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F.J. "Rick" Dindinger II
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Candace Cole Figa
Bernard F. Gehris
Gregory C. Graf
Alix L. Joseph
Stephen H. Leonhardt
Herrick K. Lidstone, Jr.
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ATTORNEYS AT LAW

6400 S. Fiddler's Green Circle
Suite 1030
Englewood, CO 80111

P: 303 796 2626
F: 303 796 2777
www.bfw-law.com

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department

Briefly

. . . from Burns, Figa & Will, P.C.

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**Burns
Figa &
Will** P.C.

ATTORNEYS AT LAW

6400 S. Fiddler's Green Circle
Suite 1030
Englewood, CO 80111

P: 303 796 2626
F: 303 796 2777
www.bfw-law.com

Phase One and a Half : Expanded Due Diligence

Standards for Real Property Transactions

by J. Kemper Will

In the Fall 2003 edition of *Briefly*, Scott Clark wrote about “Expect[ed] New Standards for Due Diligence in Real Estate Transactions”. Since then, the EPA negotiated rulemaking committee has completed its work with a “Final Consensus Document” for “Standards for Conducting All Appropriate Inquiries”, which is being published by EPA as a proposed rule in early 2004. The concept of all appropriate inquiry derived from the “innocent landowner exemption” of the Comprehensive Environmental Response Compensation and Liability Act, (“CERCLA”) enacted in 1980. To give flesh to the exemption, the American Society of Testing and Materials (“ASTM”) developed an ASTM standard for “Phase I” property assessments, which became the standard for environmental due diligence in property transactions.



It has been far from a perfect system. First of all, that exemption is only from CERCLA liability and did not protect a property purchaser from other bases of liability, such as other federal and state environmental statutes or common law claims. However, perhaps more importantly, Phase I's tended to become a least-cost provider and checklist item, and commonly too little thought went into the real concept and purpose of all appropriate inquiry, namely to assure a buyer that it was not inheriting environmental problems which could materially impact the property, whether it be transaction

costs or liability. I have reviewed hundreds of Phase I reports over the years, and sadly, more of those Phase I reports failed to meet that objective than met it.

The Brownfields Redevelopment Act intends to step beyond the Phase I standard and to refocus on the full scope of all appropriate inquiry. Also, it is important to note, that the all appropriate inquiry standard will be just one of several requirements for obtaining an exemption under the Brownfields Redevelopment Act. Other Brownfields Redevelopment Act criteria include exercising appropriate environmental care, preventing future releases, providing notices and cooperation with EPA.

The final consensus document will certainly be controversial and it likely will elicit much public comment during the comment period. A link to the proposed rule is available at www.bfw-law.com/. This article focuses on only a few of the most significant provisions of the final consensus document.

The proposed rule goes beyond the former Phase I standards and imposes obligations on both the property buyer and the professional who is conducting the inquiry. Using a ASTM-2000 Phase I Environmental Site Assessment will no longer be sufficient for CERCLA exemption for any property purchased on or after January 11, 2002. For example, there is greater emphasis on the obligation of the property buyer to provide to the environmental professional conducting the all appropriate inquiry the following items:

- Information about any environmental clean up liens.
- Any relevant and applicable specialized knowledge and experience of the property buyer about the subject property and the area surrounding the subject property.
- Information about the relationship of the purchase price to the fair market value of the subject property, if the property were not contaminated.

In addition, the obligations for all appropriate inquiry are now the joint responsibility of the property buyer and the environmental professional conducting the all appropriate inquiry.

A key new term of the proposed rule is the definition of “environmental professional”, who will conduct the majority of the inquiries required for all appropriate inquiry. Several categories of licensing/certification, education and experience are established, and those standards exceed previous qualification standards of the ASTM Phase I Site Assessments.

In conducting the inquiry, the environmental professional must conduct information and record searches similar to those of an ASTM- 2000 Phase I. However, **the performance standards of the proposed rule will require a more thorough and thoughtful evaluation of the information gathered**, for example, the obligation to comment on the significance of any identified data gaps regarding the subject property. In appropriate circumstances, it may even be necessary to conduct sampling and analysis in

order to address data gaps, especially if known or threatened releases would pose a threat to human health or the environment, a phrase which is not defined. In conducting all appropriate inquiry, the interviews conducted by the environmental professional will take a more prominent role than in past Phase I Site Assessments. The interviews must now include the current owner and occupant of the subject property and major occupants and chemical users, including those from the past, in the case of multiple occupants. The environmental professional may also need to interview current and past facility managers with relevant knowledge, past owners, occupants or operators of the subject property or employees of current or past occupants of the subject property.

