

#2.6



STEVE COWPER
Governor

STATE OF ALASKA
OFFICE OF THE GOVERNOR
WASHINGTON, D.C.
December 8, 1988

TRANSMITTAL MEMORANDUM-RECOMMENDED ACTIONS

TO: THE HONORABLE STEVE COWPER, Governor
GARREY PESKA, Chief of Staff
THE HONORABLE JUDY BRADY, Commissioner of DNR
THE HONORABLE MARK HICKEY, Commissioner of DOTPF
THE HONORABLE GRACE SCHAIBLE, Attorney General
JACK MCGEE, Assistant Attorney General
CLYDE STOLTZFUS, Special Assistant to the
Commissioner, DOTPF
TOM HAWKINS, Assistant Commissioner, DNR
GARY GUSTAFSON, Director, Division of Mining, DNR
RON CLARKE, Special Assistant, Governor's Office
DAVID RAMSEUR, Press Secretary
REBECHA MILLER, Director, Fairbanks Executive
Office

FROM: *JW* JOHN W. KATZ, Director of State/Federal Relations
and Special Counsel to the Governor

SUBJECT: FINAL R.S. 2477 POLICY

COMMENTS: Here's the long-awaited, final version of the Interior Department's R.S. 2477 policy.

The policy reflects our previous input to D.O.I. officials here in Washington. Notwithstanding certain inaccurate representations made by BLM employees in Fairbanks last weekend, the final resolution should be acceptable to most Alaskans who are familiar with the issues. Because of differences of opinion about the relevant law, the policy does not deal with section line easements, which will ultimately be addressed by the courts in any event.

We are currently working with David Ramseur to coordinate the press with D.O.I. and Senator Stevens' office. If you have any questions, please give me a call.



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

(S33) Susan Recce
ACT

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July 26, 1866, Revised Statute 2477 (Repealed),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Although RS 2477 was repealed nearly 12 years ago, controversies periodically arise regarding whether a public highway was established pursuant to the congressional grant under RS 2477 and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

cc: Secretary's Reading File (3)

ES (8): MIS Rm. 6221

IM (2)

FW (2)

330 Official

330 Reading File, MIS 3660

LLM-330:Bingham:3/4/88, IS Rm. 3660:343-5441:0434B09

Revised: FW-Wyman:10/4/88:343-9211:RS2477.1

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.

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 2677 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.

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 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, 1976, 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 precedents.

Responsibilities of Agency and Right-of-Way Holders:

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

BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240



IN REPLY REFER TO:

2801 (330)
RS 2477

APR 1976

Memorandum

To: Assistant Secretary - Land and Minerals Management

From: Director, Bureau of Land Management

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)

Issue: Department Policy on the Recognition of Public Highway Rights-of-Way Granted Under RS 2477 and the Administration of such Recognized Grants.

Need:

Significant issues have been raised, principally in Alaska, regarding the Department's interpretation and position as to the acceptance of the right-of-way (R/W) grant offered by Congress by Section 8 of the Act of July 26, 1866, RS 2477, repealed by Title VII of the Federal Land Policy and Management Act of October 21, 1976, 90 Stat. 2793 (FLPMA). For those grants recognized, issues exist as to the extent of the grant, i.e., terms and conditions such as the width, allowable uses, and Federal oversight.

Historically, such issues have generally affected only the Bureau of Land Management (BLM), with minor impact on other Federal land managing agencies. Two relatively recent events have heightened the need for expressed policy at the Departmental or higher level. First, the repeal of RS 2477 in 1976 closed the door to the acceptance of the grant for new highways or corrections to existing road situations to perfect acceptance of the grant. Secondly, the addition of extensive acreages in Alaska to the National Park and National Wildlife Refuge Systems by the Alaska National Interest Lands Conservation Act of 1980 (ANILCA) requires the managing agency to consider the possible existence of RS 2477 highways on these Conservation System Units. Other Federal land managing agencies in Alaska, principally the Forest Service, U.S. Department of Agriculture, are also involved but to a lesser extent than the three Interior Bureaus.

