#19,11

MEMORANDUM

State of Alaska

TO: Andy Zahare
Regional Engineer
Fairbanks

DATE: July 17, 1980

FILE NO: 111I-2900

TELEPHONE NO: 452-1911, ext. 266

FROM: Paul J. Wild
Interior Regional R/W Agent
Fairbanks

SUBJECT: RS 2477
Opinion of Deputy Solicitor
Department of Interior

Attached, for your information, is a copy of a very important opinion dated April 28, 1980, just received in this office

This opinion can have a very serious impact on RS 2477 roads in Alaska

PJW/ph

cc: Jack Bodine; Joe Arns
Steve Sisk
Donald Ronken
John Chalupnik
✓All R/W Personnel

X	Regional R/W Agent
	Negotiations
	Encroachments
	Engineering
	Title
	Appraisals
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	FILE

PAUL WILD

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

APR 28 1980

Honorable James W. Moorman
Assistant Attorney General
Land and Natural Resources Division
Department of Justice
Washington, D.C. 20530

Re: Standards to be applied in determining whether highways have been established across public lands under the repealed statute R.S. 2477 (43 U.S.C. § 932).

Dear Mr. Moorman:

I. Introduction

This is in response to your letter of March 12, 1980. The statute in question, R.S. 2477 (43 U.S.C. § 932), was originally section 8 of the Act of July 26, 1866 (14 Stat. 253). It was repealed in 1976 by section 706(a) of the Federal Land Policy and Management Act. Prior to its repeal, it provided in its entirety as follows:

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

Because of the repeal, we are only concerned with grants of rights-of-ways perfected prior to October 21, 1976, the date of the enactment of FLPMA.1/

As you are probably aware, R.S. 2477 has been the subject of inconsistent state statutes and state court decisions, and a handful of inconsistent federal court decisions, during its 110-year existence.2/ Even if the state interpretations were fully consistent with each other, they would not necessarily control, especially where, as here, almost all of the reported state court decisions involved competing rights of third parties and the United States was not a party to them. The analysis in the various federal

1/ A valid R.S. 2477 highway right-of-way is a valid existing right which is protected by FLPMA's sections 701(a) (43 U.S.C. § 701 note), and 509(a) (43 U.S.C. § 1769(a)).

2/ The legislative history is silent as to the meaning of this section of the 1866 statute. See generally The Congressional Globe, Vol. 36, 39th Cong., 1st Sess. (1866).

cases involving R.S. 2477 also are not only inconsistent with each other but none of them definitively come to grips with the precise issue we now face: Exactly what was offered and to whom by Congress in its enactment of R.S. 2477, and how were such rights-of-way to be perfected?

In the face of this tangled history,3/ we outline below what we believe to be the proper interpretation of R.S. 2477. Our interpretation comports closely with its language which, because of the absence of legislative history, is especially appropriate. Our view is also consistent with many of the reported decisions. It has the added virtue of avoiding what would otherwise be a serious conflict between highway rights-of-way established under R.S. 2477 and the meaning of the term "roadless" in section 603 of FLPMA, which deals with the Bureau of Land Management (BLM) wilderness review responsibilities.

3/ A similar situation existed in the dispute over the ownership of the submerged lands off the coast of California. In United States v. California 332 U.S. 19 (1947), the state argued that the United States was barred from asserting its title to the area because of the prior inconsistent positions taken by its agents over the years. The Supreme Court refuted this contention, stating in part (332 U.S. at 39-40):

> As a matter of fact, the record plainly demonstrates that until the California oil issue began to be pressed in the thirties, neither the states nor the Government has had reason to focus attention on the question of which of them owned or had paramount rights in or power over the three-mile belt. And even assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government in this ocean area are not to be forfeited as a result. The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act. (Citations omitted, emphasis added.