The proposed rule also expands the scope of review of historical documents and records beyond that of an ASTM-2000 Phase I. Now the historical documents and records review must go back in history to when the property first contained structures or was shown to first be used for residential, agricultural, commercial, industrial or governmental purposes. Obtaining such information may be burdensome and expensive for a property with a long history.

The proposed rule also expands the chemicals of concern. Phase I's only focused on hazardous substances and petroleum products, but the proposed rule will also address pollutants, contaminants and controlled substances.

Of course, as in prior Phase I searches, public database searches must be conducted. There are several commercial database providers which are usually used by the environmental professional to satisfy this requirement. However, the new database search requirements of the proposed rule will put increasing pressure on those database providers to assure the accuracy and reliability of their databases.

In many respects, the proposed regulations will refine and expand the scope of all future appropriate inquiries beyond the scope of current Phase I Site Assessments. The expanded scope will no doubt significantly increase the costs of performing all appropriate inquiry and will require increased participation and diligence from the property buyer. As environmental due diligence is part of the core practice area of Burns, Figa & Will, P.C., the firm is highly qualified to assist property buyers and environmental professionals with these new evolving standards. We will continue to update you in future *Briefly* articles as the new standards become law.

[J. Kemper Will heads the environmental and water law practice group at Burns, Figa & Will, P.C. and is active in environmental litigation and regulatory matters and contaminated property transactions. You can reach Mr. Will at 303-796-2626 or \[kwil@bfw-law.com\]\(mailto:kwil@bfw-law.com\).](#)

The Ghost of RS 2477; Does it Haunt Your Neck of the Woods?

By Geoffrey P. Anderson

A post Civil War statute allowing the creation of roads throughout the West can save the necks of some landowners from the noose or be a pain in the neck to others. Either way, the problems caused by this old law are racing across the West at break neck speed.

Background

RS 2477 was passed in 1866 for the creation of public roads across public property. The statute was one sentence: "The right-of-way for the construction of highways over public land, not reserved for public uses, is hereby granted". The law was repealed in 1976, but roads that had been established before then are still valid.

The statute was designed to help open and settle the West. The federal government was passing homesteading and mining laws around the same time. The idea was to transfer the vast amount of public land in the West to private ownership. Farming, ranching and mining would not be possible without a road system allowing the new owners to access their properties and allowing them to bring their goods to market. Many of the federal, state and county highways throughout Colorado and the West were established as RS 2477 roads and no one questions that they are valid public roads. Problems can arise with more obscure roads.

RS 2477 can be employed to open access to previously isolated or landlocked tracts. At the same time, a previously unknown road may suddenly appear crossing what had been a peaceful, private property destroying the very attributes that may be highly valued by the owner. **RS 2477 has also been used by county governments to thwart federal attempts to designate large areas in the West as wilderness.** This occurred first in Southern Utah and in Alaska and most recently in Moffat County, Colorado.

Nuts and Bolts

Although RS 2477 is a federal statute, courts will look to state law to determine whether sufficient action has occurred to create a public road. *Sierra Club v. Hodel*, 848 F.2d 1068, 1078 (10th Cir. 1988). In Colorado, use by only one property owner is sufficient to create a public road. *Wilkenson v. Department of the Interior*, 634 F.Supp. 1265, 1272 (D. Colo. 1986); *Leach v. Manhart*, 77 P.2d 652, 653 (Colo. 1938). The terms “roads” and “highways” include footpaths. *Wilkenson*, *supra*; *Simon v. Pettit*, 651 P.2d 418, 419 (Colo. App. 1982), *aff’d.*, 687 P.2d 1299 (Colo. 1984).

Public roads can also be created by the passage of wagons over the natural soil. *Wilkenson*, *supra*; *Central Pacific Railway Co. v. Alameda County*, 284 U.S. 463, 467 (1932).

RS 2477 can be asserted against private landowners, *Brown v. Jolley*, 387 P.2d 278, 282 (Colo. 1963) and *Leach v. Manhart*, 77 P.2d 652, 653-54 (Colo. 1938). The ability of a

private party to assert an R.S. 2477 claim against the federal government to cross federal property is questionable at this point. *Fairhurst Family Association, LLC v. United States Forest Service*, 172 F. Supp.2d 1328 (D. Colo. 2001) and *Staley v. United States of America*, 168 F. Supp.2d 1209 (D. Colo. 2001).

Federal Regulations

The Bush Administration issued a new regulation on January 6, 2003 that may make it easier for BLM to acknowledge RS 2477 roads across federal property. 69 FR 494-01. The regulation allows BLM to issue disclaimers of interest in lands in which the federal government may claim some title interest. The changes allow any entity claiming title to make an application for a disclaimer, whereas the former rule required that the record title holder apply. The language that any entity may file for a disclaimer may allow individuals to claim public roads to their property across federal property, but so far the regulation is too new to know for sure.

