

MAR 09 2004

Betty A. Griess, Clerk  
Cheyenne

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WYOMING

BOARD OF COUNTY COMMISSIONERS )  
OF THE COUNTY OF SUBLETTE, a )  
political subdivision of the )  
State of Wyoming; WILLIAM W. )  
CRAMER, BETTY FEAR, and GORDON )  
R. JOHNSTON, in their official ) Case No. 02-CV-193-B  
capacities as members of the )  
Board of County Commissioners )  
of Sublette County, Wyoming, )  
)  
Plaintiffs, )  
)  
vs. )  
)  
GALE NORTON, in her official )  
capacity as Secretary of the )  
United States Department of )  
the Interior; THE DEPARTMENT )  
OF THE INTERIOR OF THE UNITED )  
STATES; and THE BUREAU OF LAND )  
MANAGEMENT, an agency of the )  
Department of the Interior of )  
the United States, )  
)  
Defendants. )

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**ORDER GRANTING DEFENDANTS' MOTION TO DISMISS**

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This matter is before the Court on Defendants' Motion to Dismiss and the Court, having reviewed the materials on file herein, having heard oral argument, and being fully advised in the premises, hereby **FINDS** and **ORDERS** as follows:

**Statement of Parties and Jurisdiction**

Plaintiff, Board of County Commissioners of the County of

Sublette, is a political subdivision of the State of Wyoming. Plaintiff, William W. Cramer, is suing in his official capacity as a member of the Board of County Commissioners of Sublette County, Wyoming. Plaintiff, Betty Fear, is suing in her official capacity as a member of the Board of County Commissioners of Sublette County, Wyoming. Plaintiff, Gordon R. Johnston, is suing in his official capacity as a member of the Board of County Commissioners of Sublette County, Wyoming. Plaintiff, G&E Livestock ("G&E"), has been dismissed from this case on the joint stipulation of the parties. Defendant, Gale Norton, Secretary of the United States Department of the Interior, is sued in her official capacity. Defendant, Department of Interior of the United States, and Defendant, Bureau of Land Management ("BLM"), are sued as governmental agencies.

This Court has Jurisdiction pursuant to 29 U.S.C. § 1331, this suit is being brought under the Quiet Title Act, 28 U.S.C. § 2409a, for a recognized right-of-way, as required by Revised Statute 2477, formerly codified at 43 U.S.C. § 932 (referred to as "R.S. 2477"), over a road that traverses federal public land owned and managed by the BLM.

### Background

Plaintiffs brought this action on October 21, 2002 under the Quiet Title Act 28 U.S.C. § 2409(a), for a recognized right-of-way, as required by R.S. 2477. The road in question (sometimes referred to as the "Erramouspe Road") crosses federal public land and is owned and maintained by the Defendants, with an exception of those portions of the road lying within the section of land managed for the exclusive benefit of the common schools of the State of Wyoming. Plaintiffs seek the right-of-way to ensure access to the road without Defendants' approval or notification. The road in question was established in the 1920's and remains in a condition that is suitable for public use.

G&E owns land that is completely surrounded by Federal public lands owned and managed by the BLM. The principle access to G&E land is by the road at issue. G&E has agreed to maintain the road in accordance with county road standards of Sublette County, Wyoming.

The controversy arises from an event on November 1997, when the BLM observed unauthorized maintenance of the road by G&E. The BLM informed G&E that they were not allowed to perform maintenance on the road and that any maintenance would be considered

trespassing.

Access to the ranch was originally established back in the 1920's by G&E's predecessor-in-interest. This road has been continuously used since it was originally established. On June 19, 2001, Plaintiff, Board of County Commissioners of Sublette County, Wyoming officially declared that public interest required the Erramouspe Road should be established as a county road in accordance with the Wyoming Statutes. Plaintiffs claim that the BLM refuses to recognize the Erramouspe Road as a right-of-way pursuant to R.S. 2477 and insists that the Plaintiffs pursue a right-of-way easement pursuant to the Federal Lands Policy Management Act ("FLPMA"), 43 U.S.C. §§ 1761-1771.<sup>1</sup>

Defendants filed their Motion to Dismiss in this case in April 2003. Plaintiffs responded and this Court held a hearing on June 6, 2003. After the hearing the parties jointly stipulated that the issues this Court had to determine to rule on the Motion to Dismiss should be certified to the Wyoming Supreme Court. On July 10, 2003, the following questions were certified to the Wyoming Supreme Court:

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<sup>1</sup> 43 U.S.C. 1761-1771 repeals R.S. 2477, and sets out the requirements for obtaining a right-of-way through public lands. These provisions also provide that any rights-of-way issued under R.S. 2477, prior to its repeal would remain effective.

1. Does Wyoming law prohibit the establishment of a highway right-of-way pursuant to R.S. 2477, unless the boards of county commissioners, within their respective counties, lawfully established and recorded a public highway in accordance with Wyo. Stat. § 24-1-101(a) prior to October 21, 1976, the date R.S. 2477 was repealed by the enactment of the Federal Land Policy Management Act ("FLPMA")?
2. Under Wyoming law, may a R.S. 2477 highway right-of-way be established by public use without official action (including a recording) by county or local authorities?  
(Certification Order, July 10, 2003 at p. 8).