1. Does R.S. 2477 Apply to Highways Constructed After 1866?

A threshold issue here is whether the statute sought only to validate highways previously constructed in trespass, or to apply prospectively as well. This Department has always regarded R.S. 2477 as applying prospectively to highways constructed after 1866. In United States v. Dunn, 478 F.2d 443, 445, note 2 (9th Cir. 1973), however, the court of appeals held that the Act was designed only to cure the trespass of those persons who had already (prior to 1866) "encroached on the public domain without authorization." The court said R.S. 2477 was "not intended to grant rights, but instead to give legitimacy to an existing status otherwise indefinable." The Ninth Circuit relied on Supreme Court decisions in Jennison v. Kirk, 98 U.S. 453, 459-61 (1878), and Central Pacific Rv. Co. v. Alameda County, 28 U.S. 463 (1931).

Jennsion concerned section 9 of the 1866 Act, R.S. 2339, which -- besides confirming and protecting the water rights of those who had perfected or accrued water rights on the public domain under local custom and laws -- held liable for damages any person who, in constructing a ditch or canal, impaired the possession of any settler on the public domain. This section immediately followed section 8 of that Act (R.S. 2477) with which we are here concerned. The dispute in that case concerned two competing miners, the second of which (the plaintiff) had constructed a ditch for hydraulic mining which had crossed, and interfered with the first miner's working of, his mining claim. The first miner (defendant) had cut away the second miner's ditch in order to work his claim as before, and the Court held this did not give rise to the second miner's claim for damages under section 8. In dictum, the Court acknowledged that the broad purpose of the 1866 Act was to cure prior trespasses on the public domain, but made no specific comments on R.S. 2477.

The Central Pacific Rv. case did involve R.S. 2477, but only the validity of roads constructed prior to 1866. The Court said that, like section 9 construed in Jennison, section 8 (R.S. 2477) was, "so far as then existing roads are concerned, a voluntary recognition and confirmation of preexisting rights, brought into being with the acquiescence and encouragement of the general government." 284 U.S. at 473 (emphasis added). The underlined clause is ambiguous, but might be read as suggesting that R.S. 2477 could apply to highways constructed after 1866, and indeed this is how the Department applied it both before and after the Dunn case.

We find implicit support for the Department's view in Wilderness Society v. Morton, 479 F.2d 842, 882-83 (D.C. Cir. 1973), cert. denied, 411 U.S. 917 (1973), which upheld the validity of an R.S. 2477 grant of a right-of-way for a highway constructed in 1970 along the Trans-Alaska Pipeline. Dunn's holding to the contrary, therefore, does not find unambiguous support in the cases it cites as support for its holding, and most reported decisions assume to the contrary; as a result, it has not been followed by the Department, in the Ninth Circuit, or elsewhere.

While the Ninth Circuit is correct in finding that one major purpose of the 1866 Act, taken as a whole, was to validate various prior trespasses on the public lands, it does not follow a fortiori that R.S. 2477 applies only retroactively. The statutory language, fairly read, looks forward as well as backward in time, and the great bulk of case law also supports the Department's consistent administrative interpretation.

Determining whether an R.S. 2477 highway has been validly established is a question of federal law.

The common law doctrine of adverse possession does not operate against the federal government. United States v. California, 332 U.S. 19, 39-40 (1947); Texas v. Louisiana, 410 U.S. 702, 714 (1973), rehearing denied 411 U.S. 988 (1973); Drew v. Valentine, 18 F. 712 (5th Cir. 1983). The necessary corollary of this rule is that in order for a state or individual to gain an interest in land owned by the United States, there must be compliance with a federal statute which grants such interests.