Consequences

Whether a road can be established as a public road can make a significant difference in how the road can be used. Many parcels that have been used for decades for agricultural uses and the access road may be limited to those uses. An adjacent property owner may be able to raise a valid objection if the road crossing her property changes to access for one or two houses instead of access to mow hay two or three times per year. However, if the road is public, it can be used in any manner, for any purposes. Therefore, the adjoining landowner could not object if the road was used to access a 150 unit subdivision. Obviously, if the land crossed by the road is in a high value area, the stakes in a dispute like that would be equally high.

How can you tell whether a road that could provide access to your property (or one crossing your property to reach another property) is an RS 2477 road? Many times, the answer is not clear. It will depend on events that occurred long ago, sometimes 100 years or more. Every road is unique and usually significant historic research is required. Avenues of inquiry include searching old government records, reviewing current and historic maps and aerial photographs and other techniques. Many times, the research will turn up evidence on both sides of the question and a court action will be required to resolve the issue.

Although it was repealed nearly 30 years ago, the ghost of RS 2477 continues to haunt Colorado, sometimes with significant consequences.

Geoffrey P. Anderson is active in Commercial Litigation, Real Estate Transactions and Real Estate Litigation. A particular area of emphasis in Mr. Anderson's practice is Road and Access Law. You can reach Mr. Anderson at 303-796-2626, or ganderson@bfw-law.com



During the fourth quarter of 2003 the Securities and Exchange Commission approved final regulations on many corporate governance standards for public companies, all of which were put into motion by the Sarbanes-Oxley Act of 2002 ("S/O"). This summary is intended to take into account recently announced or upcoming effective dates for companies listed on Nasdaq or traded on the Over-the-Counter Bulletin Board ("OTCBB"). Although OTCBB companies might not be required to comply with some S/O requirements, in many cases OTCBB

Corporate Governance Upcoming Effective Dates

By Theresa Mehringer and Herrick K. Lidstone

companies are adopting a "best practices" policy by following most or all of the Nasdaq listing requirements. In addition, an OTCBB company, although not required to comply with some of the new standards, in most instances must disclose whether it is complying with the S/O standards. Furthermore, directors of OTCBB companies may face liability where they fail to maintain "best practices," even though not required by law.

The following is a summary of upcoming effective dates for public companies, either listed on Nasdaq or traded on the OTCBB.

Audit Committee Requirements (§§ 301, 406 & 407 of S/O)

■ The audit committee consisting solely of independent directors must be established by the earlier of: (1) *the first annual shareholder's meeting after January 15, 2004*, or (2) *October 31, 2004*. Foreign Private Issuers and Small Business Issuers: *July 31, 2005*. If a Foreign Private Issuer listed on Nasdaq relies on an exemption from NASD Rule 4350 (Listing Requirements) for compliance with regulations or practices in its home jurisdiction, it must disclose that reliance in its annual report for *all filings made after January 1, 2004*.

OTCBB Companies: Must disclose whether audit committee exists, identify the members and whether it has a financial expert.

- Effective for *fiscal years ended on or after July 15, 2003* (for small business issuers, *December 15, 2003*), all public companies must disclose whether the company has a financial expert on its audit committee.
- For Nasdaq companies, at least one member of the audit committee must be financially sophisticated (which is similar to the "financial expert" definition prescribed by S/O), effective by the earlier of: (1) *the first annual shareholder's meeting after January 15, 2004*, or (2) *October 31, 2004*; (for foreign private issuers and small business issuers: *July 31, 2005*).
- Effective for *fiscal years ended on or after July 15, 2003*, all public companies must disclose whether the company maintains a Code of Ethics for its CEO and senior financial officers.
- For Nasdaq companies, the Nasdaq Code of Conduct and Ethics requirement becomes *effective May 4, 2004* in order to maintain the Nasdaq listing (but prior to this date the company still has the disclosure obligations listed above).
- The audit committee must have whistleblower procedures in place by the earlier of: (1) *the first annual meeting after January 15, 2004*; or (2) *October 31, 2004*; (for foreign private issuers and small business issuers: *July 31, 2005*). This provision does not apply to OTCBB companies.

Disclosure regarding nomination of Directors and Shareholder communications with Directors.

- For all public companies, the new rules apply **January 1, 2004** with respect to proxy statement disclosure of whether the company has a nominating committee and a description of its nominating process.
- Nasdaq filers must have a nominating committee consisting solely of independent directors and adopt a charter or formal nominating process. This requirement is *effective July 31, 2005* for small business issuers or foreign private issuers. For all other issuers, by the *earlier of: (1) the company's first annual shareholders meeting after January 15, 2004*; or (2) *October 31, 2004*.