After these questions were certified to the Wyoming Supreme Court, that Court decided the case of Yeager v. Forbes, 78 P.3d 241 (Wyo. 2003). The parties in this action stipulated that the Yeager case resolved and determined the questions certified to the Wyoming Supreme Court. In Yeager, the Wyoming Supreme Court found that the 1919 Wyo. Stat. § 24-1-101(a) "effectively vacated the status of any road, including those established pursuant to R.S. 2477, which were not recorded and established by the pertinent board of county commissioners." Yeager, 78 P.3d at 255.

After the Wyoming Supreme Court dismissed the certified question the Plaintiffs filed Plaintiffs' Supplemental Brief in Opposition to Federal Defendants' Motion to Dismiss. Since the original filing of the Motion to Dismiss, the parties have agreed to dismiss G&E Livestock, Inc., as a Plaintiff in this matter and the Plaintiffs have filed an Amended Complaint; therefore, the only remaining issue from the Defendants' Motion to Dismiss is Defendants' claim that the remaining Plaintiffs have failed to state a claim for which relief can be granted.

#### **Standard of Review**

A federal district court may dismiss a cause of action for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) only when it appears beyond a doubt that the plaintiff can prove no set of facts that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Yousef v. Reno, 254 F.3d 1214, 1219 (10th Cir. 2001). The district court must assume the plaintiff's allegations are true and construe them liberally in the light most favorable to him. Conley, 355 U.S. at 45-46; Grossman v. Novell, Inc., 120 F.3d 1112, 1118 (10th Cir. 1997). The district court's function on a Rule 12(b)(6) motion is to assess whether the plaintiff's complaint alone is legally sufficient to state a claim

upon which relief may be granted. Sutton v. Utah State Sch. for the Deaf and Blind, 173 F.3d 1226, 1236 (10th Cir. 1999). In so assessing, the district court is not to weigh potential evidence that might be presented or determine who will ultimately prevail; rather, the issue is whether the plaintiff is entitled to offer evidence to support his claim. Scheur v. Rhodes, 416 U.S. 232, 236 (1974). The plaintiff may not overcome pleading deficiencies with arguments that extend beyond the allegations contained in the complaint. Bauchman v. West High Sch., 132 F.3d 542, 550 (10th Cir. 1997).

#### **Analysis**

Defendants argue that Plaintiffs' claim should be dismissed because the requirements for a right-of-way pursuant to R.S. 2477 were not met before the statute was repealed in 1976. Plaintiffs argue they have met the requirements for a right-of-way.

The central issue in this case is whether a highway was established pursuant to R.S. 2477, prior to its repeal in 1976. R.S. 2477 granted right-of-ways for "construction of highways over public lands, not reserved for public uses . . . ." R.S. 2477. The main issue facing this Court is whether the road at issue was a highway for purposes of a R.S. 2477 grant of a right-of-way.

The Wyoming Supreme Court has ruled that only action by the county can create a highway for purposes of creating a R.S. 2477 right-of-way. See Yeager 78 P.3d 241.<sup>2</sup> The Plaintiffs have not stated any facts that the Sublette County Board of County Commissioners took any action to make the Erramouspe Road a recognized highway pursuant to Wyo. Stat. § 24-1-101(a).

Plaintiffs argue that Wyo. Stat. § 24-1-101(a) frustrates the Congressional purpose behind the enactment of R.S. 2477, which was to allow private parties access to their land over public land. Plaintiffs urge this Court to find that Wyo. Stat. § 24-1-101(a) is preempted by R.S. 2477 and find that rights-of-way for R.S. 2477 purposes could have been created by public use alone.

The Wyoming Supreme Court has clearly stated that only action by the board of county commissioners can create a highway for purposes of R.S. 2477 and this Court will not find contrary to that

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<sup>2</sup> The Wyoming Supreme Court in Yeager stated:  
We hold that the 1919 statute effectively vacated the public status of any road, including those established pursuant to R.S. 2477, which were not recorded and established by the pertinent board of county commissioners. R.S. 2477 roads are regulated under the law of the state in which the road is located. The 1919 law was clear and unambiguous: The act provided that no roads should be public roads unless and until duly established as the act provided.  
Yeager v. Forbes, 78 P.3d 241, 255 (Wyo. 2003) (citations and quotation marks omitted).



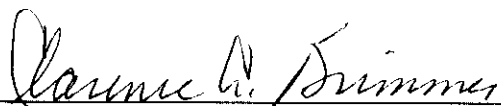
ruling. See Yeager, 78 P.3d at 255.

This Court finds that there was no established highway pursuant to Wyo. Stat. § 24-1-101(a) until 2001, when the Board of Commissioners established the road. R.S. 2477 does not come into effect until there is construction of a highway. In Wyoming only the appropriate board of county commissioners can create a highway. Plaintiffs have pled no facts that action was taken by the Sublette County Board of County Commissioners creating a highway of the road in question pursuant to Wyo. Stat. § 24-1-101(a) before 1976 when R.S. 2477 was repealed.

**Conclusion**

For all the aforementioned reasons, Defendants' Motion to Dismiss is **GRANTED**.

Dated this 9<sup>th</sup> day of March, 2004.

  
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Clarence A. Brimmer,  
United States District Judge