The operative rule of construction applicable to such statutes is that grants by the federal government "must be construed favorably to the government and . . . nothing passes but what is conveyed in clear and explicit language -- inferences being resolved not against but for the government." Caldwell v. United States, 250 U.S. 14, 20 (1918); Wisconsin Central R.R. Co. v. United States, 164 U.S. 190, 202 (1896); Great Northern Ry. Co. v. United States, 315 U.S. 262, 272 (1942); Andrus v. Charlestone Stone Products Co., 436 U.S. 604, 617 (1978); cf. Leo Sheep v. United States, 440 U.S. 668 (1979). This doctrine applies to grants to states as well as grants to private parties. Dubuque v. Pacific Ry. Co., 64 U.S. 66, 38 (1859). Thus, in accordance with these rules, any ambiguities which exist in the statutory language must be resolved in favor of the federal government.

The question of whether a particular highway has been legally established under R.S. 2477 remains a question of federal law. It is a settled rule of statutory construction that all words in a statute are to be given effect. It must be assumed that Congress meant every word of a statute and that, therefore, every word must be given force and effect. United States v. Menasche, 348 U.S. 528, 538-39 (1955); Williams v. Sisseton-Wahpeton Sioux Tribal Council, 387 F. Supp. 1194, 1200 (D. South Dakota 1975); see also Zeigler Coal Co. v. Kleppe, 536 F. 2d 398, 406 (D.C. Cir. 1976); Wilderness Society v. Morton, 479 F. 2d 842, 856 (D.C. Cir. 1973),

cert. denied, 411 U.S. 917 (1973); United States v. [illegible] Kim Bo, 472 F. 2d 720, 722 (5th Cir., 1972); Consolidated Flower Sni[illegible] Inc.-Bay Area v. C.A.B., 205 F.2d 449 (9th Cir. 1953). This is especially so when, as here, there is no legislative history to suggest otherwise.4/

Thus in order to determine whether a valid R.S. 2477 highway exists on the federal lands, the several elements of the offer provided by the terms of the statute must be met. First, was the land reserved for a public use? Second, was there actual construction? Third, was what was constructed a highway?

(A) Land reserved for public use

R.S. 2477 only grants rights of way over public lands "not reserved for public uses." Therefore, Indian reservations, Wildlife Refuges, National Parks, National Forests, Military Reservations, and other areas not under the jurisdiction of BLM are clearly not open to construction of highways. The extent to which withdrawals of public lands constitute "reservations for public uses" is potentially complicated -- see, e.g., Executive Order 6910 (54 I.D. 539) (1934); Wilderness Society v. Morton, 479 F.2d 842, 882, n.90 (D.C. Cir. 1973) — but for present purposes it is sufficient to observe that R.S. 2477 was an offer of rights-of-way only across public lands "not reserved for public uses."

(B) Construction

Consistent with the rules of statutory interpretation previously discussed, the choice of the term "construction" in R.S. 2477 necessitates that it be considered an essential element of the offer made by Congress. "Construction" is defined in Webster's New International Dictionary, (2d Ed. 1935) (unabridged) at 572, as: "act of building; erection; act of devising and forming." Construction ordinarily means more than mere use, such as the creation of a track across public lands by the passage of vehicles. Accordingly, we believe that the plain meaning of the term "construction," as used in R.S. 2477, is that in order for a valid right-of-way to come into existence, there must have been the actual building of a highway; i.e., the grant could not be perfected without some actual construction.

4/ An analogy can be drawn from the law of contracts. It is a basic tenet of contract law that no more than is offered is susceptible of a valid acceptance. Maddox v. Northern Natural Gas Co., 259 F. Supp 781, 783 (D.C. Okla. 1966). Thus, in order for rights-of-way to have been validly accepted under the instant statute, such acceptance must have been performed in accordance with the terms and conditions of the offer. Minneapolis & St. LR. Co. v. Columbus Rolling Mill Co., 119 U.S. 149, 151 (1886); Tilley v. County of Cook, 103 U.S. 155, 161 (1880); National Bank v. Hall, 101 U.S. 43, 49 (1879).

