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Not Just Another Federal Pre-Emption Case

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NOTE

NOT JUST ANOTHER FEDERAL PRE-EMPTION CASE

INTRODUCTION

Sierra Club v. Hodel[1] is a Tenth Circuit Court of Appeals case which has broad implications for federal land managers by limiting federal discretion and authority on the public lands. The Tenth Circuit held that the Federal Land Policy Management Act (FLPMA)[2] does not pre-empt state law when a right-of-way,[3] granted under Revised Statutes 2477 (R.S. 2477),[4] is expanded. The effect of applying state law on public lands with protected areas is potentially enormous and flies in the face of Congress' intent in enacting FLPMA to centralize management of the federal lands.

STATEMENT OF THE CASE

The Burr Trail is a sixty-six-mile, one-lane dirt road which connects Boulder, Utah with Lake Powell's Bullfrog Basin Marina. The road winds across or next to a national park, a national recreation area, unreserved federal lands,[5] a wilderness study area, and an instant study area.[6] Used during the late 1800s and early 1900s to assist oil exploration, the trail has been used since the 1930s for transportation, development, and tourist

1. Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988).

2. Federal Land Policy Management Act of 1976, 90 Stat. 2743 (1976) (codified in scattered sections of titles 7, 16, 30, 40, 43 U.S.C. (1982 & Supp. V 1987)).

3. A right-of-way "includes an easement, lease, permit, or license to occupy, use, or traverse public lands. . . ." 43 U.S.C. § 1702(f) (1982). A right-of-way is granted under FLPMA for such things as reservoirs, canals, pipelines, roads, trails, etc. *Id.* § 1761.

4. An Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes, 14 Stat. 253 (1866), *repealed by* Federal Land Policy Management Act of 1976, 43 U.S.C. 932 (1982).

5. Reserved lands are public lands withdrawn from the public domain and dedicated to a "specified purpose, more or less permanently." G. Coggins & C. Wilkinson, Federal Public Land and Resources Law 239 (2nd ed. 1987). Reservations include national forests and national parks, among others. Unreserved land is public land which has not been withdrawn and dedicated. *Id.*

6. An instant study area is a natural or primitive area designated for wilderness review, such as the North Escalante Canyons in Utah, prior to November 1, 1975. A wilderness study area was designated for wilderness review under the Federal Land Policy Management Act of 1976 (FLPMA). 43 U.S.C. § 1782 (1982). FLPMA requires the Secretary of the Interior to review public lands with wilderness characteristics and submit a report to the President as to the "suitability or nonsuitability of each" area reviewed. *Id.* § 1782. An interim management policy governs Bureau of Land Management (BLM) administration of these areas. United States Department of the Interior, H-8550-1, Interim Management Policy and Guidelines for Lands under Wilderness Review (1987).

needs. Public uses and the county's maintenance of the trail resulted in creation of a right-of-way in Garfield County pursuant to R.S. 2477, a federal statute.[7]

Garfield County's 1986 plan to upgrade the western twenty-eight miles of the trail, which borders the two wilderness study areas, into an improved two-lane graveled road[8] was challenged by the Sierra Club and other environmental groups.[9] The Sierra Club brought suit against the Secretary of the United States Department of the Interior and one of its divisions, the Bureau of Land Management (BLM), and Garfield County out of concern for the impact that construction and increased travel would have on the area. The basis of the complaint, among others not relevant to this note,[10] was that the road improvement would extend the roadway beyond the county's right-of-way, and thus would encroach on federal lands.

Sierra Club asserted that the scope right-of-way should be defined by federal law.[11] Under federal law, according to the literal terms of the R.S. 2477 grant, "actual construction," that is, the road as used and maintained by the county, defines the scope of the right-of-way.[12] Garfield County maintained that its right-of-way was defined by Utah state law and, therefore, its scope was what was "reasonable and necessary" to serve the county's transportation needs.[13]

The United States District Court for the Central District of Utah held that state law defines the scope of an R.S. 2477 right-of-way, and thus the road improvement fell within the county's right-of-way.[14] The district court found that Garfield County had the authority under Utah law to improve the roadway in a manner which is "reasonable and necessary"

7. R.S. 2477 § 8 states, *"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." R.S. 2477, 14 Stat. 253 (1866) (repealed 1976).

