildlife and wildlands to obtain the maximum benefits from these resources.

50 C.F.R. § 25.11(b) (1992).

Thus, the 1962 Refuge Recreation Act authorizes the Fish and Wildlife Service to allow public recreational use of the national wildlife refuges, but such use "shall be permitted only to the extent that is practicable and not inconsistent with . . . the primary objectives for which each particular area is established." 16 U.S.C. § 460k. Recreational use may be curtailed whenever such action is considered necessary to assure accomplishment of primary refuge objectives. Id. Decisions of the Secretary of the Interior permitting recreational use of refuges have been closely scrutinized. Defenders of Wildlife v. Andrus[Ruby Lake II], 455 F. Supp. 446 (D.D.C. 1978) (refuge regulations violate the statutory standard of the Refuge Recreation Act because the degree and manner of boating use which they would permit are not incidental or secondary use, are inconsistent, and would interfere with the refuge's primary purpose). Courts look specifically at the purpose of the particular refuge in determining the validity of management practices. Trustees for Alaska v. Watt, 425 F. Supp. 1301 (D. Alaska 1981) (Fish and Wildlife Service required to control and direct the Arctic National Wildlife Refuge by regulating human access in order to conserve the entire spectrum of wildlife found in the Refuge), aff'd, 690 F.2d 1279 (9th Cir. 1981).

The management mandate that Congress has given the Fish and Wildlife Service for the National Wildlife Refuge System is clear. The authority of that agency over federal refuge property is at least as extensive as the authority the National Park Service exercises over parks and monuments. For the reasons stated above, the authority of the Fish and Wildlife Service arguably exceeds that of the Park Service. Thus, existing judicial interpretation of the Property Clause with regard to the National Park Service applies to the management of wildlife refuges by the Fish and Wildlife Service as well. Under these authorities the Fish and Wildlife Service therefore has the power to regulate use of an R.S. 2477 public right-of-way within the boundaries of a wildlife refuge and public recreational use of that right-of-way is permitted "only to the extent that is practicable and not inconsistent" with the

primary objectives for which the refuge was established. 16 U.S.C. § 460k.

THEREFORE, IT IS MY OPINION:

> The United States Fish and Wildlife Service has the authority to regulate use of an R.S. 2477 public right-of-way within the boundaries of a wildlife refuge and public recreational use of that right-of-way may be permitted only to the extent that is practicable and not inconsistent with the primary objectives for which the refuge was established.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/gs/brf