Arizona Attorney General Opinion No. I17-005 (R15-014)

To: Representative Mark Finchem
Arizona House of Representatives

Questions Presented

Does Arizona Revised Statutes § 37-931 authorize officers and employees of the State of Arizona and its political subdivisions to use, access, maintain, and guarantee access to valid Revised Statute (R.S.) 2477 rights-of-way across federal lands?

If so, what is the extent of that authority?

Summary Answer

Yes. The newly-enacted Arizona Revised Statutes § 37-931 authorizes officers and employees of the State of Arizona and its political subdivisions to use, access, maintain and guarantee access to valid R.S. 2477 rights-of-way across federal lands.

Where a valid R.S. 2477 right-of-way exists, Arizona state and local officials have broad authority over those lands. While federal agencies may exercise regulatory oversight over rights-of-way that cross federal lands, no federal agency may unreasonably interfere with the right-of-way possessed by the State of Arizona.

Background

The Mining Act of 1866 provided a broad grant of rights-of-way over federal lands. This federal enactment, commonly referred to as Revised Statute (R.S. 2477), states that “the right of

way for the construction of highways over public lands, not reserved for public uses, is hereby granted." An Act granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes, ch. 262, § 8, 14 Stat. 251, 253 (1866) (codified at 43 U.S.C. § 932). This standing offer of a free right-of-way over the public domain continued for over a century, before its repeal in 1976. Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, § 706(a), 90 Stat. 2743. Yet while FLPMA repealed the offer to create new rights-of-way, "[t]he law repealing R.S. 2477 expressly preserved any valid, existing right-of-way." *Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1076 (9th Cir. 2010) (citations omitted), *see* 43 U.S.C. 1769(a). Thus, FLPMA "had the effect of 'freezing' R.S. 2477 rights as they were in 1976." *Id.* at 741 (quoting *Sierra Club v. Hodel*, 848 F.2d 1068, 1081 (10th Cir. 1988)).

Various federal agencies, but primarily the Bureau of Land Management, have closed roads and trails across federal lands, sometimes without regard to R.S. 2477 rights-of-way. For instance, pursuant to the preliminary 2013 Lake Havasu Travel Management Plan, the BLM proposed to close over 150 miles of roads and trails and limit access to another 100 miles of roads and trails without first adjudicating whether any of the affected roads and trails are R.S. 2477 rights-of-way. Lake Havasu Field Office, U.S. Department of Interior, *Havasu Travel Management Plan* 6 (2013). Constituents appealed to their legislators for assistance in preserving access to these purported rights-of-way over federal lands. In response, the Arizona Legislature enacted Chapter 277 to re-assert the rights-of-way possessed by the State of Arizona. 2015 Ariz. Sess. Laws ch. 277.

Newly enacted Arizona Revised Statute § 37-931(a) provides that the "state, on behalf of itself and its political subdivisions, asserts and claims rights-of-way across public lands under … Revised Statute 2477." The next three sections

of the statute disclaim any prior implicit or unintentional waiver of any R.S. 2477 rights-of-way that existed in Arizona.

B. This state does not recognize or consent, and has not consented, to the exchange, waiver or abandonment of any Revised Statute 2477 right-of-way across public lands unless by formal, written official action that was taken by the state, county or municipal agency or instrumentality that held the right-of-way across public lands and that was recorded in the office of the county recorder or the county in which the public lands are located. No officer, employee or agent of this state or a county, city or town of this state has or had authority to exchange, waive, or abandon a Revised Statute 2477 right-of-way across public lands in violation of this subsection, and any such purported action was void when taken unless later ratified by official action in compliance with this subsection.

C. The failure to conduct mechanical maintenance of a Revised Statute 2477 right-of-way across public roads does not affect the status of the right-of-way across public lands as a highway for any purpose of Revised Statute 2477.

D. The omission of a Revised Statute 2477 right-of-way across public lands from any plat, description or map of public roads does not waive or constitute a failure to acquire a right-of-way across public lands under Revised Statute 2477.

A.R.S. § 37-931 (B-D).

Finally, the statute turns to its primary concern: the conditions of access for valid R.S. 2477 rights-of-way. Section E sets forth scope, maintenance and use provisions.