8. The county plans to improve, as well as pave, the entire sixty-six mile trail. These plans were not part of the proposal challenged. Sierra Club v. Hodel, 848 F.2d 1068, 1073 n.2 (10th Cir. 1988).

9. Joining the Sierra Club were the National Parks and Conservation Association, Southern Utah Wilderness Alliance, and the Wilderness Society. *Id.*

10. Other allegations were that the county was not authorized by the BLM to improve the roadway, the improvements would degrade wilderness study areas and impair their suitability for wilderness designation, and BLM failed to study the environmental impacts in violation of the National Environmental Policy Act (NEPA). *Id.* at 1073.

11. *Id.* at 1079.

12. *Id.* at 1079-80.

13. *Id.* at 1079.

14. Sierra Club v. Hodel, 675 F.Supp. 594, 606-08 (C.D. Utah 1987) *aff'd in part, rev'd in part,* 848 F.2d at 1073. The court found that one part of the proposal threatened the wilderness study areas and therefore ordered the county to seek a FLPMA permit to relocate part of the road outside the existing right-of-way. *Id.* at 611. In addition, BLM, the federal agency responsible for administering the federal public lands, was ordered to study plant life along the trail, to monitor construction near archaeological sites, and to direct alterations in the plan where necessary to protect plant life and archaeological sites. *Id.* at 617.

under the circumstances.[15] Both sides appealed parts of the district court's rulings.[16]

The Court of Appeals for the Tenth Circuit upheld the lower court's finding that state law defines the scope of an R.S. 2477 right-of-way.[17] The court also found that the county's plan fell within their right-of-way as defined by state law, and therefore the county could proceed with their improvements to the trail upon completion of an environmental assessment by BLM.[18]

BACKGROUND

In 1866, Congress enacted R.S. 2477 which granted a "right of way for the construction of highways over public lands, not reserved for public uses. . . ."[19] R.S. 2477 did not specify the requirements or methods to be used in establishing highways over public lands.[20] In addition, BLM regulations did not require permission or approval by the federal government for state governmental entities to obtain a right-of-way.[21] Highways at that time were constructed across federal public lands without formal approval, such as a written easement or deed for the right-of-way, from the federal goverment.[22]

In 1976, Congress passed FLPMA, giving BLM what has been described as a "permanent, comprehensive, and self-contained statutory base for management of the land and other resources under its jurisdiction. . . ."[23] FLPMA repealed R.S. 2477[24] and replaced it with a com-

15. *Id.* at 605-08. The court also held that where the right-of-way passes between the study areas, the right-of-way may impact the study areas regardless of whether the proposed wilderness designation might be endangered. *Id.* at 610-11. In addition, the court found that BLM's participation in the road improvement constitutes major federal action under NEPA, but the project will not have a major impact on the human environment and thus BLM does not have to prepare an Environmental Impact Statement (EIS). *Id.* at 612-15. Even if there was to be a significant impact, the material prepared before and at trial is substantially the same as an EIS. *Id.* at 615-17.

16. *Sierra Club*, 848 F.2d at 1074.

17. *Id.* at 1083.

18. *Id.* at 1085, 1096.

19. An Act Granting the Right of Way to Ditch and Canal over the Public Lands, and for other Purposes, ch. 262 § 8, 14 Stat. 253 (1866), *repealed by* Federal Land Policy Management Act of 1976, 43 U.S.C. 932 (1982).

20. *See, e.g.*, Ball v. Stephens, 68 Cal.App.2d 843, ___, 158 P.2d 207, 209 (1945). "Congress did not specify or limit the methods to be followed in the establishment of such highways." *Id.* at ___, 158 P.2d at 209.

21. *See* Roads Over Public Lands Under R.S. 2477, 43 C.F.R. § 2822.1-1 (1979) ("No application should be filed under R.S. 2477, as no action on the part of the Government is necessary.")

