Proposed Rule

Department of the Interior

RS2411

DEPARTMENT OF THE INTERIOR
Office of the Secretary of the Interior
43 CFR Part 39
RIN 1090-AA44

Revised Statute 2477 Rights-of-Way

AGENCY: Department of the Interior
Bureau of Land Management, Interior
National Park Service, Interior
U.S. Fish and Wildlife Service, Interior

ACTION: Proposed rule.

SUMMARY: This proposed rule implements the Secretary of the Interior's June 1, 1993 recommendation to Congress that the Department of the Interior (Department) promulgate regulations addressing rights-of-way pursuant to Revised Statute (R.S.) 2477 across lands now administered by the Bureau of Land Management, the National Park Service, and the U.S. Fish and Wildlife Service. R.S. 2477—a provision adopted by Congress in 1866 that granted a right-of-way for the construction of highways across public land not reserved for public uses—was repealed in 1976, but valid existing rights-of-way were not terminated.

There is not currently in place any formal administrative process by which those who claim R.S. 2477 rights-of-way can have the Department make binding determinations of their existence and validity. Furthermore, inconsistent court interpretations and incomplete guidance from the Department over the years have done little to elucidate the nature of the rights acquired. This proposed rule intends to clarify the meaning of the statute and provide a workable administrative process and standards for recognizing valid claims.

DATES: Comments must be submitted in writing by [60 days after date of publication]. Comments received after this date may not be considered in the decision-making process on the issuance of the final rule.

ADDRESSES: Comments on these proposed regulations should be sent to: U.S. Department of the Interior, Main Interior Building, 1849 C Street, N.W., Room 5555, Washington, D.C. 20240. All comments received will be available for public review in Room 5555 at the above address between the hours of 7:45 a.m. to 4:15 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management: Ron Montagna, (202) 452-7782, or Ted D. Stephenson, (801) 539-4100. National Park Service: Michael K. Johnson, (202) 208-7675. U.S. Fish and Wildlife Service: Duncan Brown, (703) 358-1744.

SUPPLEMENTARY INFORMATION:
Background.

R.S. 2477 states simply: "The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Originally, the grant was Section 8 of "An Act Granting Right of Way To Ditch and Canal Owners Over The Public Lands, and For Other Purposes," also known as the Mining Act of 1866. In 1873 Section 8 was codified as Section 2477 of the Revised Statutes, hence the reference as R.S. 2477. In 1938 the statute was recodified as 43 U.S.C. 932. On October 21, 1976 R.S. 2477 was repealed by the Federal Land Policy and Management Act of 1976 (FLPMA). Pub. L. No. 94-579, Section 706(a), 90 Stat. 2744, 2793 (1976). FLPMA did not terminate valid rights-of-way existing on the date of its approval. Section 509(a), 90 Stat. 2781, 43 U.S.C. 1769; Section 701(a), 90 Stat. 2786, 43 U.S.C. 1701 note.

Although this more than a century-and-a-quarter-old provision was repealed nearly 18 years ago, interpreting it today remains important, because valid rights-of-way existing at repeal were not terminated. In recent years, there has been growing controversy, concentrated in two Western States, over whether specific claimed access routes ought to be considered "highways" that were "constructed" pursuant to R.S. 2477, and if so, the extent of the rights thus obtained. This controversy stems in large part from the lack of specificity in the statutory language, which has helped create unrealistic expectations in interested local and State governments, environmental and wilderness protection groups, and other Federal land users. In addition, the language of R.S. 2477 causes uncertainty and potential conflict for Federal land managers charged with managing and protecting Federal lands according to current environmental and land use laws.

For several years both Congress and the Department have given attention to the problems posed by R.S. 2477. Most recently, in the Conference Report on the Fiscal Year 1993 Appropriations Bill for Interior and Related Agencies (September 24, 1992), Congress directed the Department of the Interior to study the history, impacts, status, and alternatives to R.S. 2477 and to prepare a report that provided sound recommendations for assessing the validity of claims. On June 1, 1993, the Secretary of the Interior submitted to Congress the United States Department of the Interior Report to Congress on R.S. 2477: The History and Management of R.S. 2477 Rights-of-Way Claims on Federal and Other Lands (Report). In the Report, the Secretary informed Congress that the Department of the Interior (DOI) would promulgate regulations to address these ongoing concerns.

During preparation of the Report, the Department obtained public participation in two stages. Preliminary scoping meetings were held in December 1992 and January 1993 in eight western cities. Over 4,000 pages of public comments were received and reviewed. These comments were instrumental in preparing a March 1993 draft of the Report, which was circulated to approximately 4,000 interested parties. Seven additional public meetings were held to solicit comments on the draft. Approximately 1,000 pages of further comments were provided to the Department. All public input received in this process was considered in preparation of this proposed rule.

Need for the Regulations.

Thousands of miles of highways have been constructed across the public domain, including many existing State and county highways in the Western United States, under the authorization of R.S. 2477 and similar provisions. Rights-of-way validly acquired pursuant to R.S. 2477 are historic and important means of access to and across Federal lands for local citizens, recreationists, and Federal land managers performing official duties.

Historically, these rights-of-way have not presented many problems to land managers, because in general their existence is obvious and unquestioned. However, in some locales in recent years, competing ideas about the purposes for which Federal lands should be managed have mirrored competing interpretations of what the R.S. 2477 statute granted. Some State and county governments, intent on maintaining a road infrastructure for their citizens and providing for economic development, have turned to R.S. 2477 as a guarantee of access across and to Federal lands, believing it to provide simpler and less restrictive access than other Federal laws. There are some proponents of unlimited and unregulated access to Federal lands who view R.S. 2477 as a mechanism on which they believe they can rely to circumvent the protective requirements of current environmental and land use law and to authorize the present expansion of footpaths and animal trails into highways. Some environmental groups view R.S. 2477 with alarm, believing it to have been resurrected so long after its repeal as a weapon to defeat the designation of existing and potential wilderness areas (which are roadless by definition). These widely varying views have created controversy and exacerbated management problems for both holders of the rights-of-way and Federal land managers.

In the current situation, it is difficult for Federal land managers, local governments, and public land users to know which right-of-way claims are valid and where they lie. These proposed regulations are intended to clarify the provision in its historic context and to provide a formal administrative process—as an alternative to potentially expensive and lengthy judicial proceedings—by which validly acquired rights-of-way will be recognized and regulated.

R.S. 2477 has been the subject of inconsistent interpretations. The statutory terms "highway," "construction," and "public lands not reserved for public uses" have not been defined completely or consistently, resulting in uncertainty for all parties about the exact nature and extent of the grant. In the absence of uniform Federal guidance, court decisions—sometimes applying widely varying State laws—have also failed to provide consistent or complete interpretations. Some recent State laws, including some adopted after the repeal of R.S. 2477, employ overly broad definitions or are otherwise inconsistent with the statutory requirements.

Federal land managers need consistent, coherent guidance on how to apply this provision and how to manage its potential conflicts with other existing laws. State and local governments and public land users need greater certainty. This proposed rule would clarify the legal meaning of these terms so that validly acquired rights-of-way can be recognized and regulated consistently and fairly.

In most cases, records do not exist documenting the existence of rights-of-way. Highways constructed pursuant to R.S.2477 did not require any specific, formal approval from the Federal government, so they were not generally recorded on the public land records. A Federal regulation published in 1980 requested claim holders to notify the Bureau of Land Management (BLM) of the existence of claims, but it also expressly said that the filing or failing to file a claim would have no legal effect. 43 CFR 2802.5(b) (1980). The response elicited by this request was therefore incomplete.

This uncertainty can cloud the title of Federal, State, local, private, and Indian or Alaska Native lands with possible unrecorded restrictions and interfere with the ability of property owners and land managers to manage or plan for uses of the land. The uncertainty also leaves claimants with undefined and unrecorded rights and the potential for confusion in trying to use or enforce those rights.

The ability of Federal agencies to meet their statutory obligations is compromised if claims are not identified with finality. For example, land use planning to provide for orderly and responsible decision-making on Federal lands is adversely affected if previously unnoticed or unused R.S. 2477 rights-of-way can be claimed for an indefinite period. Federal land managing agencies are required by existing laws to prepare long-term land use planning documents that identify and analyze the condition of the land, current and future uses, current and future environmental protection measures, and other measures to establish an appropriate management scheme. Preparation of these land use plans, whether they are General Management Plans prepared for each unit of the National Park Service or Resource Management Plans prepared for BLM lands, is a lengthy, complex process designed to meet existing legal requirements, the needs of the public, and the resource.

This rule intends to establish a process to determine which claims to rights-of-way were validly acquired, by requiring the filing of a claim within specified time periods. Besides offering a way to have rights validated without pursuing court actions, finalizing claims within a set time period will give claimants more security, because as time passes it will become increasingly difficult to determine which rights-of-way were validly acquired. After the locations of claimed rights-of-way are known, Federal land managing agencies will be better able to plan for and manage the Federal lands.

R.S. 2477 and Other Means of Access to and Across Federal Lands.

Although R.S. 2477 was repealed in 1976, it is not the only method of obtaining access to or across Federal lands. There are, in fact, a variety of provisions and means of obtaining access across Federal lands other than R.S. 2477. If a right-of-way under R.S. 2477 is determined not to exist, or to be limited in scope, access may still be obtained under, and consistent with, these other laws allowing access.

Most access across public lands is accomplished informally under the privilege of casual use (defined at 43 CFR 2800), without the necessity of special permission. Refuge and park visitors or public land users travel under the terms of casual use or other implied rights that do not require a right-of-way permit or other authorization.

Reasonable access is generally made available to persons engaged in valid uses of the public lands such as mining claims, mineral leasing, livestock grazing, and others. Provisions of the Alaska National Interest Lands Conservation Act (ANILCA) provide for reasonable access across Federal lands to inholdings including those within National Forests and within blocks of public land managed by BLM.

Rights-of-way for roads or other access can be applied for under several other provisions of existing Federal law such as Title V of FLPMA. Access is sometimes obtained also through reciprocal road agreements between a Federal agency and parties seeking access across Federal land. This authority is found at 43 CFR 2801.1-2.

For rights-of-way in Alaska, Congress has provided certain special provisions. These include public easements across selected Native corporation lands pursuant to Section 17(b) of the Alaska Native Claims Settlement Act (ANCSA) and the Transportation and Utility Corridor system process under Title XI of ANILCA.

Regulation of Valid R.S. 2477 Rights-of-Way.

Congress enacted R.S. 2477 during a period when the Federal Government was promoting settlement of the West. In the same era and in the same manner, Congress granted rights-of-way for numerous purposes, perhaps most commonly for the construction of railroads. R.S. 2477 was part of an Act that granted other types of rights-of-way and certain mining rights. Later recodified along with other rights-of-way provisions, this simple statute had a very specific purpose, limited by its own terms, to authorize the construction of highways across the public domain. There is no legislative history elaborating on Congress' intent in passing this provision.

With the passage of the Federal Land Policy and Management Act (FLPMA) of 1976, Congress determined that lands managed by the Bureau of Land Management should be retained in public ownership and managed according to the principles of multiple use and sustained yield, while preventing unnecessary or undue degradation of the lands. 43 U.S.C. 1732(a),(b). FLPMA also sets out a process for areas to be reviewed and designated as Wilderness Study Areas (WSA) while Congress considers inclusion of these areas in the National Wilderness Preservation System. Section 603(c) of FLPMA requires that these areas are to be managed under FLPMA and "other applicable law" in a manner that will preserve the suitability for designation as wilderness and to prevent unnecessary or undue degradation and to provide environmental protection. 43 U.S.C. 1732(c).

In addition to providing for new management standards, FLPMA repealed R.S. 2477 and numerous other similar provisions, and provided a new, consolidated process for the granting and management of rights-of-way over Bureau of Land Management lands (and National Forest lands). Pub.L. 94-579, Section 706(a), 90 Stat. 2744, 2793 (1976); FLPMA, Title V, 43 U.S.C. 1761-1771. FLPMA neither terminated existing rights-of-way, nor exempted them from regulation under its standards. Pub.L. 94-579, Section 701(a), 90 Stat. 2786, 43 U.S.C. 1701 note. See also, Sierra Club v. Hodel, 848 F.2d 1068, 1086-1088 (10th Cir. 1988) (valid existing R.S. 2477 right-of-way can be regulated by BLM to prevent unnecessary and undue degradation).

Similarly, when Congress passed laws creating the National Park System and the National Wildlife Refuge System, it imposed new, more protective management standards on these categories of Federal land and directed the Department to uphold these standards. When most parks or refuges were created, pre-existing rights including rights-of-way usually were not terminated, but became subject to the new management regime. For example, the courts have interpreted the authority of the National Park Service to include regulation of pre-existing R.S. 2477 rights-of-way across National Parks. United States v. Vogler, 859 F.2d 638 (9th Cir. 1988), cert. denied, 488 U.S. 1006 (1989).

R.S. 2477 must be read against these requirements. While existing rights pursuant to R.S. 2477 were not terminated, their preservation did not provide prospective, unrestricted authority to create or improve highways without regard for the purposes of these land management systems, or other environmental and resource protection laws. That is, rights-of-way validly acquired pursuant to R.S. 2477 remain subject to regulation under the Federal laws that govern the underlying and adjacent Federal lands. An Advance Notice of Proposed Rulemaking, published separately today, announces that the Department is considering whether and how to promulgate specific regulations to address the management of R.S. 2477 rights-of-way.

Role of State and Federal Law.

The relationship between State and Federal law is important both for determining whether a right-of-way was validly acquired and for determining the scope of a right-of-way. The proposed rule states that Federal law controls interpretation of the offer made by R.S. 2477, but that claimants are required also to comply with State law, which therefore may further condition the acceptance of a right-of-way or define its scope. A claimant cannot, however, accept under State law something that was not offered by Federal law.

The interplay between State and Federal law has created some confusion, which this proposed rule is intended to eliminate. The rule would continue to recognize the role of State law, to the extent that State law is consistent with the baseline requirements of Federal law. The Department is authorized to recognize only those interests in the Federal lands that have been established in accordance with the directions of Congress. It cannot recognize highways purported to be established under State laws that do not meet the minimal Federal statutory requirements, written into R.S. 2477, for construction of a highway over unreserved public lands.

This position was articulated as early as 1898. Secretary C.N. Bliss reviewed an Order of the Board of County Commissioners of Douglas County, Washington, which declared that with respect to R.S. 2477, all section lines in the county would be the center lines or side lines of highways that would be hereby declared to be 60 feet in width. Observing that the county's order "embodies the manifestation of a marked and novel liberality on the part of the county authorities in dealing with the public land," the Secretary affirmed the decision of the General Land Office that such State action could not validly accept the R.S. 2477 grant. The Secretary's decision provides guidance on the appropriate interpretation of these issues still before the Department nearly one hundred years later:

> There is no showing of either a present or a future necessity for these roads or that any of them have been actually constructed, or that their construction and maintenance is practicable. Whatever may be scope of the statute under consideration it certainly was not intended to grant a right of way over public lands in advance of an apparent necessity therefor, or on the mere suggestion that at some future time such roads may be needed.

26 I.D. 446, at 447 (1898).

As this decision illustrates, R.S. 2477 was intended to convey a right-of-way for highway purposes upon actual construction, and not merely upon the suggestion that a State or local government might need a highway in a suggested location at a later time.

The Department has referred to State law to fill in gaps in the terms of R.S. 2477. See 43 CFR 244.55 (1939); BLM Manual, Rel. 2-229. This is consistent with the approach taken by Federal courts, which have recognized that while the scope of a grant of Federal lands is a question of Federal law, and that any doubt as to the scope of the grant under R.S. 2477 must be resolved in favor of the Government, the Department may properly look to State law to determine the scope of a right-of-way. See, e.g., United States v. Gates of the Mountains Lakeshore Homes, 732 F.2d 1411, 1413 (9th Cir. 1984); Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988).

When R.S. 2477 was repealed, the ability to acquire new rights under its auspices was also revoked. Therefore, provisions of State laws that authorize the "establishing" of highways without the requirements that there be actual construction of a highway over unreserved public lands, or provisions

that authorize expansion of the scope of a right-of-way vested as of the repeal of the statute (or the reservation of the land, whichever was earlier) conflict with Federal law and may not be utilized.

When the Department makes a determination concerning the acquisition or scope of a right-of-way under these regulations, it will refer to State law as appropriate. The pertinent State law is that which was in effect at the time of the repeal of R.S. 2477 or at the time of the reservation of the land, whichever came first. All rights that could have been acquired must have been acquired prior to that date. Subsequent revisions of State law cannot expand these rights.

While this proposed rule was in preparation, a panel of the Ninth Circuit Court of Appeals issued a decision in the case of Schultz v. Department of the Army, 92-35197, 92-35580, 1993 U.S.App. Lexis 31037, (9th Cir., Nov. 30, 1993). The panel decision took a somewhat more lenient view of the criteria for establishing a valid R.S. 2477 right-of-way than does this proposed rule. The Federal Government believes the panel decision is not consistent with congressional intent or practice under the statute, and the United States is seeking a rehearing of the panel's decision before the full Ninth Circuit Court of Appeals. The Department will, of course, take any final decision in the case into account in moving forward with a final rule.

The Department specifically requests comments on the foregoing interpretation of the relationship between State and Federal law as applied to R.S. 2477.

Structure and Objective of the Proposed Rule.

This proposed regulation is the first of two proposed parts. This part outlines a process for determining which rights-of-way were validly acquired. The second part, published separately today as an Advance Notice of Proposed Rulemaking, will outline options the Department is considering for determining how validly acquired rights-of-way will be managed on Department of the Interior lands.

This proposed rule aims to: define key terms of the statute, provide a process for assertion of claims for rights-of-ways, establish an administrative procedure for the orderly and timely processing of claims, establish a process for input from the public prior to the administrative determination of a claim, and provide an appeal process for any adversely affected party. The proposed regulations that will implement these objectives are proposed jointly by the Bureau of Land Management, the National Park Service, and the U.S. Fish and Wildlife Service in this rulemaking action and will be codified at 43 CFR part 39.

As indicated in an Advance Notice of Proposed Rulemaking, published separately today, the Department is also considering whether and how to manage rights-of-way determined to be validly acquired under these provisions. The Bureau of Land Management, the National Park Service, and the U.S. Fish and Wildlife Service are each considering the need for regulations to govern the management of R.S. 2477 rights-of-way found to be validly acquired, consistent with the legal requirements that govern the adjacent and underlying Federal lands. Separate management regulations for each agency may be necessary because each has different statutory authority and management standards.

Applicability of the Regulations.

These regulations would apply to all lands managed by the Bureau of Land Management, the National Park Service, and the U.S. Fish and Wildlife Service. Federal lands under the administrative

jurisdiction of other bureaus in the Department of the Interior or other Federal agencies would not be affected by these regulations.

These regulations are intended to create a process by which R.S. 2477 right-of-way claims can be systematically filed and reviewed to determine whether the elements of the R.S. 2477 statute were met. In order for the Department to recognize that a right-of-way exists pursuant to R.S. 2477, a highway had to have been constructed when the public land it traverses was not reserved, or prior to the repeal of R.S. 2477, whichever was earlier.

The process provided in the proposed rule is not an application process for new rights-of-way, and the Department cannot grant new rights through these provisions. Rather, it is a process for formal recognition by the Department of rights-of-way that were validly acquired pursuant to R.S. 2477 prior to its repeal and the enactment of FLPMA. The Department's recognition that a right-of-way was validly acquired will improve manageability and convenience for the holder of the right-of-way and the Federal land manager.

The proposed rule would establish specific filing requirements and a specific process to facilitate efficient processing of claims. The implementing Federal officials will work with claimants to comply with these requirements. Failure to follow the process as outlined will delay processing and may result in an administrative denial of the claim. An administrative denial of a claim can be appealed to the Director of the appropriate agency, and if the desired relief is not received, to an appropriate Federal court.

R.S. 2477 rights-of-way that cross private or Indian or Alaska Native lands are not governed or affected by these regulations. The Department does not intend to make administrative determinations of claims for rights-of-way that cross lands that are now in State, private, Indian, or Alaska Native ownership or under the jurisdiction of another Federal agency.

Section by Section Analysis.

Section 39.1 Purpose.

This section would state the purposes of the rule.

Section 39.2 Authority.

This section would provide citations to the general authorities of the Secretary of the Interior, and to the specific authorities of the National Park Service, Bureau of Land Management, and U.S. Fish and Wildlife Service to manage the Federal lands.

Section 39.3 Definitions.

This section would define the statutory terms of R.S. 2477 and other key terms in these regulations.

Paragraph (a) Administrative Determination: The decision made by the authorized officer after consideration of the evidence would be called the administrative determination. It will include a finding of whether the right-of-way was validly acquired, and if so, describe its scope. If a claimant has

received a judicial determination that a right-of-way was validly acquired, the administrative determination will describe any aspects of the right-of-way not decided by the court, including, if applicable, its scope.

Paragraph (b) Authorized Officer: Claimants would file their claims with an authorized officer. The authorized officer is the State Director of the Bureau of Land Management, or the Regional Director of the Fish and Wildlife Service, or the Regional Director of the National Park Service, who has jurisdiction over the Federal land over which a claim pursuant to R.S. 2477 lies. The rule proposes that State or Regional Directors be authorized to delegate this responsibility.

Paragraph (c) Claim: This term would be defined as the filing of documentation that asserts the existence and scope of a right-of-way pursuant to R.S. 2477 across lands managed by the Department of the Interior. Claims must contain information sufficient to allow the authorized officer to evaluate the validity of the claim and/or to describe its scope.

Paragraph (d) Claimant: The term claimant would be defined as any person or entity asserting the existence of and a property interest in a right-of-way pursuant to R.S. 2477 across lands managed by the Department of the Interior under these regulations or in any court action. The Department presumes that all claimants will be State or local government agencies with authority for public highway management. However, there may be rare cases in which a private citizen constructed and operates a highway (that meets all other requirements) in such a manner as to have validly acquired a right-of-way pursuant to R.S. 2477. The Department will consider such claims, unless they are precluded by State law, but will require that these same standards be met. The Department specifically requests comments on whether and how, in any case of a private claim, State or local agencies with jurisdiction over highways in the area should be notified, consulted, and involved in the determination of validity.

Paragraph (e) Construction: In interpreting R.S. 2477, ordinary rules of statutory construction dictate that every word in the statute be given effect. See Sutherland, Statutory Construction, Fourth Edition, Section 46.01, (1984). Construction is an important term: it is the act required to be performed in order to complete the right-of-way grant. R.S. 2477 granted a right-of-way upon the construction of a highway, not the dedication or planning or designing of a highway. Prior to its repeal, new construction for highway purposes could complete acceptance of new or additional rights-of-way, so long as the land remained unreserved at the time of construction.

The definition in the proposed regulations would recognize that standards of highway construction technology changed between the time when R.S. 2477 was passed and when it was repealed. The definition also recognizes that Congress intended in R.S. 2477 to authorize a specific activity—the construction of highways—and did not intend, and would not have needed, to authorize less durable forms of access. The proposed rule, therefore, would require that intentional physical acts be performed with the achieved purpose of preparing a durable, observable, physical modification of land and that this modification be suitable for highway traffic.

Where a path or trail was created initially by the mere passage of vehicles, the construction requirement is met only if the path or trail has been subsequently maintained by acts that meet the requirements of construction, before the latest available date (defined below). Construction of a highway cannot be accomplished solely by any of the following activities: continual passage over a surface that has not previously been intentionally constructed, even if the continual passage eventually creates a defined route; clearing of vegetation; or removal of large rocks.

The Department specifically requests comments on this definition, including the requirements to show intentional acts, durable and observable physical modifications of land, and a link to highway traffic.

Paragraph (f) Highway: R.S. 2477 authorized the construction of highways, not railroads or canals or other types of access. When R.S. 2477 was enacted, a highway was understood to mean an open public road that served public travel or commerce needs or connected places between which people or goods traveled. Congress presumably authorized the construction of highways to make it possible for vehicles, including wagons, to travel them. There is no legislative history to suggest that Congress meant to authorize the construction of highways for private uses, for foot traffic, or for a road that did not provide needed access from one public destination to another.

The Department specifically requests comments on this definition, including the requirements to show current use, vehicular use, public use, and the connection between places made possible by the construction of the highway. The Department also requests comments on whether any of these terms needs further definition. The Department is considering whether to require a more specific showing that a right-of-way that once existed, but is no longer used, has not been abandoned and requests comments on this issue.

This definition of highway would not rule out the later adoption of a private road by a public entity, prior to repeal of the statute (or reservation of the land if this was earlier) in order to establish the right-of-way under the authority of R.S. 2477. The Department does not intend to require that all rights-of-way run from city to city; as long as the route connects identifiable places to which the public travels, it may meet this requirement. The Department therefore interprets the term highway to mean a thoroughfare that is currently and was, prior to the latest available date, used by the public without discrimination against any individual or group for passage of vehicles carrying people or goods from place to place. State law that was in effect on the latest available date may place additional limits on what kind of thoroughfare can be considered a highway in that State—claimants are also required to comply with these limits.

Paragraph (g) Holder: The term holder means someone whose claim of a right-of-way pursuant to R.S. 2477 has been determined to be valid under these regulations or by a Federal court in an appropriate case (see definition of Judicial Determination).

Paragraph (h) Improvement: The proposal divides all maintenance or construction activities that might take place on a claimed right-of-way into two categories: improvements and routine maintenance (which is defined separately). Improvements are considered any of these activities that expand the scope of the right-of-way; routine maintenance activities are any activities within that scope. Improvements may include activities such as paving a dirt road, widening a right-of-way, clearing vegetation from outside the scope of the right-of-way, removing materials from adjacent Federal lands, realignment, or new occupation of Federal land for any purpose. The Department does not interpret the R.S. 2477 savings provision to authorize improvements that expand the scope of the right-of-way as it existed on the latest available date. The Department requests comments on these issues, including comments on how specific the regulations should be on these points.

Paragraph (i) Judicial Determination: The term judicial determination means a decision by a United States Federal court holding that someone validly acquired a right-of-way pursuant to R.S. 2477. The Department of the Interior will not give binding effect to State court determinations on the validity of rights-of-way pursuant to R.S. 2477 unless the United States was a party to those cases

(which was rarely if ever the case). However, if a claimant has received a State court determination that a right-of-way was validly acquired pursuant to R.S. 2477, it is evidence that the authorized officer will consider in making his or her administrative determination.

Paragraph (j) Latest Available Date: This is the latest date on which a party could have acquired a right-of-way pursuant to R.S. 2477. The latest available date is the earliest of (1) the date of repeal of R.S. 2477 (October 21, 1976) in the case of public lands that were unreserved as of that date, or (2) the date the public lands were reserved for public uses (such as the date of reservation of the lands to create a National Park), because at that point the land was no longer "not reserved for public use."

Paragraph (k) Maintenance: Maintenance is defined in this section as recurring or periodic actions that repair and prevent damage to the right-of-way surface and keep the right-of-way surface suitable for travel by the intended vehicles. This term is included in order to provide descriptions of the usual, periodic kinds of activities that are conducted on public highways and must be read along with the terms "improvements" and "routine maintenance," both of which are defined separately. Maintenance activities may include: grading, planking, graveling, asphalting, surfacing, cuts and fills, preparation of drainage ditches, curbing, or installation of culverts. The Department requests comments on these issues.

Paragraph (l) Public Lands Not Reserved for Public Uses: This term is used in R.S. 2477 and means lands owned by the United States that were available and open to the public under various public land laws that provided for disposition to the public, but that had not been set aside, withdrawn, reserved, dedicated, settled, preempted, entered, appropriated, disposed of, located, or otherwise reserved. These are now commonly referred to as "unreserved public lands." Lands can be reserved by an Act of Congress, Presidential Proclamation or Executive Order, Secretarial Order, or other classification action.

These proposed regulations would not apply to reserved Federal lands, acquired Federal lands, privately held lands, or lands held in fee by Indian tribes or by individual Indians or Alaska Natives.

Paragraph (m) Public Land Records: This term refers to the records of the Bureau of Land Management and the Bureau's predecessor agency, the General Land Office. These records are relevant even where the claimed R.S. 2477 right-of-way crosses lands managed by the National Park Service or the U.S. Fish and Wildlife Service. This is because the right-of-way must have been acquired prior to the land being withdrawn or reserved as a National Park or Wildlife Refuge, that is, when the lands were managed by the Bureau of Land Management or its predecessor agency.

Paragraph (n) Routine maintenance: This term would be defined as maintenance activities that are within the scope of the right-of-way as it existed on the latest available date. Activity that expands the scope is considered an "improvement." Routine maintenance may include activities such as grading, or repairing potholes or existing culverts, and other minor, necessary activities that do not alter the character of the right-of-way or impact federal lands. Routine maintenance probably would not include activities such as paving a dirt road, widening the right-of-way, clearing vegetation outside the scope of the right-of-way, removing material from adjacent Federal lands, realignment, or new occupation of Federal land for any purposes. The Department requests comments on these issues.

Paragraph (o) Scope: Until the repeal of R.S. 2477 (or the reservation of the land, if earlier), claimants could acquire new rights-of-way or expand the scope of already acquired rights-of-way by constructing additional highways or by widening, realigning, or otherwise expanding an existing highway. After the latest available date, however, no new rights under R.S. 2477 could be acquired.

New rights-of-way and new uses of Federal land require authorization under FLPMA or other statutory authorities. The scope of the right-of-way that the holder validly acquired is that which was actually in use for public highway purposes at the latest available date. Where State law, as of the latest available date, further limits the scope of a right-of-way, these limits also apply. The Department specifically requests comments on its interpretation of scope, including whether or when it is necessary or useful for the Department to provide, as part of its Administrative Determination, a written description of scope and, if so, what parameters should be used to describe it.

The authorized officer will generally look to the current condition of the right-of-way as evidence of the validly acquired scope. Any future expansions of scope or creation of new rights-of-way would need to be authorized under other available statutory provisions, such as Title V of FLPMA. Some expansion of scope may have occurred after the repeal of R.S. 2477 in 1976 (or reservation of the land if earlier) on some rights-of-way. Generally, the Department does not intend to treat these activities as trespass, unless neither the courts nor the Department approved the expansion and significant public values are threatened by the expansion. In some cases, Department officials and Federal courts authorized expansion of the scope of a particular right-of-way and these authorizations will be upheld.

Paragraph (p) Secretary: This term means the Secretary of the Interior.

Section 39.4 Recognition of a Validly Acquired Grant.

This section would provide that the Department will recognize Federal court decisions, and decisions of the authorized officer under these regulations, that a right-of-way was validly acquired. All parties that already have obtained judicial determinations that they hold a right-of-way pursuant to R.S. 2477 must file a copy of the judicial determination with the authorized officer. This will allow the Department to maintain current, accurate records and to manage the right-of-way appropriately. Any issues that are not resolved in the judicial determination, including the scope of a right-of-way, will be determined by the authorized officer under these regulations.

This section further provides that the Department will recognize the scope of a right-of-way when it is described by either a Federal court or the authorized officer. Where a claimant has received a judicial determination of validity, but the court does not provide a specific description of its scope, the holder must file a claim to gain recognition of the scope.

Section 39.5 Interests Granted and Retained by the United States.

This section would enumerate the limited interests that were granted and acquired under R.S. 2477. The Department is considering whether these regulations should authorize the U.S. to receive a conveyance of an R.S. 2477 right-of-way from a claimant or holder, consistent with applicable law and subject to appropriate terms and conditions. Such conveyances may be mutually beneficial in cases where a State or county does not want to retain the legal and financial liability for an R.S. 2477 right-of-way, but the right-of-way provides important public access to or across Federal lands. The Department specifically requests comments on this issue.

Section 39.6 Filing Process for Administrative Determination.

Paragraph (a) Requirement to File a Claim. Claimants would be required to file a request for an administrative determination of the validity and/or scope of each R.S. 2477 claim within 2 years after the effective date of the final rule. By requiring claimants to file their claims by this date, the agency will then have a record of all potential rights-of-way, and will be able to consider this information in land use planning and other management decisions. The Department specifically requests comments on the length of the filing period.

The proposed regulations require claimants to file a claim for a right-of-way pursuant to R.S. 2477 in all cases, even if they previously filed a map with the Bureau of Land Management showing the location of highways constructed under the authority of R.S. 2477, as requested by 43 CFR 2802.5(b). That regulation specifically states that the submission of the maps is not conclusive evidence of the existence of the rights-of-way.

Paragraph (b) Determination of the Appropriate Office. If the claim crosses lands managed by only one agency, the claimant should file in the appropriate Regional or State office of that agency. However, where right-of-way claims cross lands managed by more than one agency, the proposed rule would direct the claimant to the office where the claim should be filed. For the convenience of claimants and the Department, claims for a single right-of-way should not be segmented by filing a claim for a portion of a right-of-way in a particular office, for any reason.

Paragraph (c) Information Required in the Claim. A claim would be required to include sufficient information to demonstrate to the authorized officer that each element of R.S. 2477 and each requirement of these regulations has been met, and to determine the scope of a claimed or judicially determined right-of-way.

By requiring that standard information be provided for all claims and allowing the authorized officer to determine the sufficiency of each point, the Department believes it is establishing a process that will be fair and consistent as well as flexible enough to allow for differences in record-keeping.

Claimants would be required to provide general historic and descriptive information and any additional documentation necessary to demonstrate that a claimed right-of-way was validly acquired, including proof of construction of a highway across public lands not reserved for public uses, as those terms are herein defined. In order to facilitate speedy processing, provide manageable standards for authorized officers, and to make documenting a claim easier for claimants, this section sets forth some specific types of proof, including numerous kinds of public records, that are most likely to make these demonstrations. Obvious claims will be easily documented and easily approved. Although some evidence of each point is required, the authorized officer will weigh the evidence produced as a whole in making the requisite determination. Less obvious claims can be documented using numerous kinds or combinations of evidence, and can be approved if the evidence shows that the elements of R.S. 2477 and these regulations are met.

If the authorized officer believes that more information is needed in order to make a fair and informed decision, the claimant may be asked to provide additional information. If a claimant has already received a judicial determination that an R.S. 2477 right-of-way has been validly acquired, the claim should include a copy of that determination, along with any other information necessary for an administrative determination of any issues not determined by the court.

The claimant is required to provide evidence of actual construction (see definition of Construction). The proposed regulations illustrate the kinds of information that are likely to meet the requirement. The claimant is also required to provide sufficient evidence that the claimed right-of-way meets the definition of highway and was constructed across public lands not reserved for public uses at the time of the construction.

The Department specifically requests comments on these requirements, whether they are sufficiently flexible, specific, and predictable, and on the amount of discretion provided to authorized officers.

Section 39.7 Effect of Failure to File a Claim.

The rule would require claimants to file claims within 2 years after the effective date of the final rule. The failure to file a claim by that date would be deemed to constitute a relinquishment of any rights purported to have been acquired under R.S. 2477. Any claims filed after that date would not be accepted or processed. A refusal to process a claim submitted after this date would be final agency action.

A filing deadline is necessary to enable the land managing agencies to approach land use planning and other management issues with complete information, and to provide certainty to public land users and those whose title may be affected by such claims. Earlier requests for this information not accompanied by a filing deadline did not elicit significant responses. Anyone who fails to file a claim within this period, but who wishes to assert the existence of a right-of-way, can seek authorization for the use of the right-of-way under other existing statutory authority, such as Title V of the Federal Land and Policy Management Act, 43 U.S.C. 1761-1771.

The process in the proposed rule would provide claimants with a reasonable method of obtaining an administrative determination of their claims without undertaking the expense and time of litigation. Some claimants may find the existing procedures under the Title V of FLPMA, or other statutory authorities, to be a more familiar and speedy process for resolving their right-of-way claims.

This section also provides that these regulations, from their effective date, shall serve as notice for purposes of the Quiet Title Act that the United States asserts an adverse interest in all purported R.S. 2477 rights-of-way that cross Federal lands. This will start the clock running on the applicable twelve year statute of limitations period for filing a quiet title action in Federal court. This provision is not intended to provide any additional time to a claimant if any prior notice has already been given of an adverse Federal claim, or otherwise affect any prior notice that might have been given of an adverse Federal claim.

The net effect of the proposal is that claimants will have two years from the date of final regulations to file claims with the Department for administrative determinations of the claims and twelve years from the date of final regulations to file suit in Federal court to establish their rights. After these two periods lapse, all unfiled claims would be extinguished.

The Department specifically requests comments on these provisions, including on its legal authority to require claimants to follow this administrative process.

Section 39.8 Processing of the R.S. 2477 Claim.

Paragraph (a) Additional Information. This section would set out the procedure that the authorized officer will follow in processing the claim. The authorized officer will review the information submitted with the claim to determine its sufficiency. Where the authorized officer determines that additional information is necessary, the claimant will be notified in writing and afforded an opportunity to furnish the information. The Department is considering whether to require that such additional information be supplied within a specific amount of time, such as 60 days, and specifically requests comments on this issue.

Failure of a claimant to make reasonable and timely efforts to respond to a request for additional information would be deemed to constitute a relinquishment of any rights purported to have been acquired under R.S. 2477. The Department's decision not to process an incomplete claim will constitute final agency action.

Paragraph (b) Consultation with other Federal agencies. If the claimed right-of-way also crosses lands that are under the jurisdiction of other Federal agencies (including agencies that are not within the Interior Department, such as the U.S. Forest Service or the Department of Defense), the authorized officer will consult with the other agencies. In addition, if the claimed right-of-way abuts lands managed by other agencies, the authorized officer will consult with these agencies. This consultation will allow the other agencies to offer input and information to the authorized officer.

Paragraph (c) Consultation with the Bureau of Indian Affairs. This proposed provision details the circumstances in which the authorized officer will consult with the appropriate office of the Bureau of Indian Affairs (BIA). The purpose of this consultation is to provide BIA with the opportunity to contact persons or Indian tribes affected by these claims. The Department specifically requests comments on whether this process provides sufficient notice to Indians and Alaska Natives about right-of-way claims that may affect their lands.

Paragraph (d) Public Notification of Filing of the Claim. The authorized officer will notify the public that a claim has been filed by publishing a notice in a newspaper once a week for three consecutive weeks. The notice will be published in a local newspaper that is distributed in the area of the claim. The paragraph specifies the information that will be included in the notice. The authorized officer will receive public comments for at least 30 days beginning after the last notice has appeared in the paper. The Department specifically requests comments on the sufficiency of this procedure and the utility and cost-effectiveness of other public notification procedures.

Paragraph (e) Disqualification of the Claim. There are some situations in which the authorized officer will not process the claim. If a Federal court or a Department of the Interior agency has previously made a determination that a right-of-way is not a valid right-of-way pursuant to R.S. 2477, then the authorized officer will not substitute his or her decision for the previous judgment of the court or decision by the agency. A claimant may not make multiple claims or shop for a different result in different offices. The Department specifically requests comments on whether other types of Congressional or administrative determinations, such as the designation of Wilderness Areas or Wilderness Study Areas, should automatically disqualify a claim from consideration in the Department's administrative process proposed by these regulations.

Paragraph (f) Review of the Claim. This paragraph directs the authorized officer to review the claim and determine whether the evidence is sufficient to establish that the claimed right-of-way was validly acquired. The authorized officer has some discretion to account for differences in record-keeping processes and to examine the overall claim for sufficiency. The Department specifically requests comments on the standards by which authorized officers will evaluate claims.

Paragraph (g) Administrative Determination: After review of the information submitted by the claimant, review of the Bureau of Land Management official public land records for the area in question, consultation with affected Federal agencies, and consideration of public comment, the authorized officer will prepare an administrative determination.

The administrative determination will not be final until the authorized officer obtains the concurrence of the authorized officers of the other Department of the Interior land managing agencies (the Bureau of Land Management, the National Park Service, and the U.S. Fish and Wildlife Service) that have jurisdiction over lands crossed by the claim. For example, if a claim of a right-of-way crosses both Park Service and Bureau of Land Management lands, the authorized officer is the Regional Director of the National Park Service or his or her designee. Before the Regional Director makes a final administrative determination of the claim that crosses Park Service and Bureau of Land Management lands, he or she will consult with and obtain the concurrence of the Bureau of Land Management authorized officer. Concurrence of other Federal agencies is not required. Having such "one stop shopping" should make the process simpler and faster for the claimants, and ensure that all appropriate information for a particular claim is available for the authorized officer's consideration.

The authorized officer will address issues raised during the public review and comment period, and determine whether to recognize an R.S. 2477 right-of-way and, if so, its scope. The Department requests comment on whether or when it is necessary or useful to provide, as part of an Administrative Determination, a written description of scope and, if so, what parameters should be used to describe it.

Paragraph (h) Public Notification of Administrative Determination. The authorized officer will publish a notice in a newspaper of general distribution in the vicinity of the claim and in the Federal Register. The notice will alert the public to the results of and reasons for the determination. A copy of the administrative determination will be sent to the claimant. The Department specifically requests comments on the sufficiency and utility of these procedures and the utility and cost-effectiveness of other public notification procedures.

Section 39.9 Appeals Procedure from Administrative Determinations.

The proposed regulations allow any interested party, including the claimant, State or local governments, and other public land users to appeal the administrative determination to the Director of the Bureau or Service. This will allow for efficient processing of appeals and uniformity in the decisions. Appeals are required to be in writing and must be submitted to the Director within 30 days of the decision's publication. The decision of the authorized officer will take effect 30 days after its publication in the Federal Register, unless the decision is properly appealed to the Director during that time.

The Director of the appropriate Bureau or Service will consider the official files of the authorized officer and any evidence submitted to the authorized officer by any interested party. The Director may ask the parties or the authorized officer for additional information and may provide for a hearing. If the claim involves land managed by more than one Department of the Interior land managing agency, the Director will consult with and obtain the concurrence of the Director of the other agency or agencies before making a final decision on the appeal.

The Department specifically requests comments on whether a different type of appeals process should be considered; for example, whether a hearing should be required or allowed if requested, whether appeals should be sent to a hearing board or other bureau official rather than a bureau director, whether decisions should be effective immediately or await action on any administrative appeal, and whether appeals should be limited to parties that participate in the determination of a claim.

Section 39.10 Interim Activity.

This section would provide guidance on the activities that claimants can engage in before a final administrative determination is issued or while any administrative appeal is pending. The Department will allow interim activities on all rights-of-way that are currently maintained by claimants, in accordance with these regulations, until final agency determinations are made. The Department specifically requests comments on whether these procedures will provide a workable framework for necessary activities of claimants while adequately protecting public resources.

The principal authors of this proposed rule are Ted D. Stephenson, Chief, Branch of Lands and Minerals Operations, Utah State Office, Ted G. Bingham, Deputy State Director for Operations, Arizona State Office, Sue A. Wolf, Chief, Branch of Lands, Alaska State Office, Bill Wiegand, Idaho State Office, and Ron Montagna, Realty Specialist, Division of Lands, Washington Office, assisted by the staff of the Division of Legislation and Regulatory Management, all of the BLM; Tony Sisto, