

Sue Wolf, Chief
Division of Land and Renewable Resources
Branch of Land Resources
Bureau of Land Management, Alaska State Office

ES 2477 on books 110 years before repeal

IBLA ruled that 17(b) over ES 2477
did not diminish rights in 2477.

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2. Examples of Casual Use. Casual use may include the following activities and practices:

a. Recreation activities such as use of roads for hunting and sightseeing. This does not include driving in areas where vehicle use is prohibited.

b. Domestic uses or activities associated with managing ranches, farms, and rural residences includes trucking of products and use of support vehicles.

c. Ingress and egress on existing roads and trails.

d. Activities necessary to collect data for filing a right-of-way application such as vehicle use on existing roads, sampling, marking of routes or sites, including surveying or other activities that do not unduly disturb the surface or require the extensive removal of vegetation.

e. Minor activities or practices that have existed over a period of time without a grant and without causing appreciable disturbance to the public land resources or improvements.

B. Revised Statute 2477 (RS 2477). (See Departmental Policy Statement, RS 2477 in appendix 3.) The Act of July 26, 1866, RS 2477, repealed October 21, 1976, (formerly codified at 43 U.S.C. 932) provided: "The right of way for the construction of highways over public lands, not reserved for public use, is hereby granted." Acceptance of the grant occurred when a public highway was constructed on unreserved public lands. Holders of such rights-of-way shall be encouraged to have them acknowledged by having the BLM note the right-of-way on the records (MTP/ALMRS) in the same manner as other existing rights-of-way.

1. Criteria for Identification of RS 2477 Public Highway Rights-of-Way. Three conditions must have occurred before October 21, 1976 (date of repeal) for BLM to acknowledge the existence of an RS 2477 right-of-way; the lands involved must have been public lands, not reserved for public uses, (called **unreserved public lands**) at the time of acceptance; some form of construction of the highway must have occurred; and the highway so constructed must be considered a **public highway**.

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a. Unreserved Public Lands.

(1) Public lands of the United States that were open to the operation of the various public land laws enacted by Congress are considered unreserved public lands. Lands that were reserved or dedicated by an Act of Congress, Executive Order, Secretarial Order, or, in some cases, classification actions authorized by statute, were not subject to RS 2477 during the existence of the reservation or dedication. Likewise, lands preempted by settlers under the public land laws or located under the mining laws were not subject to RS 2477 during the pendency of the entry, claim, or other. The general withdrawals by Executive Orders 6910 and 6964 are not considered to have removed public lands from unreserved status.

(2) Between 1866 and 1976 it is possible that a single parcel of land was subject to and not subject to RS 2477 numerous times through various land status changes. Thus, a highway initiated while land was reserved might subsequently qualify under RS 2477 if the conditions were later met when the land returned to the status of unreserved public lands. Appropriate status must be checked relative to any highway being considered for acknowledgement.

b. Construction.

(1) Construction must have occurred, or have been initiated (actual construction must have followed within a reasonable time), while the lands were unreserved public lands. Construction is a physical act of readying the highway for use by the public according to the available or intended mode of transportation - foot, horse, vehicle, etc. Removing high vegetation, moving large rocks out of the way, or filling low spots, etc., may be sufficient as construction for a particular case. Road maintenance or the passage of vehicles by users over time may equal construction.

(2) Where construction was initiated by survey, planning, or pronouncement by public authority while the lands were unreserved public lands, actual construction could occur within a reasonable time even if the status of the land changed. Reasonable time must be determined in accordance with the specific conditions, i.e., one or two construction seasons for a minor county road, perhaps 3 to 5 years for a Federal-aid highway.

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c. Public Highway. A public highway is a definite route or way that is freely open for all to use for the type of use intended. A toll road may be a public highway if the only limitation is the payment of the toll by all users. Roads or ways that have had access restricted to the public by locked gates or other means are not considered public highways. The inclusion of a highway in a State, county, or municipal road system constitutes it being a public highway. Absent evidence to the contrary, a statement by an appropriate public body that the highway was and is considered a public highway will be accepted.

NOTE: Appropriate local law must be considered in determining what constitutes a public highway; some jurisdictions allow or permit a public highway to exist with the general public; others may require a formal resolution by the State, county, or municipality adopting the road as a public highway.

