

State of Alaska
Department of Transportation
& Public Facilities
Interior Region

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10/20/86

CHRIS —

I GOT THIS FROM DWIGHT HEMPEL OF BLM AT ONE OF OUR RIGHT OF WAY ASSOCIATION MEETINGS. IT'S STILL IN DRAFT FORM & NOT FOR GENERAL DISTRIBUTION.

HOWEVER, MUCH OF THE PROPOSED POLICY IS ANTI-THETICAL TO THE STATE'S (AND POSSIBLY THE BOROUGH'S) BEST INTEREST. THOUGHT YOU SHOULD SEE A COPY IF YOU HAVEN'T ALREADY. GIVE ME A CALL TO DISCUSS WHEN YOU GET A CHANCE.

Charlie

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CHRIS
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8/13/86

DRAFT

ALASKA FEDERAL AGENCY RS 2477 POLICY

Bureau of Land Management, National Park Service,
Fish and Wildlife Service, and Forest Service

Since the passage of the Alaska National Interest Lands Conservation Act (ANILCA), RS 2477 rights-of-way have become a major issue in the State of Alaska. These rights-of-way provide prescribed legal access across federally managed lands. A uniform understanding of the rights granted by this law, as it pertains to federally managed lands, is the goal of this policy paper. This paper is intended to assist both the Federal land managers and the public with access related questions.

RS 2477 is only one of many authorities which have been used to provide access across Federal lands. Some of these authorities are available to all the agencies, i.e., Title XI, ANILCA, while others apply to only one or two agencies, i.e., where both the Bureau of Land Management (BLM) and Forest Service may use Title V, Federal Land Policy and Management Act. All agencies also have permitting authorities relating to access.

The RS 2477 grant is unique among these access authorities. It is a congressional grant which does not require any action on the part of a Federal agency. While the grant is "offered" by Congress, a right cannot come into existence until there is an "acceptance" of the offer and thereby a contract is completed. The scope of the congressional offer is defined by Federal law. The acceptance is by a State, instrumentality of the State, or citizen of the State and is defined by State law only to the degree the acceptance is within the scope of the Federal offer, i.e., the rights accepted cannot exceed those offered. These unique features of RS 2477 have led to varying interpretations of both the grant and acceptance and the relationship of the Federal land manager to RS 2477 right-of-way claims. Only limited Federal case law is available for guidance to Federal land managers. Most judicial opinions have been from State courts where the Federal government was not a party to the lawsuit and which are not binding on the Federal government. The following policy statements are intended to eliminate some key areas of confusion.

Revised Statute 2477

The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted. (Sec. 8 of the Act of July 26, 1866; R.S. 2477, 43 U.S.C. 932; repealed October 31, 1976, 90 Stat. 2793.)

1. An RS 2477 right could only have been created on unreserved public lands; withdrawn, appropriated, or reserved lands were not available. December 14, 1968, the date Public Land Order 4582 was posted to the Miscellaneous Documents Index of the BLM Master Title Plats, is the date

all lands became reserved in Alaska. Generally, no RS 2477 grants could be accepted after this date. Many acres left an "unreserved public lands" status prior to December 14, 1968, i.e., National Forest lands where withdrawn between 1906 and 1923, Clarence Rhode National Wildlife Refuge withdrawn in 1909, Mt. McKinley National Park withdrawn in 1917, and segregation of lands by settlement entries. When researching an RS 2477 right-of-way claim, the BLM Master Title Plats and the managing agency's land status records must be examined to determine the exact date(s) the lands crossed by the claim were unreserved public lands.

2. A potential RS 2477 right will not be recognized by a Federal agency until the requirement cited below under *Hamerly v. Denton* (Item 4) has been satisfied: (a) the party claiming the public highway has proven the highway was located over unreserved public lands and (b) the character of use was such as to constitute acceptance by the public of the statutory grant. Information supporting a potential RS 2477 right on Federal lands may be submitted to Federal agencies and should include, as a minimum, a 1:63360 scale USGS map and a narrative, with supporting documentation, stating the acceptance date of the grant, the land status and availability on that date, and the use history of the right-of-way prior to the lands becoming reserved.
3. Federal agencies may administratively recognize RS 2477 claims for management purposes. This administrative action shall not be interpreted as an adjudication of the claim's validity.
4. Federal agencies will use the following definition of "public highway" for the purposes of RS 2477 recognition.