22. Rippley, *Highway Rights-of-Way on Public Lands*, 9 Trans. L.J. 121 (1977).

23. Leshy, *Wilderness and Its Discontents—Wilderness Review Comes to the Public Lands*, 1981 Ariz. St. L.J. 361, 369.

24. 43 U.S.C. § 932 (1982). FLPMA repealed "partially or totally thirty statutes which previously authorized rights-of-way. . . ." Morrison, *Rights-of-Way on Federally Owned Lands: A Journey through the Statutes by Way of the Federal Land Policy and Management Act of 1976*, 9 Transp. L.J. 97, 101 (1977).

prehensive system for granting and managing rights-of-way.[25] In other words, the open-ended invitation to establish rights-of-way under R.S. 2477 to encourage the "expansion, exploitation and development of the public lands"[26] was replaced by a system for "conservation, protection and preservation of the public lands."[27]

Even though R.S. 2477 was repealed, rights-of-way in existence at the time of FLMPA's passage were preserved.[28] Thus, when dealing with a right-of-way across unreserved public land, whether a right-of-way was established or accepted under R.S. 2477 and what the scope of the right-of-way is must be established. With regard to establishment, the general view is that state statutory and common law dictate the establishment of rights-of-way for public highways over unreserved public lands.[29] R.S. 2477 was "an offer of rights of way in general [to the public], and it operated as a grant of specific rights upon the selection of routes and the establishment of roads over public land."[30] In other words, acceptance of an R.S. 2477 grant usually required "proof of affirmative acts of taking possession by public authorities or by general use by the public, provided the use is sufficient to constitute acceptance."[31]

Although the general view is that state law defines whether an R.S. 2477 grant has been accepted,[32] the idea was challenged under rules of statutory construction. In *Wilkenson v. United States Department of Interior*,[33] the United States Department of Interior argued that under the rule of statutory construction, every word in a statute must be given effect,[34] and that for a grant to be accepted, the statute requires actual "construction" of a highway.[35] The Department of Interior agreed that the statute is applied "by reference to state law to determine when the

25. Morrison, *supra* note 24, at 98-101.

26. Wilkenson v. Dept of Interior of United States, 634 F.Supp. 1265, 1275 (D. Col. 1986).

27. *Id.* According to the statute, public land is to be retained in federal ownership unless its disposal "will serve the national interest." 43 U.S.C. § 1701(a)(1) (1982).

28. *See* 43 U.S.C. §§ 1701, Savings Provision (a) & (h) and 1769 (1982) ("Nothing . . . shall have the effect of terminating any right-of-way . . . heretofore issued, granted, or permitted.")

29. *See, e.g.*, Lovelace v. Hightower, 50 NM 50, 52, 168 P.2d 864, 866 (1946) ("[H]ighways can be established only as provided by the statute quoted . . . unless they can be established by a prescriptive user."), Ball v. Stephens, 68 Cal.App.2d at ___, 158 P.2d at 209 (To become a public highway, a road must "be established in accordance with the laws of the state in which it was located").

30. *Ball*, 68 Cal.App.2d at ___, 158 P.2d at 209.

31. *Lovelace*, 50 NM at 54-5, 168 P.2d at 867. To establish a highway by use, in general, the public must use the road "For such length of time and under such circumstances as to indicate clearly an intention on the part of the public to accept the grant is sufficient." Rippley, *supra* note 22, at 122. However, there seems to be "some divergence of opinion" on what is required to establish a highway by public authority. *Id.* at 123-124.

32. Rippley, *supra* note 22, at 121.

33. 634 F.Supp. 1265, 1272 (D. Col. 1986).

