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REGULATION was first published in July 1977 "because the extension of regulation is piecemeal, the sources and targets diverse, the language complex and often opaque, and the volume overwhelming." REGULATION is devoted to analyzing the implications of government regulatory policy and its effects on our public and private endeavors.

Cigarettes and the Courts

As an attorney who for more than a quarter of a century has advocated for the adoption of smoke-free laws and policies, I was struck by what Thomas A. Lambert omitted from his article "The Case Against Smoking Bans" (Winter 2006–2007).

Predictably, Mr. Lambert touted U.S. District Court Judge William Osteen's 1998 opinion that purported to vacate a portion of the 1992 U.S. Environmental Protection Agency report on environmental tobacco smoke (ETS), or secondhand smoke. However, he neglected to inform *Regulation's* readers that, in December 2002, the U.S. Court of Appeals for the Fourth Circuit overturned Judge Osteen's opinion, thus rendering it a legal nullity.

More egregiously, Mr. Lambert totally ignored the voluminous final opinion of U.S. District Judge Gladys Kessler, who presided over the federal government's mammoth anti-racketeering lawsuit against the major American cigarette manufacturers. In her August 2006 opinion in *U.S. v. Philip Morris USA, Inc., et al.*, Judge Kessler found that the companies violated the federal Racketeer Influenced and Corrupt Organizations statute, 18 U.S.C. secs. 1961-1968, by engaging in a lengthy, unlawful conspiracy to deceive the American public about, among other things, the health effects of secondhand smoke.

Judge Kessler found, at page 1407 of her Final Opinion, that despite the fact that the tobacco defendants'

own scientists were increasingly persuaded of the strength of the research showing the dangers of ETS to nonsmokers, Defendants mounted a comprehensive, coordinated, international effort to undermine and discredit this research. Defendants poured money and resources into establishing a network of interlocking organizations. They identified, trained, and subsidized "friendly" scientists throughout their Global Consultancy Program, and sponsored symposia all over the world from Vienna to Tokyo to Bermuda to Canada featuring those "friendly" scientists, without revealing

their substantial financial ties to Defendants. They conducted a mammoth national and international public relations campaign to criticize and trivialize scientific reports demonstrating the health hazards of ETS to nonsmokers and smokers.

As more studies (including an *American Journal of Public Health* study, reported on January 31, 2007, in which scientists led by epidemiologist Leslie Stayner at the University of Illinois at Chicago concluded that high levels of secondhand smoke on the job double nonsmokers' risk of developing lung cancer) confirm the dangers of secondhand smoke, *Regulation's* readers should remember the tobacco industry's sordid history of creating and disseminating disinformation on this important subject.

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From Little Roads to 'Roadless'

There is a large body of law concerning "roadless areas" that was not discussed by Joseph Rotondi's "The Forest Fight" (Winter 2006-2007). The most important limitation on expansion of federal "roadless areas" is not the construction of new roads, but the existence of tens of thousands of small roads that already crisscross public lands. However, this limit is disappearing along with many of these small roads.

The roads were created in accordance with Revised Statute 2477 of the Mining Act of 1866, which allowed for the creation of public rights-of-way on federal lands. The roads later received protection from the 1976 Federal Land Policy Management Act (FLPMA), which preserved the public use rights-of-way in existence as of that date, but prohibited the creation of any new rights-of-way without a federal permit. As we have submitted written public comments frequently to the U.S. Forest Service (USFS), the Bureau of Land Management (BLM), and other federal agencies concerning

these “RS2477 roads,” we would like to explain this important issue.

Wilderness areas must contain no roads, so the existence of RS2477 roads has made the creation of new wilderness areas very difficult. The existing RS2477s require no permit for ongoing use or maintenance within the pre-1976 right of way. They do, however, require public vigilance and sometimes even litigation to keep them open, as the federals are closing them, usually illegally, as often as they think they can get away with it.

The FLPMA included an important protection for existing RS2477 roads: “Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act.” The FLPMA further states: “Nothing in this title shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted.”

Later, in Section 108 of the 1994 Department of the Interior appropriations bill, Congress expressly withdrew all delegation of authority regarding any changes of rules, regulations, or definitions of RS2477 roads. Under the legislation, “No final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to Revised Statute 2477 (43 USC 932) shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act.”

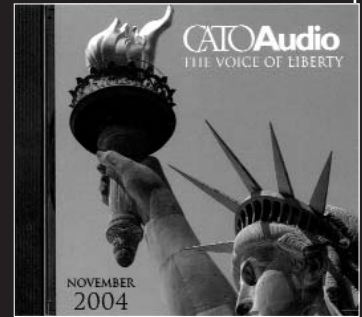
States, particularly western states, also have specific protections. Nevada, for example, requires that specific procedures be followed prior to closure of any public road, including roads across federal lands controlled by the USFS and the BLM.

It is well established that, though the feds may own the land through which these roads pass, they do not own the right of passage over the land. They cannot prevent either use — or even maintenance via bulldozer — within the existing right-of-way. Obviously, this creates quite an obstacle for the expansion of federal roadless areas — one that federal employees seem determined to make disappear.

DURK PEARSON AND SANDY SHAW

Nevada

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