A public highway is a travel or transportation route typical of that locale at the time the grant was accepted, it must be freely open to everyone, and must satisfy the requirements as expressed in *Hamerly v Denton*.

Requirements of *Hamerly v. Denton* (359 P.2d at 125)

Before a highway may be created, there must be either positive act on the part of appropriate public authorities of state clearly manifesting intention to accept grant, or there must be public user for such period of time and under such conditions as to prove grant has been accepted.

Party claiming that road became public highway under federal statute granting highway right of ways over public lands by virtue of public use had burden of proving that highway was located over public lands and that character of use was such as to constitute acceptance by public of the statutory grant.

Desultory use of dead-end, road or trail running into wild, unenclosed and uncultivated country, does not create a public highway.

5. Construction or sufficient use must have taken place for an RS 2477 grant to have been accepted. The passage of a Territorial or State law does not equal construction. Therefore, a section line easement that has not been constructed or used while the lands were unreserved public lands is not valid under RS 2477.
6. The concept of construction under RS 2477 is not well defined. As a minimum, there must be sufficient "construction" to allow passage of persons, animals or vehicles for which the public highway was established.
7. An RS 2477 grant is for:
 - a. the right of passage over the land; it is not fee title
 - b. vehicular, animal, or pedestrian travel, not for pipelines, powerlines, telephone or other communication facilities, and
 - c. a specific width, it is not a transportation corridor.
8. The width of an RS 2477 right-of-way is that width necessary to accommodate the uses common to that right-of-way, variously defined as the area actually used, ditch to ditch, or the constructed area. The Federal Government's position is that the State's April 6, 1963 law does not apply to Federal lands, because a State law cannot define the Federal offer.
9. The legal uses of an RS 2477 right-of-way are defined by the acceptance of the grant, i.e. an acceptance for the purpose of a winter trail results in a public highway where only winter use is legal. A lesser right of use is encompassed by a larger right, i.e. pedestrian or light all-terrain vehicles can use a trail accepted by use of heavy mining equipment. However, an attempted enlargement of the accepted right after the lands became reserved is not legal, i.e. where acceptance occurred through use as a foot trail, use now by all-terrain vehicles would not be legal. In summary, the scope and character of use will not exceed that which was identified on the date the land was withdrawn, reserved, or appropriated.
10. Abandonment of a valid RS 2477 right-of-way requires formal vacation procedures by the State.

Although RS 2477 was repealed on October 21, 1976, there is no time limit to claim acceptance of an RS 2477 grant across unreserved public lands so long as the action(s) constituting the acceptance took place prior to repeal of the law and prior to withdrawal, appropriation or reservation of the land.

Clearing potential RS 2477 claims from a management unit through use of a "quiet title" action will not normally be pursued.

All Federal agencies have legal authority to manage uses on RS 2477 rights-of-way. The extent of that authority is governed by the regulations of the individual agency whose lands the right-of-way crosses. Retention of rights by the agency would be the same as the normal rights reserved in grants and reservations for public roads similar in scope and character issued to public authorities by that agency.

Any action a Federal agency may take to abate misuse of an RS 2477 right-of-way will be taken against the user and/or holder of the grant. Misuse would include environmental damage, making the right-of-way unusable and not staying within the right-of-way.

15. The placement of RS 2477 information in land use plans is at the discretion of each agency. Generally, RS 2477 information will be treated as inventory data and will not be included in a final plan

Administratively recognized RS 2477 claims and valid RS 2477 rights-of-way which cross BLM managed lands will be placed on the BLM Master Title Plats. They will not be shown crossing another agency's or private lands. This is consistent with existing policy for less than fee title interests. Where an administratively recognized RS 2477 claim crosses BLM land and other land management/ownership is also impacted by the claim, BLM shall coordinate with these other managers/owners prior to placing the claim on the Master Title Plats.

17. The State of Alaska Roads and Trails Inventory of 1974 does not satisfy the requirements listed under Item 2 above.

State Director
Bureau of Land Management

Regional Director
U.S. Fish and Wildlife Service

Regional Forester
Forest Service, USDA

Regional Director
National Park Service