34. United States v. Menasche, 348 U.S. 528, 538-9 (1955).

35. Other courts have held that actual construction fulfills the requirement for accepting an R.S. 2477 grant of right-of-way. *See* Humboldt County v. United States, 684 F.2d 1276 (9th Cir. 1982) and United States v. Gates of the Mountains Lakeshore Homes, 732 F.2d 1411 (9th Cir. 1984).

offer of grant has been accepted by the 'construction of highways.'"[36] However, Interior disagreed that "mere use," as state law defined acceptance, was enough to constitute construction of a highway.[37] Interior argued that there must be actual construction of a highway.[38] Nonetheless, the United States District Court for Colorado applied state law and found mere use sufficient, holding that right-of-way means access to land for traveling across it,[39] not a roadway constructed over a definite route.[40]

Once an R.S. right-of-way has been determined, the scope of the established right-of-way must be decided, especially when improvements in the right-of-way are planned. Some states have fixed the width of the highway's right-of-way by statute.[41] Other states have to rely on state courts to authoritatively determine the width of the right-of-way.[42] Many state courts have determined the width to be that which is "reasonably necessary" or as "recognized by the local laws, customs, and usages."[43]

In *United States v. Oklahoma Gas and Elec. Co.*,[44] a case involving a statute providing for the establishment of public highways by the state or local authorities across Indian land according to state law, the United States Supreme Court rejected an argument that the federal government should define the scope of a highway.[45] The statute provided that the public highway be opened and established "in accordance with the laws of the State or Territory in which the lands are situated. . . ."[46] Therefore, the Court held that state law should be applied to determine the scope of the right-of-way "in the absence of any governing administrative ruling, statute, or dominating consideration of Congressional policy to the contrary."[47]

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36. *Wilkenson* at 1272.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. Sierra Club v. Hodel, 848 F.2d 1068, 1083 (10th Cir. 1988).
42. *See, e.g.*, Costain v. Turner County, 72 S.D. 427, ___, 36 N.W.2d 382, 383 (1949) (Section lines in Territory declared public highways and width of public highway along section lines was sixty-six feet.)
43. Rippley, *supra* note 22, at 125. *See, e.g.*, Bishop v. Hawley, 33 Wyo. 271, 238 P. 284 (1925) "[A]ssume that Congress intended . . . to grant only rights of way reasonably necessary for the use of the general public." *Id.* 33 Wyo. at ___, 238 P. at 286. City of Butte v. Mikoswitz, 39 Mont. 350, 102 P. 593 (1909) "Congress must have intended such a highway as is recognized by the local laws, customs, and usages." *Id.* 39 Mont. at ___, 102 P. at 596.
44. 318 U.S. 206 (1942).
45. *Id.* at 209.
46. 25 U.S.C. § 311 (1982) gave the Secretary of the Interior authorization "to grant permission . . . to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not yet been conveyed to the allottees with full power of alienation."
47. *Oklahoma Gas Co.*, 318 U.S. at 210 (referring to Act of March 3, 1901, 25 U.S.C. § 311 (1982)).

However, the United States Court of Appeals for the Ninth Circuit distinguished the holding in *Oklahoma Gas* in *United States v. Gates of the Mountains Lakeshore Homes*.[48] The court, in deciding whether federal law or state law determined whether a power transmission is within the scope of an R.S. 2477 right-of-way, compared the statutes involved in *Oklahoma Gas* and *Gates*.[49] The court specifically pointed to the fact that whereas the statute in *Oklahoma Gas* incorporates state law, the statute in *Gates*, R.S. 2477, makes no reference to or incorporation of state law.[50] In addition, doubts "as to the extent of the grant . . . [of a right-of-way] must be resolved in government's favor."[51] Therefore, the court was free to decide that federal law prohibits a power transmission from being included in an R.S. 2477 right-of-way.[52]

Pre-emption Factors

In controversies involving federal law, the United States Supreme Court looks to three factors to determine whether to adopt a state law or create a nationwide federal rule.[53] First, whether or not a nationally uniform body of law is necessary in situations similar to the controversy involved is determined.[54] Second, whether or not using state law to decide the controversy would frustrate federal objectives or functions is determined.[55] Finally, whether or not a federal rule would adversely impact relationships created under state law is determined.[56] *Wilson v. Omaha Indian Tribe*[57] applied these factors to a boundary dispute involving the State of Iowa and the Omaha Indian Tribe. In deciding that state law should control, the Supreme Court found that evenhanded application of the particular state law would not cause injury to tribes and that private landowners' reliance on the state's determination of the boundary needed to be given substantial consideration.[58]

ANALYSIS

The Tenth Circuit in *Sierra Club v. Hodel* rejected federal law as determinative of the scope of an R.S. 2477 right-of-way based on agency