Historical:

RS 2477 provided:

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

In the past, the Department paid little attention to such public highways on the public lands since if the grant was not accepted today it could be tomorrow. In disposing of the public lands, the General Land Office and, subsequently, the BLM did not even include the existence of such public highways in the patent document; the agency had no duty to adjudicate the acceptance or non-acceptance of the highway grant. As with other "open" offers by Congress, such as the railroad grants, the existence of such rights were considered factual matters that the settler or enterer of public lands should recognize as existing at the time of settlement or entry. Disputes between the holder of the highway and the patentee were left for settlement in local court under the laws of the State or Territory.

As a result, there is lacking any quantity of administrative or judicial decisions at the Federal level to provide such assistance in setting Federal policy and a plethora of local judicial decisions, often conflicting between States or Territories. Attachment B is a summary of published administrative decisions regarding RS 2477.

Regulations:

Regulations promulgated by the Department in 1938 provided:

"The grant . . . becomes effective upon the construction or establishing of highways in accordance with the State laws, over public lands not reserved for public uses. No application should be filed under said R.S. 2477 as no action on the part of the Federal Government is necessary." See 43 CFR 244.53 (1938) (Par. 55, Circ. 1237a, May 23, 1938).

In 1949, regulations were added to provide for a highway applicant to petition the BLM to modify a "public use" reservation to allow application of RS 2477. See 43 CFR 244.47 (1949).

In 1952, the regulations were modified to exclude from the RS 2477 grant any R/Ws for facilities with respect to which any other provision of law specifically required the filing of an application for R/W. These regulations also waived the requirement of filing an application for all facilities usual to or along a highway R/W (certain specific exceptions) where the holder of the highway R/W consented. These regulations also provided that the R/W granted under RS 2477 would be subject to certain terms and conditions—clearing, soil and resource conservation, prevent and suppress fires, build or repair facilities damaged in construction of highway, restoration upon termination, nondiscrimination, and reservation of certain minerals. Where the highway holder consented to construction of related facilities, such holder was responsible for compliance with appropriate terms and conditions of the Department for the type of facility. See 43 CFR 244.56 (1953 Supp).

In 1974, the regulations were modified to remove the waiver provided in 1952 and required applications to be filed for facilities usual to a highway. See 43 CFR 2822.2-2 (1979).

With the repeal of RS 2477 in 1976, regulations were adopted allowing any person or State or local government which has constructed public highways under RS 2477 to file a map showing the location of such highway with the BLM. See 43 CFR 2802.3(b) (1985). This action was taken to facilitate the management of the public lands under the FLPMA.

BLM Policy:

Current policy is contained in BLM Manual 2801.48B (1986). It provides:

- Grant became fixed when constructed and accepted as a public highway.
- Construction must be actual; survey and planning are not construction. Road maintenance over several years may equal construction. Incremental maintenance over several years may equal construction. Construction on public lands must have occurred prior to 10/21/76. Where history is unknown or questionable, its existence in condition suitable for public use is evidence that sufficient construction has taken place.
- Highway must be public, an access road restricted by locked gates is not a public highway. Expenditure of public funds on a road will equate to a public highway. State in which road is located must have a procedure to confirm the road as a public highway, i.e., a public highway may not be created contrary to local law.
- RS 2477 did not specify the extent, width, or nature of rights conveyed. State law specifying highway width(s) that is specific to RS 2477 highways shall be used. Where State law does not apply, width is that required for the road uses existing at the time of acceptance or repeal of RS 2477.
- Holder has right to maintain, including realignment and reconstruction within the R/W width; activities outside require permit.
- Facilities usual to public highways, i.e., telephone and electric lines, are to be authorized by separate R/Ws granted under FLPMA; grandfather clause for those established during application waiver period.
- Field Offices are directed to work with each State, county, and municipality to identify all existing highways; acknowledge, serialize, and note Master Title Plats of those meeting criteria.

Concern in Alaska:

By 1985 many issues were raised in Alaska concerning possible RS 2477 R/Ws and management plans being prepared for the individual Conservation System Units created under the ANILCA. Positions and concerns expressed by the State (both administrative and legislative), Native entities, minerals industry, conservation groups, and others illustrated a need for a single Departmental or Federal Government position on RS 2477. In 1986, the BLM State Director, Alaska, was asked to chair an interagency group consisting of the regional heads of the BLM, Fish and Wildlife Service, National Park Service, and the

Forest Service to formulate a policy acceptable to these regional heads. A proposed policy was submitted by that group, together with comments by the State of Alaska, to the Director, BLM, in August 1987 requesting agency approval (Attachment 1). This proposed policy deviates from existing BLM policy in two areas: (1) establishing the width as that which was necessary for the use involved at the time the land was reserved for a public use or the repeal of RS 2477 (ignoring State statutes) and (2) providing that the Federal land managing agency had administrative control over use of the public highway.

Expressing reservations with the proposed policy, the Governor of Alaska's Washington representative requested meetings with the Assistant Secretaries for Land and Minerals Management and for Fish and Wildlife and Parks to present the State's views and seek a policy acceptable to both the State and the Department. As a result of such a meeting on November 24, 1987, the Governor's representative submitted four issues needing resolution, including the State's reasoning for its position on the issues. These issues and our response are contained in Attachments 3 and 6. With some clarification, BLM's existing policy is acceptable to the Governor's representative on all but one issue--legislative acceptance of RS 2477 on section lines.

Interior's Position is critical:

As the steward of the public lands, not reserved for public purposes, the Department's past and current policy and rulings on the acceptance of the grant of R/Ws for public highways can have impacts on the management of Federal lands in the 30 "public land" States--basically those west of the Mississippi River. RS 2477 issues involving the creation of "Federal reserves - Forests, Parks, Refuges" at the turn of the century and the early 1900's have, generally, been long resolved either through Federal recognition, abandonment, or judicial decisions, although some issues such as utility lines usual to a public highway still occur. Federal reserves created from unreserved public lands in the near past, especially the Conservation System Units in Alaska established under the ANILCA, contain or possibly contain numerous RS 2477 issues.

The one remaining issue involving recognition of acceptance of the congressional grant by State/Territorial law or local government ordinance not diligently followed by actual construction is an issue that has a potential affect on many Federal reserves in the public domain States as well as the remaining public lands under BLM jurisdiction.

In addition there is a perception, with some reality, that decisions made reflecting Federal lands will carry over into the private reality area. Concern has been expressed here by the Alaska Federation of Natives.

Section Line RS 2477 R/Ws:

Alaska contends, as do some other States, that a positive act by the public authorities, i.e., State/Territory legislative branch, county or municipal authorities pursuant to State law, declaring a public highway along all section/township lines is acceptance of the grant offered by Congress under RS 2477. It is contended that such a covenant runs with the land, whether a highway is actually constructed or not, until there is appropriate action taken to abandon or otherwise terminate the R/W pursuant to State law or judicial action. To mollify private landowners who received title from the United States subsequent to such section line legislation, the Alaska Governor's representative has indicated that the State would compensate such owners prior to actual construction of a section line highway.

While section line statutes constitute the primary discussion issue, this issue would also include those cases where the appropriate local authority, counties, for example, by resolution or other appropriate action declared the establishment of a public highway along a route which, for some reason, was never actually constructed.

Western States which have/had section line statutes include Alaska (Territorial and State), Arizona (however State Law requires a road to be adopted by the county or other jurisdiction after it has been constructed to become a public highway), North and South Dakota (Dakota Territorial law), and Kansas. Montana, although it does not have a section line statute, has interpreted RS 2477 as requiring construction. Various counties in California, Colorado, and Washington are known to have enacted section line ordinances. Local courts have held that, once dedicated, the highway may only be terminated according to the procedures of the local jurisdiction which, depending on the local jurisdiction, may be only through a public procedure of intent to abandon, hearing, and final abandonment or may occur through non-use and/or adverse possession.

As early as 1898 the Department held that such section line statutes or ordinances did not apply unless the highway was actually constructed (25 LD 446) (Attachment 2). In 1980, the Deputy Solicitor provided a lengthy and detailed position on RS 2477 to the Department of Justice (Attachment 3). Included in this letter was the requirement that construction must have occurred for acceptance of the RS 2477 grant. At the request of the District Court, Alaska, the United States submitted an Amicus Curiae brief to the Court in 1985, which included detailed reasoning that RS 2477 requires construction in order to establish a R/W (Attachment 4).

Problems if Section Lines Adopted:

A number of issues arise if such section line legislation/ordinances are considered acceptance of the grant under RS 2477. Among these are:

When/What does it attach?

If the land was covered by a rectangular survey our position would be that the grant would have become effective on the date of the legislation or ordinance.

If the land is subsequently surveyed, does the effective date of the grant relate back to the date of the legislation or ordinance or to the date of survey? We believe the later would be the answer.

If the land is reserved for public use prior to survey but subsequent to the legislation or ordinance, does the effect of the legislation or ordinance attach upon survey? We believe that it would not.

Are officially accepted protraction diagrams, which are used for resource sale/lease and from which subsequent surveys conform as to the location of township and section corners, considered as establishing section lines for which the grant becomes effective? We would not concur with such a proposition.

In Alaska, departures from the usual rectangular survey system are authorized, especially for conveyances to the State and to Native Corporations. Since these surveys are based on the township grid (identified as T.-N., R.-E., -M) but do not necessarily identify sections, i.e., the interior of the township is designated Tract A or Tracts A & B, would the surveyed lines that would otherwise correspond to section lines be impressed with the R/W grant? We think they would.

Alaska. Depending on the answers to the above questions, only a small amount of Federally owned land would be subject to a R/W grant if applied to only actually surveyed section lines (by 1976 only about 13 percent of the State had been surveyed) and most all Federal lands if applied to protracted survey lines.

Impacts outside of Alaska

Assume that the R/W grant attaches to the section line where such land was public land, not reserved for public use, at the time of the legislative act or subsequent date when actually surveyed.

North and South Dakota. All surveyed public land, not reserved for public use, in these two States in 1872 would be impressed with a section line R/W grant. At time of subsequent survey, such public lands not entered would also be impressed with the R/W grant.

In 1872, little public lands had been set aside for public uses; Forest Reserves, the forerunners to National Forests, and National Parks, came into existence in the 1890's and later. In these two States, 9.5 million acres are owned by the Federal Government (1981 Public Land Statistics), including some 4.0 million reacquired acres. Acres by agency are: Forest Service 3.0 millions acres, Corps of Engineers 1.1 million, Fish and Wildlife Service 0.5 million, and BLM, National Park Service, Bureau of Reclamation, and Bureau of Indian Affairs at 0.2 million each.

Kansas. All surveyed public land, not reserved for public use, in this State in 1907 would be impressed with a section line R/W grant. At time of subsequent survey, such public lands not entered would also be impressed with the R/W grant. By 1976 all lands in the State had been surveyed.

Only some 730,000 acres are owned by Federal agencies—Corps of Engineers 320,000; Army 125,000; and Forest Service 105,000. The majority of this acreage is acquired land.

Other Western States. Arizona had (has) section line legislation, however, the courts there ruled that Arizona law also required an acceptance action after construction for the road to become a public highway.

In Washington, California, and Colorado, there are published cases involving section line ordinances enacted by county government, i.e., the Douglas County, Washington, ordinance of April 6, 1897. To identify the extent of such county ordinances would require a historical search of individual County actions.

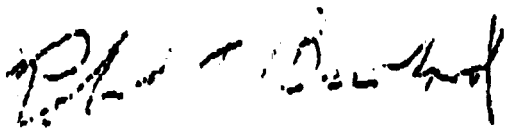
It is our recommendation that we do not modify our interpretation of the Statute that construction must have occurred in order for a R/W grant under RS 2477 to attach.

Federalism - Executive Order 12612:

With the possible exception of the section line issue, existing BLM policy and the action we are herein recommending comport with the principles of Executive Order 12612. The section line issue involves interpretation of a Federal statute and the property rights of the United States and various States, including Alaska. To accede to the position of the State of Alaska would have adverse impact on numerous properties of the Federal Government, including the possibility of having to reacquire such property interests to protect Federal interests.

Recommendation:

It is recommended that the Department retain the policy established in BLM Manual 2801.48B (1986) and adopt it as Departmental policy for use by other land managing Bureaus in the Department.



8 Attachments

- 1 - 5D AK BLM Memo of 5/1/87 + Attachment
- 2 - 26 L.D. 466
- 3 - SOL letter of 4/23/80
- 4 - Pgs 1 & 16-26 of US Amicus Brief in Greenhouse
- 5 - Katz letter of 12/4/87
- 6 - BLM response
- 7 - Katz letter of 2-29-88
- 8 - Summary of Published Administrative Decisions