We believe the correct interpretation on this point is that accepted by the New Jersey Supreme Court in Paterson R.R. Co. v. City of Paterson, 86 A. 68 (N.J. 1912) construing the nearly identical phrase "construction of a highway" which appeared in a 1911 state statute. The court noted (86 A. at 69-70, emphasis added):

> [T]he first question that arises is what is meant by the "construction of a highway." Does it mean simply to lay out the highway on paper and file a map thereof in some public office, or does it contemplate such grading, curbing, flagging, planking, or other physical alteration or addition as may be necessary to prepare the crossing for use by horses, wagons and other vehicles, [and] foot passengers. . . . The plain words of the statute indicate to my mind that the latter is the intention.
>
> To survey a piece of lands and make a map of it, to designate it as a public street, and to file the map cannot in any sense be said to be the construction of a highway. To construct a building it is not sufficient to make a drawing of it and file it: it is necessary to make a physical erection which can be used as buildings ordinarily are used, and so I think that a highway cannot be said to be "constructed" until it shall have been made ready for actual use as a highway. The word "construction" implies the performance of work; it implies also the fitting of an object for use or occupation in the usual way, and for some distinct purpose; it means to put together the constituent parts, to build, to fabricate, to form and to make. The use of the word in connection with a highway manifestly means the preparation of the highway for actual ordinary use, and not the mere delineation thereof, or the taking of land for the purpose of a street.

The federal court decisions are not helpful in interpreting "construction." For example, both Dunn and Wilderness Society involved roads actually constructed. One might find a faint suggestion in the Central Pacific Ry. case that an R.S. 2477 highway may be created solely by actual use,5/ but the Court never addressed the question whether some "construction" in the ordinary, dictionary sense of the word was necessary.

5/ See 284 U.S. at 467, where the Court noted in passing that the original road in question "was formed by the passage of wagons, etc., over the natural soil . . . ." Earlier the Court noted that the highway had been "laid out and declared by the county in 1859, and ever since has been maintained." 284 U.S. at 465.

The administrative difficulty of applying a standard other than actual construction would be potentially unmanageable. If actual use were the only criterion, innumerable jeep trails, wagon roads and other access ways -- some of them ancient, and some traversed only very infrequently (but whose susceptibility to use has not deteriorated significantly because of natural aridity in much of the West) -- might qualify as public highways under R.S. 2477.6/ Requiring highways to be constructed will prove, we believe, much more workable in determining whether an R.S. 2477 right-of-way existed prior to October 21, 1976.7/

6/ For example, the State of Utah, which argues that R.S. 2477 highways can be perfected merely by public use without construction, is by state law in the process of mapping such "roads" which it considers were in existence as of October 21, 1976, the date of the repeal of R.S. 2477. (Section 27-12-3, Utah Code Annotated 1978). Our initial review of these maps indicates that the State of Utah considers all of the numerous trails across federal lands to be R.S. 2477 highways, regardless of extent of construction maintenance or use.

7/ In the debates leading up to the repeal of R.S. 2477 in FLPMA, there occurred a colloquy between Senators Stevens (Alaska) and Haskell (Colorado) which mirrors the confusion in the reported decisions about the meaning of R.S. 2477. See generally 120 Cong. Rec. 22283-84 (July 8, 1974). For example, Senator Stevens refers at one point to "de facto public roads" which are created from trails that "have been graded and then graveled and then are suddenly maintained by the state." He was concerned that repeal of R.S. 2477 might eliminate rights-of-way for such highways if there had been no formal declaration of a highway under R.S. 2477, even if the state "did, in fact, build public highways across federal land." Senator Haskell assured him that such formal perfection of the grant was not necessary; i.e., that actual existing use as a public highway under state law at the time FLPMA becomes law is sufficient to protect the highway right-of-way as a valid existing right not affected by the repeal of R.S. 2477. Senator Haskell referred to a North Dakota state court decision which recognized both formal and informal acceptance of the R.S. 2477 grant, the latter being done by "uses sufficient to establish a highway under the laws of the State." Whether either Senator thought use without construction was sufficient is doubtful. Senator Stevens raised the point in the context of highways which had been graded, graveled and otherwise built. Finally, of course, this debate, occurring nearly 110 years after enactment of R.S. 2477, sheds no light on Congress' intent in 1866.