48. 732 F.2d 1411, 1414 (9th Cir. 1984).
49. *Id.*
50. *Id.* at 1413-14.
51. *Id.* at 1413.
52. *Id.* at 1414.
53. United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979).
54. *Id.*
55. *Id.*
56. *Id.* at 728-29.
57. 442 U.S. 653 (1979).
58. *Id.* at 672-74.

interpretation,[59] state case law,[60] and application of the Supreme Court's analysis in *Wilson*.[61] However, the *Wilson* factors applied in the context of FLPMA demand the application of federal, not state, law.[62]

The Tenth Circuit found that the first *Wilson* factor, the need for uniformity in dealing with R.S. 2477 rights-of-way, provided only minimal support for choosing federal law.[63] Although the court admitted that FLPMA "embodies a congressional intent to centralize and systematize the management of public lands"[64] which could be advanced by a uniform rule of law for rights-of-way, the court nonetheless found FLPMA irrelevant because FLPMA did not exist at the time of R.S. 2477's passage.[65] The court looked solely to Congress' intent when passing R.S. 2477 and found no support for uniformity.[66]

The court's focus on R.S. 2477 and the 123-year-old legislative history to determine the need for a nationally uniform body of law today seems misplaced. FLPMA repealed R.S. 2477 and other right-of-way statutes and replaced them with a single section of FLPMA—Title V.[67]

Title V contains technical, financial, and environmental controls on occupancy and use of rights-of-way.[68] Title V of FLPMA provides a system for granting, renewing, and issuing rights-of-way.[69] Applicants are required to submit plans and other information relating to the rights-of-way use.[70] The applicants may also be required to submit plans for rehabilitation if adverse environmental impacts may result.[71] No right-

59. The court found heavy support for a state law definition in the Secretary of the Interior's interpretation of R.S. 2477. Sierra Club v. Hodel, 848 F.2d 1068, 1080 (10th Cir. 1988). The court also determined that BLM had consistently followed the Secretary of the Interior's interpretation, in spite of evidence to the contrary. *Id.* at 1080-81.

60. The court decided that applying federal law to determine the scope of an R.S. 2477 right-of-way would conflict with "over a century of state court jurisprudence." *Id.* at 1081. The court also found no controlling precedent in previous cases, such as *Gates*, in spite of the fact R.S. 2477 was addressed based upon the narrowness of the holding. *Id.* at 1081.

61. The court made the *Wilson* analysis only "to fully meet Sierra Club's arguments and to demonstrate that it does not dictate a different result than that we reach without it." *Id.* at 1082 n.12. The *Wilson* analysis is explored because it provides a strong basis for policy arguments involving FLPMA.

62. R.S. 2477 § 8 granting public highways across unreserved federal lands does not reference state or federal law. Strangely, however, Congress did adopt state or local law for interpreting or administering §§ 1, 2, 5, 9 of the 1866 act and asserted federal law or regulations for §§ 7, 10, 11 of the act. An Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes, 14 Stat. 253 (1866), *repealed by* Federal Land Policy Management Act of 1976, 43 U.S.C. 932 (1982).

63. *Sierra Club*, 848 F.2d at 1082.

64. *Id.*

65. *Id.*

66. *Id.*

67. 43 U.S.C. §§ 1761-1771 (1982 & Supp. V 1987).

68. *Id.* § 1765.

69. Morrison, *supra* note 24, at 101.

70. 43 U.S.C. § 1764(d).

71. *Id.*

of-way can be granted unless the applicant has the technical and financial capability.[72] In addition, numerous methods for controls on occupancy and use are provided.[73]

Thus, FLPMA's repeal of R.S. 2477 and the detailed procedures outlined in FLPMA should make FLPMA, not R.S. 2477, the basis for determining whether Congress has intended uniformity. Clearly, Congress demonstrated such intent in the language of FLPMA.[74] Congress intended uniformity in the governing of rights-of-way on federal land and, therefore, it is incongruous that state law be applied in determining the establishment and scope of a right-of-way. Federal law should govern rights-of-way.