E. For the purposes of this section:

1. The extent of a Revised Statute 2477 right-of-way across public lands is the dimension that is reasonable under the circumstance.

2. A Revised Statute 2477 right-of-way across public lands includes the right to:

(a) Widen the highway as necessary to accommodate increased public travel and traffic associated with all accepted uses.

(b) Change or modify the horizontal alignment or vertical profiles as required for public safety and contemporary design standards.

3. The public has the right to use a Revised Statute 2477 right-of-way across public lands to access public lands.

4. If privately owned land is completely surrounded by or adjacent to public lands, the landowner has the right to use a Revised Statute 2477 right-of-way across public lands to access that land.

5. A Revised Statute 2477 right-of-way across public lands shall be closed only by order of a court of competent jurisdiction or the proper completion of an administrative process established for the abandonment, maintenance, construction or vacation of a public right-of-way otherwise allowed by law.

A.R.S. § 37-931(E). The crucial implication of this final section is that Arizona R.S. 2477 rights-of-way may not be closed by a federal agency's regulatory fiat. We analyze the impact of this newly enacted statute below.

Analysis

This Opinion examines the impact of A.R.S. § 37-931 in guaranteeing that all valid Arizona R.S. 2477 rights-of-way over federal land shall remain open unless closed under certain specified circumstances[^1] . The central question for this analysis is whether officers and employees of the State of Arizona and its political subdivisions may use,

access, maintain, and guarantee access to the right-of-way in the event that a federal agency effects a closure of a valid R.S. 2477 right-of-way without complying with the procedures set forth in A.R.S. 37-931(E).

All easements over public land, including the R.S. 2477 rights-of-way at issue here, are subject to reasonable regulation. The federal government,

in its capacity as the owner of the servient tenement, has the right to reasonable use of its land, and its rights and the rights of easement owners are mutually limiting, though of course easements are burdensome by their very nature, and the fact that a given use imposes a hardship upon the servient owner does not, in itself, render that use unreasonable or unnecessary.

McFarland v. Norton, 425 F.3d 724, 727 (9th Cir. 2005) (internal quotation marks omitted); *see also* Restatement (Third) of Property (Servitudes) § 4.9 (2000). In short, any holder of an easement is subject to some amount of reasonable interference due to the property owner's use of the land over which the easement runs.

The question focuses on whether the officers and employees of the State of Arizona and its political subdivisions possess three related powers:

a. Are they authorized "to use [and] access . . . Revised Statute (R.S.) 2477 rights-of-way across federal lands"?

Yes. If a valid R.S. 2477 right-of-way across federal lands exists, officers and employees of the State of Arizona and its political subdivisions may use and access that easement.

b. Are they authorized to "maintain . . . Revised Statute (R.S.) 2477 rights-of-way across federal lands"?

Yes. It should be noted, however, that the rights and power

of the State of Arizona and the rights and powers of the federal government are "correlative rather than plenary, absolute, or exclusive." *United States v. Garfield Cnty.*, 122 F. Supp. 2d 1201, 1263 (D. Utah 2000). When it comes to the upkeep of R.S. 2477 rights-of-way "[t]he law expects [both parties] to speak to each other about work to be done on lands to which they both have important correlative rights." *Id.* For this reason, any officer, employee, or political subdivision that wants to significantly alter a right-of-way or make changes beyond "routine maintenance" should consult with the federal land management agency before it acts. *S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 745 (10th Cir. 2005) ("*SUWA*"); *see also United States v. Vogler*, 859 F.2d 638, 642 (9th Cir. 1998). In *SUWA*, the Tenth Circuit explained, "[t]o convert a two-track jeep trail into a graded dirt road, or a graded road into a paved one, alters the use, affects the servient estate, and may go beyond the scope of the right of way." 425 F.3dat 747 (citing *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988)). While State officials have authority to maintain R.S. 2477 rights-of-way to "preserv[e] the status quo," because federal regulations could be at issue and any significant changes could extend outside the State's authority, the best course is for the State's officials to work in conjunction with the relevant agency when contemplating changes to an R.S. 2477 right-of-way over federal land. *See generally SUWA*, 425 F.3d at 749.

c. Are they allowed to "guarantee access to Revised Statute (R.S.) 2477 rights-of-way across federal lands?"