This is not to say that if a road was originally created merely by the passage of vehicles, it can never qualify for a right-of-way grant under R.S. 2477. To the contrary, we think such a road can become a highway within the meaning of R.S. 2477 if state or local government improves and maintains it by taking measures which qualify as "construction"; i.e., grading, paving, placing culverts, etc. If the highway has been "constructed" in this sense prior to October 21, 1976, it can qualify for an R.S. 2477 right-of-way whether or not constructed ab initio.8/

highway

A highway is a road freely open to everyone; a public road. See, e.g., Webster's New World Dictionary, (College ed. 1951) at 666; Harris v Hanson, 75 F. Supp. 481 (D. Idaho 1948); Kerb v. City of Bellingham, 377 P.2d 984 (Wash. 1963). Because a private road is not a highway, no right-of-way for a private road could have been established under R.S. 2477. Insofar as the dicta in United States v. 9,947.71 Acres of Land, 220 F. Supp. 32 (D. Nev. 1963) concludes otherwise, we believe the court was clearly wrong. The court's error in that case was in confusing the standards of R.S. 2477 with other law of access across public lands; i.e., the road at issue in that case was a road to a mining claim, and the Department had previously distinguished such roads from public highways such as might be constructed pursuant to R.S. 2477. See Rights of Mining Claimants to Access Over the Public Lands to Their Claims, 66 I.D. 361, 365 (1959). The court in 9,947.71 Acres of Land specifically found that the road in question was not a public road or highway, 220 F. Supp. at 336-37, and it therefore follows that it could not have been an R.S. 2477 road.9/ Rather it was an access road under the Mining Law of 1872, and even assuming the court correctly concluded that its taking by the government was compensable, the court's discussion of R.S. 2477 was not pertinent to the legal question presented.

In summary, it is our view that R.S. 2477 was an offer by Congress that could only be perfected by actual construction, whether by the state or local government or by an authorized private individual, of a highway open to public use, prior to October 21, 1976, on public lands not reserved

8/ It is not necessary to deal herein with whether and how an R.S. 2477 right-of-way can be terminated. Because only a right-of-way rather than title is conveyed, however, it seems clear that such a right-of-way can be terminated by abandonment or failure to maintain conditions suitable for use as a public highway. Cf. United States v. 9,947.1 Acres of Land, 220 F. Supp. 333, 334 (D. Nev. 1963)

9/ In fact, the State of Nevada had officially taken the position that the road in question was not considered a public road or highway. See 220 F. Supp. 337.

for public uses. Insofar as highways were actually constructed over unreserved public land by state or local governments or by private individuals under state or local government imprimatur prior to October 21, 1976, we do not question their validity.

D. State law construing R.S. 2477

As noted above, state court decisions and state statutes are in conflict with each other on the issue of how a right-of-way under R.S. 2477 is perfected. Generally, the approach of the states appears to fall into three general categories. First, some (Kansas, South Dakota and Alaska) have held that state statutes which purport to establish such rights-of-way along all section lines are sufficient to perfect the grant upon enactment of the state statute, even if no highway had either been constructed or created by use. Tholl v. Koles, 70 P. 381 (Kan. 1902); Pederson v. Canton Twp. 34 N.W. 2d 172 (S.D. 1948); Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Alas. 1975), contra Warren v. Chouteau County, 265 P. 676 (Mont. 1928). Second, states such as Colorado, Oregon, Wyoming, New Mexico, and Utah have held that R.S. 2477 rights-of-ways can be perfected solely by public use, without any construction or maintenance. Nicolas v. Grassle, 267 P. 196 (Colo. 1928); Montgomery v. Somers, 90 P. 674 (Ore. 1907); Hatch Bros Co. v. Black, 165 P. 518 (Wyo. 1917); Wilson v. Williams, 87 P. 2d 683 (N.M. 1939); Lindsay Land & Livestock Co. v. Chumos, 285 P. 346 (Utah 1930). Third, Arizona courts have held that such rights-of-way can be established only by a formal resolution of local government, after the highway has been constructed. Perfection by mere use is not recognized. Tucson Consol. Copper Co. v. Reese, 100 P. 777 (Ariz. 1909).