2. Acknowledgment. Acknowledgment of the existence of an RS 2477 highway right-of-way is an administrative action and is not subject to appeal to the Interior Board of Land Appeals. Where conditions exist on public lands to support the acceptance of the Congressional grant, the Authorized Officer will issue a letter of acknowledgement and treat the highway as a valid use of the public lands. Where the evidence does not support acceptance, the Authorized Officer will inform the asserter, if any, that BLM does not recognize a highway. (Again, this is not a rejection and carries no right of appeal.)

3. Documenting RS 2477 Rights-of-Way. Minimal documentation, either submitted by the asserter/holder or developed by BLM, consists of (1) map(s), survey(s), aerial photography, or similar from which the location can be determined; (2) descriptive information to show that the highway was constructed on unreserved public lands; (3) information on public highway status; (4) the name and address of the asserter/holder, if known; and (5) where acknowledged by BLM, a copy of the acknowledgement letter to the holder or, where holder is unknown, a memorandum for the file.

a. For acknowledged RS 2477 rights-of-way, a case file must be established, a serial number assigned, and the official records noted. For State, county, or municipal RS 2477 rights-of-way, a single case file and serial number may be established for the individual entity (State of Idaho, Bingham County, Idaho, etc.) regardless of the number of separate RS 2477 rights-of-way held by that entity.

b. Where the authorized officer refused to acknowledge an RS 2477 right-of-way, a case file need not be established. However, discretion is advised. On controversial cases or where the material upon which the decision was based may be unrecoverable, establish a case file, assign a serial number, and close the case 30 days after the letter refusing to acknowledge the right-of-way has been issued.

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4. Management Issues. Reasonable activities within the RS 2477 right-of-way are within the jurisdiction of the holder. These include, but are not necessarily limited to, maintenance, reconstruction, upgrading, and the like. Under RS 2477 BLM has no authority to review and/or approve such reasonable activities. BLM's concern is whether such activities are confined within the boundaries of the right-of-way or whether such activities are so extreme that they will cause unnecessary degradation of the servient estate. Activities beyond the boundaries may require a right-of-way or other authorization. Where unnecessary degradation is anticipated, BLM's recourse is to negotiate or, as a last resort, seek injunctive relief.

a. Width.

(1) For those RS 2477 rights-of-way in the State, county, or municipal road system, i.e., the right-of-way is held and maintained by the appropriate government body, the width of the right-of-way is as specified for the type of highway under State law, if any, in force at the latest time the grant could be accepted. The width may be specified by a general State statute, i.e., secondary roads are 60 feet in width, or may be very specific, i.e., the statute authorizing State Highway 1 specifies the width to be 200 feet. Some statutes may establish a width that is "reasonably necessary" for the needs of the particular road - a floating width. In these cases "reasonably necessary" is determined under the conditions existing on the date of repeal (October 21, 1976), or such earlier date when RS 2477 was no longer applicable to the parcel of land.

(2) Where the right-of-way is not held by a local government, or State law does not apply, the width is determined from the area, including appropriate back slopes, drainage ditches, etc., actually in use for the highway at the later of (1) acceptance of the grant or (2) loss of grant authority under RS 2477.

b. Ancillary Uses.

(1) Ancillary uses or facilities usual to public highways have historically involved electric transmission lines and communication lines located adjacent to but within the highway right-of-way. Prior to November 7, 1974, the holders of such facilities were not required to obtain permission from BLM, only from the holder of the highway right-of-way. Facilities constructed outside the highway right-of-way on or after November 7, 1974, require authorization from BLM.

(2) For ancillary facilities constructed prior to November 1974, place such information that is available, e.g., a copy of the highway holder's permission or similar documentation, in the RS 2477 case file. No further action is necessary.

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(3) For ancillary facilities constructed subsequent to November 1974 with the highway holder's permission, BLM authorization is required, including payment for use during the period between construction and BLM authorization. It is Departmental policy that such facilities constructed between November 1974 and December 7, 1988, be accommodated by right-of-way or other authorization; removal or relocation will be considered only in rare and unusual circumstances and with prior approval of the Director (320).

(4) Ancillary facilities constructed outside the highway right-of-way, without the highway right-of-way holder's permission, or subsequent to December 7, 1988, are not authorized and appropriate action to resolve the unauthorized use situation should be undertaken.

c. Abandonment. Abandonment, including relinquishment by proper authority, occurs in accordance with State, local or common law or Judicial precedence. For highways held by local governments, most states have procedural statutes for abandonment proposal, hearing, and final order by the appropriate governmental entity. For those highways held by the "public in general," local statutes may or may not exist. Petitioning the appropriate governmental entity for abandonment of unnecessary RS 2477 highways is a tool available to BLM.

d. Conversion to Title V Highway Rights-of-Way. Due to the uncertain nature of RS 2477 highway rights-of-way, it may be mutually beneficial to BLM and the local highway entity to convert RS 2477 highway rights-of-way to Title V of FLPMA. This should be considered when the local highway entity seeks a Title V right-of-way to authorize partial realignment or similar action in conjunction with an RS 2477 right-of-way.