Yes, in most cases. Under limited circumstances (e.g., emergencies), the owner of the servient estate may temporarily bar an easement owner from accessing a right-of-way. Still, the validity of certain emergency interventions does not legitimize either closures in the absence of an emergency or closures of such extended duration that the use of the

easement is completely frustrated. In cases of unreasonable interference with the public's access, the officials and employees of the State and its political subdivisions should seek injunctive relief in court and may perform such self-help remedies as may be available and would not breach the peace. 25 Am.Jur.2d Easements and Licenses § 92 (1966) ("the person having the right to use an easement has the right to remove obstructions unlawfully placed thereon . . . so long as there is no breach of the peace."); *see also, e.g., State ex rel Herman v. Cardon*, 112 Ariz. 548, 551, 544 P.2d 657, 660 (1976) (one injured by "interference with the right of access, may abate it without resort to legal proceedings provided he can do so without bringing about a breach of the peace."). For example, a county sheriff may cut a lock off of a gate barring access to a valid right-of-way that has been closed without good cause.

Conclusion

Section 37-931 reasserts the right of Arizona officers, employees, and political subdivisions to use, access, maintain, and guarantee access to R.S. 2477 rights-of-way. While the State's authority over R.S. 2477 rights-of-way is broad, it is not exclusive. To

operate R.S. 2477 rights-of-way, Arizona's officers, employees, and political subdivisions must work in coordination with the federal agencies tasked with administering these lands.

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[^1]: This Opinion does not address what constitutes a "valid"

R.S. 2477 right of way. That question is slightly obscured by two factors: nuanced choice of law issues, and a specious precedent from the Arizona Territorial Court. R.S. 2477 was a federal statute and federal law governs its interpretation. *E.g.*, *S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 768 (10th Cir. 2005), *as amended on denial of reh'g* (Jan. 6, 2006)("*SUWA*"). But R.S. 2477 was enacted against a backdrop of common law principles governing land use and, for that reason, courts can "'borrow' state law to aid in interpretation of the federal statute," *id.* at 762, specifically in the determination of "how the public can accept" the right of way. *San Juan County v. U.S.* 754 F. 3d 787, 798 (10th Cir. 2014). State law that thwarts the intent of R.S. 2477 is not considered. *Id.* Such was a 1909 Arizona Territorial Court ruling that, mistakenly concluding that common law land use rights had been abrogated, restricted R.S. 2477 routes to those meeting the state statutory definition of "public highway" (a standard requiring the state's formal imprimatur). *See Tucson Consol. Copper v. Reese*, 12 Ariz. 226, 228 (1909) ("The **sole question** presented is whether or not the road alleged to cross the land described in the complaint was a [statutory] **public highway at the time suit was brought**." (emphasis added)). R.S. 2477 had no such limitation and its grant far surpassed the lines drawn on any state-managed roadway map. The R.S. 2477 "highways" referred to any trail, road, or route "over which the public at large have a right of passage." *SUWA,* 425 F.3d at 765 (quotation and citation omitted). Moreover, the grant was "a standing offer of a free right of way over the public domain" that could be accepted "without formal action by public authorities." *Id.* at 741 (quotation and citation omitted). *Reese*, largely bereft of progeny anyway, is of dubious authority because its undue restrictions thwarted the Congressional intent of R.S. 2477 to ensure that routes remained open to the public at large. Moreover, *Reese* was implicitly overruled in 2004 by *Pleak v. Entrada Prop. Owners' Ass'n*, 207 Ariz. 418, 421 (2004). In *Pleak*, the Arizona

Supreme Court flatly rejected the notion that "there are only two categories of roads—public and private—and the former can only be created pursuant to statute." *Id.* Rather, the court affirmed the uninterrupted vitality of the doctrine of common law dedication, i.e., "the dedication of roadway easements for public use," noting that the doctrine had never been abrogated by statute. *Id.* at 421-423 (specifically referencing the public highways statute),citing *Thorpe v. Clanton*, 10 Ariz. 94, 99-100 (1906).