The above analysis of the plain meaning of R.S. 2477 shows that the Arizona interpretation is the only correct one, and that the positions taken by other states do not meet the express requirements of the statute. For example, the Kansas, South Dakota and Alaska approach based on section lines does not even require that there be a highway or access route, much less that it be constructed. The approach taken by states such as Colorado, Utah, New Mexico, Oregon and Wyoming, that R.S. 2477 rights-of-way may be perfected by access ways created by use alone, without any construction, also fails to meet the plain requirement of R.S. 2477 that such highways be "constructed."

The term "construction" must be construed as an essential element of the grant offered by Congress; otherwise, Congress' use of the term is meaningless and superfluous. The states could accept only that which was offered by Congress and not more. Thus, rights-of-way which states purported to accept but on which highways were not actually constructed prior to October 21, 1976, do not meet the requirements of R.S. 2477 and therefore no perfected right-of-way grant exists.

The regulation at 43 C.F.R. § 2822 (1979) did not make the question of whether a highway has been established under R.S. 2477 a question of state law.

The language of this regulation first appeared in a Circular dated May 23 1938 (Circ. 1237 a, ¶ 54). At pertinent part, the regulation provides (43 C.F.R. § 2822.1-1):

> No application should be filed under R.S. 2477, as no action on the part of the Government is necessary.

This is a correct statement, but it does not mean that the grant may be perfected on whatever terms a state deems appropriate, without regard to the conditions on which the grant is offered.

Rather, a state claim of an R.S. 2477 right-of-way is like a miner's location of a claim under the Mining Law of 1872, for which no application is required either. Like a mining claim, however, a claim to an R.S. 2477 right-of-way does not necessarily mean that a valid right exists. The United States has often successfully challenged the validity of mining claims because of the failure of the claimant to establish rights under that law. See, e.g., Cameron v. United States, 252 U.S. 450 (1920); United States v. Coleman, 390 U.S. 599 (1968); Hickel v. Oil Shale Corp., 400 U.S. 48 (1970). The Department has not previously determined the validity of claimed rights under R.S. 2477, because it has had no land or resource management reason to do so; i.e., conflicts generally did not arise between the existence of claimed rights-of-way under R.S. 2477 and the management of the public lands affected by such claims. If there is a resource management reason to do so, such as the review of public lands for wilderness values, claimed rights-of-way may be reviewed to determine their validity under R.S. 2477.

43 C.F.R. § 2822.2-1 further provides:

> Grants of rights-of-way under R.S. 2477 are effective upon construction or establishment of highways in accordance with the State laws over public lands that are not reserved for public uses.

In the context of the above analysis, the question presented by this sentence is whether "establishment" can mean less than "construction." We think lawfully it could not because the explicit language of R.S. 2477 required "construction." If "establishment" as used in the Circular and subsequent regulations meant less than "construction," it was an unauthorized exercise of power by the Secretary of the Interior. Congress has plenary power over the public lands and the Secretary can only do those things authorized by Congress. See, e.g., Kleppe v. New Mexico, 426 U.S. 529 (1976).