C. Access to Mining Claims. (Reserved)

D. Access to Salable Minerals. (Reserved)

E. Access to Leasable Minerals Other than Oil and Gas. (Reserved)

F. Fact Finders Act. Subsection 4P of the Act of December 5, 1924, (43 Stat. 704; 43 USC 417) authorizes the reservation of a right-of-way or easement to the United States over public land withdrawn for Bureau of Reclamation project purposes by the Bureau of Reclamation. Any needs for Bureau of Reclamation projects, not located on withdrawn public lands, shall be authorized with a FLPMA right-of-way grant. A Bureau of Land Management/Bureau of Reclamation Interagency Agreement dated March 25, 1983, establishes when this procedure will be used and the means by which reservations are made. The authorized officer shall note such reservations on the Master Title Plats. These reservations may be transferred or assigned to an irrigation district or to various water user groups by the Bureau of Reclamation.

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Departmental Policy Statement, RS 2477



THE SECRETARY OF THE INTERIOR
WASHINGTON

Memorandum

To: Secretary

From: ~~Acting~~ Assistant Secretary for Fish and Wildlife and Parks
Assistant Secretary for Land and Minerals Management *(S-3) Susan Recce*

Subject: Departmental Policy on Section 8 of the Act of
July 26, 1866, Revised Statute 2477 (Repealed),
Grant of Right-of-Way for Public Highways (RS 2477)

Although RS 2477 was repealed nearly 12 years ago, controversies periodically arise regarding whether a public highway was established pursuant to the congressional grant under RS 2477 and the extent of rights obtained under that grant. Under RS 2477, the United States had (has) no duty or authority to adjudicate an assertion or application. However, it is necessary in the proper management of Federal lands to be able to recognize with some certainty the existence, or lack thereof, of public highway grants obtained under RS 2477.

With the passage of the Federal Land Policy and Management Act, the Bureau of Land Management (BLM) developed procedures, policy, and criteria for recognition, in cooperation with local governments, of the existence of such public highways and notation to the BLM's land records. This has allowed the BLM to develop land use plans and to make appropriate management decisions that consider the existence of these highway rights.

Issues have recently been raised by the State of Alaska and others which question not only the BLM policy but also the management actions by other bureaus within the Department. We have had the BLM review and report on the various issues and concerns (Attachment 2) and consulted with the State of Alaska, the BLM, the Fish and Wildlife Service, and the National Park Service.

We believe that the land management objectives of the Department will be improved with adoption of a Departmental policy and recommend that the attached policy (Attachment 1) be adopted for Departmentwide use.

Approve: Donald Paul Hodel Disapprove: _____

Date: DEC 07 1988 Date: _____

Attachments: 1-RS 2477 Policy
2-BLM Report

Celebrating the United States Constitution

RS 2477

Section 8 of the Act of July 26, 1866
Revised Statute 2477 (43 U.S.C. 932)
Repealed October 21, 1976

Section 8 of the Act of July 26, 1866, provided:

"The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

Although this statute, 43 U.S.C. 932 (RS 2477), was repealed by Title VII of the Federal Land Policy and Management Act of October 21, 1976, 90 Stat. 2793, many rights-of-way (R/W) for public highways obtained under the statute exist or may exist on lands administered by the Department and other Federal agencies. The existence or lack of existence of such highway R/Ws has material bearing on the development and implementation of management plans for conservation system units and other areas of Federal lands. Land managing Bureaus of the Department should develop, as appropriate, internal procedures for administratively recognizing those highways meeting the following criteria and recording such recognized highways on the land status records for the area managed by that Bureau.

Acceptance:

To constitute acceptance, all three conditions must have been met:

1. The lands involved must have been public lands, not reserved for public uses, at the time of acceptance.
2. Some form of construction of the highway must have occurred.
3. The highway so constructed must be considered a public highway.

Public lands, not reserved for public uses:

Public lands were those lands of the United States that were open to the operation of the various public land laws enacted by Congress.