If federal law were applied to the scope of the Burr Trail right-of-way, Garfield County would have to apply to the Secretary of the Interior for a permit to enlarge the Burr Trail.[75] The permit process gives the federal public land managers a measure of control over the public lands. Otherwise, applying state law in states that have no statutorily defined width but rather a reasonable and necessary standard such as Utah, the public land managers operate under administrative uncertainty. Public land managers cannot know to what extent the wilderness study areas adjacent to this road (and other sensitive or spectacular lands adjacent to other roads) will be encroached. Public land managers need to be able to control and plan for the lands they manage as envisioned by FLPMA.[76]

The Tenth Circuit found that the second *Wilson* factor, whether or not application of state law would frustrate federal policy, favored the continued use of state law.[77] The court found no frustration of federal policy of functions.[78] In fact, the court stated that a federal definition would be an administrative burden.[79] However, the conflict between centralized management of rights-of-way created by FLPMA and the differing state definitions of rights-of-way which leave federal public land managers unable to provide long-range planning, is not addressed by the court. Perhaps a federal definition is unnecessary in states which have established a numerical width for rights-of-way, as the defined width provides some certainty for planning. However, those states which have no defined width but a reasonable and necessary standard provide no guidelines for systematic planning. As a result, FLPMA's clearly stated intention to provide

72. *Id.* § 1764(j).

73. *Id.* § 1764(i).

74. *Id.* § 1765. The terms and conditions which can be included in the right-of-way include measures to minimize damage to scenic and esthetic values; to protect water, air, and habitat quality; and to protect public health. *Id.*

75. *Id.* § 1761(a)(6).

76. *Id.* § 1701.

77. Sierra Club v. Hodel, 848 F.2d 1068, 1082 (10th Cir. 1988).

78. *Id.*

79. *Id.* The court stated that new federal standards would require remeasurement of rights-of-way across the country and "choke BLM's ability to manage the public lands." *Id.*

a means for centralized and systematized federal planning is frustrated.[80] Federal law, therefore, should govern those states without numerical limitations. For consistent and centralized management of all federal public lands, federal law should pre-empt even states with laws giving a defined width for the right-of-way.

Finally, the Tenth Circuit found that the third *Wilson* factor, the impact of federal rule on existing relationships under state law, strongly supported the use of state law.[81] The court reasoned that federal definition of an R.S. 2477 right-of-way would undermine local management and disturb property relationships which have developed around "each particular state's definition of the scope of an R.S. 2477 road."[82] However, existing relationships need not be impaired under FLPMA. For example, FLPMA's regulations of rights-of-way would not prohibit expansion of an R.S. 2477 road.[83] Rather, the states could apply for expansion pursuant to FLPMA procedures.[84] FLPMA procedures require that an applicant submit information on use and its effect.[85] Further details may be required if significant impact on the environment may be caused.[86] Secondly, existing R.S. 2477 roads are not eliminated.[87] Furthermore, existing property relationships are, at the worst, no more uncertain under FLPMA's standards than under state standards of reasonable and necessary. In fact, FLPMA provides a detailed, written procedure for altering existing property relationships.[88] Existing relationships may, therefore, be improved under federal law.

CONCLUSION

Public land managers are directed to manage the public lands for a variety of public uses in a systematic and planned manner under FLPMA. The Tenth Circuit's decision in *Sierra Club v. Hodel* instead ensures that management of public lands with R.S. 2477 roads will be inefficient, variable, and problematic. A federal definition of the scope of an R.S. 2477 right-of-way would provide for planning on federal lands where the government's previous open-ended invitation to allow rights-of-way has created an unorganized mosaic of roads.

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80. 43 U.S.C. § 1701.
81. *Sierra Club*, 848 F.2d at 1082.
82. *Id.* at 1082-83.
83. 43 U.S.C. § 1764 (1982 & Supp. V 1987).
84. *Id.*
85. *Id.* § 1761(b)(1) (1982).
86. *Id.* § 1764(d).
87. *Id.* § 1761(a)(6-7) (1982 & Supp. V 1987).
88. *Id.* §§ 1761-1771 (1982 & Supp. V 1987).