Given the statutory requirement of construction, the phrase "or establishment in accordance with the State laws" must mean that a state could lawfully require more than mere construction of the highway in order to perfect the R.S. 2477 grant; i.e., "construction" is the minimum requirement of federal law but the State could impose on itself additional requirements in order to perfect a grant under R.S. 2477. This in fact is what Arizona has apparently done; i.e., construction of the highway is sufficient as a matter of federal law to qualify for a right-of-way under R.S. 2477, but Arizona has imposed upon itself the additional requirement of formal approval of the grant by local government. Highways thus might be "constructed" under R.S. 2477, but the right-of-way won't be accepted as far as Arizona is concerned, or "established" in terms of 43 C.F.R. § 2822.2-1, until local government resolves to accept or designate them.

Relationship between "roadless" as used in section 603 of FLPMA and "highway" as used in R.S. 2477

Section 603 of FLPMA (43 U.S.C. § 1782) mandates an inventory of all public lands initially to determine which lands contain wilderness characteristics as defined in the Wilderness Act (16 U.S.C. § 1131 et seq.), contain 5,000 acres or more and are roadless. Areas which meet these standards must be managed to protect their suitability for wilderness preservation until Congress determines whether or not they should be placed in the wilderness system. Critical to this process is the meaning of the term "roadless."

As discussed in a Solicitor's Opinion interpreting section 603 of FLPMA (86 I.D. 89, 95 (1979)), the definition used by the BLM in administering section 603 comes from the House Report on FLPMA and provides as follows

> The word "roadless" refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road.

H. Rep. No. 1163, 94th Cong. 2d Sess. 1 (1976

The above analysis shows that an area containing a highway validly constructed under the offer of R.S. 2477 is of necessity not roadless under section 603 of FLPMA, because an area containing a valid R.S. 2477 highway can never meet the definition of "roadless" in the House Report. That is, a valid R.S. 2477 right-of-way must be a public highway constructed (or, as the House Report on section 603 indicates, "improved and maintained by mechanical means") over unreserved public lands, and can, therefore, never be a way established merely by the passage of vehicles. Read in

this way, the two statutes are consistent with each other,10/ and with the settled rules of statutory construction that Congress is presumed to be cognizant of prior existing law,11/ and that statutes should be construed consistent with each other where reasonably possible.

Finally, it should be noted that in states such as Alaska, which have enacted statutes designating all section lines as highways, purporting to constitute the perfection of the R.S. 2477 grant, see Girves v. Kenai Peninsula Borough, 536 P. 2d 1221, 1225 (Alas. 1975), no public lands in the entire state would qualify for wilderness study because there would be no "roadless" areas over 640 acres, and section 603 of FLPMA requires a roadless area of 5000 acres as a minimum in order to be considered for wilderness area designation. There is absolutely no indication in the legislative history of FLPMA that Congress thought such a bizarre result would be possible. On the contrary, all indications are that Congress thought that all areas of public lands without constructed and maintained roads would be considered for possible preservation as wilderness.

I trust you will find this explanation of our position useful. I look forward to our meeting on May 2 to discuss this further.

Sincerely

Frederick J. Ferguson

DEPUTY SOLICITOR

10/ It is significant that in formulating its definition of "roadless" that the House Committee identified no conflict between that definition and R.S. 2477. See H.R. Rep. No. 1163, 94th Cong., 2d Sess. 17 (1976). The transcript of the House Committee markup session reveals that Congressman Steiger of Arizona suggested the definition of "road" which appears in the House Report. Arizona is an arid state where "ways" can be created and used as roads merely by the passage of vehicles, and Congressman Steiger took some pains to draw the distinction between a "way" and a "road" for wilderness purposes. The latter, he insisted, was any access route improved or maintained in any way, such as by grading, placing of culverts, or making of bar ditches. See Transcript of Proceedings, Subcommittee on Public lands of House Committee on Interior and Insular Affairs, Sept. 22, 1975, at 329-33

11/ See, e.g., United States v. Robinson, 369 F. Supp. 52 (D. Fla. 1973); In re Vinarsky, 87 F. Supp. 446 (D. N.Y. 1968).

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