Public lands, not reserved for public uses, do not include public lands reserved or dedicated by Act of Congress, Executive Order, Secretarial Order, or, in some cases, classification actions authorized by statute, during the existence of that reservation or dedication.

Public lands, not reserved for public uses, do not include public lands pre-empted or entered by settlers under the public land laws or located under the mining laws which ceased to be public lands during the pendency of the entry, claim, or other.

Construction:

Construction must have occurred while the lands were public lands, not reserved for public uses.

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Departmental Policy Statement, RS 2477

Construction is a physical act of readying the highway for use by the public according to the available or intended mode of transportation - foot, horse, vehicle, etc. Removing high vegetation, moving large rocks out of the way, or filling low spots, etc., may be sufficient as construction for a particular case.

Survey, planning, or pronouncement by public authorities may initiate construction, but does not by itself, constitute construction. Construction must have been initiated prior to the repeal of RS 2477 and actual construction must have followed within a reasonable time.

Road maintenance over several years may equal actual construction.

The passage of vehicles by users over time may equal actual construction.

Public Highway:

A public highway is a definitive route or way that is freely open for all to use. It need not necessarily be open to vehicular traffic for a pedestrian or pack animal trail may qualify. A toll road or trail is still a public highway if the only limitation is the payment of the toll by all users. Multiple ways through a general area may not qualify as a definite route, however, evidence may show that one or another of the ways may qualify.

The inclusion of a highway in a State, county, or municipal road system constitutes being a public highway.

Expenditure of construction or maintenance money by an appropriate public body is evidence of the highway being a public highway.

Absent evidence to the contrary, a statement by an appropriate public body that the highway was and still is considered a public highway will be accepted.

Ancillary uses or facilities usual to public highways:

Facilities such as road drainage ditches, back and front slopes, turnouts, rest areas, and the like, that facilitate use of the highway by the public are considered part of the public highway R/W grant.

Other facilities such as telephone lines, electric lines, etc., that were often placed along highways do not facilitate use of the highway and are not considered part of the public highway R/W grant. An exception is the placement of such facilities along such R/W grants on lands administered by the Bureau of Land Management prior to November 7, 1974. Prior to this date, the requirement of filing an application for such facilities was waived. Any new facility, addition, modification of route, etc., after that date requires the filing of an application/permit for such facility. Facilities that were constructed, with permission of the R/W holder, between November 7, 1974, and the effective date of this policy, should, except in rare and unusual circumstances, be accommodated by issuance of a R/W or permit authorizing the continuance of such facility.

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Departmental Policy Statement, RS 2477

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Width:

For those highway R/Ws in the State, county, or municipal road system, i.e., the R/W is held and maintained by the appropriate government body, the width of the R/W is as specified for the type of highway under State law, if any, in force at the time the grant could be accepted.

In some cases, the specific R/W may have been given a lesser or greater width at the time of creation of the public highway than that provided in State law.

Where State law does not exist or is not applicable to the specific highway R/W, the width will be determined in the same manner as below for non-governmentally controlled highways.

Where the highway R/W is not held by a local government or State law does not apply, the width is determined from the area, including appropriate back slopes, drainage ditches, etc., actually in use for the highway at the later of (1) acceptance of the grant or (2) loss of grant authority under RS 2477, e.g., repeal of RS 2477 on October 21, 1979, or an earlier removal of the land from the status of public lands not reserved for public uses.

Abandonment:

Abandonment, including relinquishment by proper authority, occurs in accordance with State, local or common law or Judicial precedence.

Responsibilities of Agency and Right-of-Way Holder:

This policy addresses the creation and abandonment of property interests under RS 2477 and the respective property rights of the holder of a R/W and the owner of the servient estate.

Under the grant offered by RS 2477 and validly accepted, the interests of the Department are that of owner of the servient estate and adjacent lands/resources. In this context, the Department has no management control under RS 2477 over proper uses of the highway and highway R/W unless we can demonstrate unnecessary degradation of the servient estate. It should be noted, however, that this policy does not deal with the applicability, if any, of other federal, state, and/or local laws on the management or regulation of R/Ws reserved pursuant to RS 2477.

Reasonable activities within the highway R/W are within the jurisdiction of the holder. As such, the Department has no authority under RS 2477 to review and/or approve such reasonable activities. However, review and approval may or may not occur, depending upon the applicability, if any, of other federal, state, or local laws or general relevance to the use of a R/W.



United States Department of the Interior

IN REPLY REFER TO
2800 (932)

BUREAU OF LAND MANAGEMENT

Alaska State Office
701 C Street, Box 13
Anchorage, Alaska 99513

AUG 12 1985

Memorandum

To: DM-F

From: State Director, Alaska

Subject: Policy Regarding 1974 Trail Atlas Filed by the State of Alaska

In 1974, the State of Alaska filed a "Trail Atlas" with BLM together with a letter transmitting the maps. This letter does not purport to be a request for notation of our records. It does not cite any authority for construction and/or maintenance of the trails.

Even if the April 8, 1974 letter had requested notation of our records under R.S. 2477, we could not have complied with the request as we had no authority to note such claims until we received the new 2800 manual in late 1982.

Had a formal request to note our records on the basis of the 1974 Atlas been made after September 10, 1982, (the date of the manual release), we would still be forced to deny the request. The maps and other information in the Atlas do not meet the requirements of BLM Manual 2801.24B. The maps are not of a scale and quality which would allow us to accurately transfer the claimed trails to our records.

Therefore, we consider the State's "Trail Atlas" as submitted to be informational material only and have treated it as such. Although the 1974 State "Trails Atlas" is not adequate for notation to the BLM records, these data are appropriate, - - and should be used - - in BLM planning documents. An instruction memo setting up procedures for this will be issue in the near future.

Quinn Winston

United States Department of the Interior
Bureau of Land Management
Alaska State Office
222 W. 7th Avenue, #13
Anchorage, Alaska 99513

2800 (932)
April 2, 1990

Instruction Memorandum No. AK 90-154
Expires: 9/30/91

To: DMs
From: State Director, Alaska
Subject: Access Across Public Lands to State Mining Claims

In an attempt to resolve the issue of miners accessing State mining claims by crossing public lands, we have made an informal agreement with the State Department of Natural Resources (DNR) to cover the situation wherein the miner is using an old trail which historically has been used for access to an area.

If you believe that the access route currently being used by a miner could qualify as an RS2477 route, you should contact Regional Director, DNR to determine the State's willingness to file an assertion under RS2477. If the state declines to file such an assertion, you will continue to issue appropriate permits and to charge rentals in accordance with our existing regulations.

When the State files an RS2477 Assertion which meets existing manual criteria, you will assure that the trail is noted on the BLM status plats in accordance with BLM Manual 2801.48B1. The width of an RS2477 trail or road held or maintained by the State or a municipality is that which is specified in for the particular type of road or trail in the State Statutes. (If the way has been formally accepted by the State, this is normally 100 feet.)

The State acknowledges the need to begin a program of RS2477 assertion; however, they lack the funding/manpower for a large scale program. Thankfully they are willing to work with us on a case-by-case basis to resolve a particular access issue.

A copy of the existing Departmental policy covering RS2477 assertions is attached for your additional information. If you have any questions concerning this matter, please contact Julienne Gibbons, in the State Office, Branch of Land Resources (932) at 271-3370.



DSD for Lands & Renewable Resources

Attachment:
Secretarial Policy Statement

Kobuk District Office
1150 University Ave.
Fairbanks, AK 99709-3844

F-87178 (2800)
ADL 414539
(070eb)

John Miller, Chief, Rights-of-Way
State Department of Transportation
& Public Facilities
600 University Avenue, Suite F
Fairbanks, Alaska 99709-3695

19 JUN 1991

Dear Sir:

On November 30, 1990, we received an assertion for an R.S. 2477 right-of-way from Rhinehart Berg, through Earl Beistline. On April 30, 1991, we received your statement that the Candle to Independence Creek Trail was and still is a public highway and that you accept the grant. Previously we received your statement that the trail is not specifically restricted and is open to the use and enjoyment of the general public and that you have no objection to the noting of our records.

This letter is to inform you that the records of the Bureau of Land Management have now been noted as to the R.S. 2477 assertion for the Candle to Independence Creek Trail as a right-of-way in Secs. 8 and 9, T. 3 N., R. 18 W., Kateel River Meridian, 100 feet wide.

Sincerely,

HELEN M. HANKINS
Kobuk District Manager

Helen M. Hankins
Kobuk District Manager

cc:
Rhinehart Berg
c/o Earl Beistline
P.O. Box 80148
Fairbanks, Alaska 99708

Rhinehart Berg
Candle, Alaska 99752

Rick Smith, Regional Manager
Division of Land & Water Management
State Department of Natural Resources
3700 Airport Way
Fairbanks, Alaska 99709

bcc:
Norm Messenger (070, Nome)
Sue Wolf (932)
Steve Lundeen (070)