Internal Controls and Procedures (§ 404 of S/O)

- For “Accelerated Filers” (U.S. companies with public float greater than \$75,000,000), the new rules apply to officer certifications for *fiscal years ending after June 15, 2004*.
- For all other issuers (including small business issuers and foreign private issuers) the new rules apply to officer certifications for *fiscal years ending after April 15, 2005*.



Note: This means the Internal Controls and Procedures (“ICP”) should be established **prior to the start of the applicable fiscal year**, because the company must follow the ICP throughout its fiscal year and conduct quarterly evaluations of its ICP.

Note: Management must identify the framework it uses to evaluate the effectiveness of internal controls over financial reporting. The evaluation framework must be a suitable, recognized control framework established by a body that has followed due process procedures, including broad distribution of the framework for public comment. The SEC confirmed that the COSO (Committee of Sponsoring Organizations of the Treadway Commission) framework would satisfy the criteria for evaluating internal controls and procedures.

Nasdaq Corporate Governance Certification

- Nasdaq companies must file a Corporate Governance Certification (in the form prepared by Nasdaq) *immediately following the first annual meeting after January 15, 2004, but no later than October 31, 2004*. Small business issuers and foreign private issuers have a delayed deadline of *July 31, 2005* to file the certification. The Certification relates to compliance with the new audit committee composition, audit committee charter, nominating committee charter, executive sessions and code of conduct requirements.

Summary

Please recognize that this is a summary of pending effective dates, and not a comprehensive list of all effective dates and requirements under S/O already in effect. For example, website posting and electronic filing of Forms 4 within two business days of a transaction became effective in June 2003, but we presume most public companies are already aware of this requirement. Certifications under S/O §§ 302 and 906 have also been in effect for some time and therefore are similarly not discussed. If you would like more specific information on any particular rule or effective date, please contact Theresa M. Mehringer or Herrick K. Lidstone at 303-796-2626, or tmehring@bfw-law.com; hklidstone@bfw-law.com

Theresa M. Mehringer and Herrick K. Lidstone are members of the Business practice group at Burns, Figa & Will, P.C.

Firm News

- **Geoffrey P. Anderson** will be presenting, “[Law of Easements: Legal Issues and Practical Considerations in Colorado](#)” for Lorman on April 2, 2004. For more information, see www.lorman.com
 - **Lee E. Miller** has been named as a member of the Board of Litigation of Mountain States Legal Foundation (MSLF), a Colorado based, nonprofit, public interest legal center created in 1977.
 - **Alix L. Joseph** joined the firm as an associate. Ms. Joseph is a graduate of Haverford College and George Washington University Law School. She will focus her practice in Commercial, Environmental and Water Law Litigation.
 - **Alec R. Rothrock** recently published, “[Essays on Legal Ethics and Professional Conduct in Colorado](#)”. Mr. Rothrock is a recognized expert in the field of Ethics and his book covers a wide array of topics. The book is available through Continuing Legal Education in Colorado, Inc. or on their website, www.cobar.org/cle
 - **Dana L. Eismeier** wrote an article which was published in the January 2004 Environmental Crimes and Enforcement Committee Newsletter for the American Bar Association, entitled “[Application of Civil and Criminal Law to Passive Migration of Toxic Chemicals in Colorado](#)”. The article can be viewed at our website, www.bfw-law.com
 - **J. Kemper Will** is included among 285 environmental lawyers worldwide in the publication, [The International Who's Who of Environmental Lawyers, 2004](#). All nominees to the publication, which includes 165 environmental lawyers in the United States, “are considered by their professional peers and by clients to be the world's leading environmental lawyers”. Mr. Will is also listed in [The International Who's Who of Business Lawyers](#).
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- J. Kemper Will, is speaking at the following seminars:**
- April 13, 2004:**
[Colorado Hazardous Management Waste Society](#). Mr. Will is speaking about Phase I Environmental Site Assessments.
- April 16, 2004:**
[Colorado Bar Association Environmental Section](#). Mr. Will is moderating a panel on press and public relations issues related to environmental law practice.
- June 16, 2004:**
[Environmental Concerns in the Sale and Redevelopment of Property](#). Mr. Will, is speaking regarding a buyer's environmental considerations. Scott Clark is Program Chair and speaker.
- August 20, 2004:**
[A Year in the Life of a Development Deal: Land Use Impacts on Real Estate Transactions](#). Mr. Will is Program Chair and he and Scott Clark will speak about natural resources and environmental issues.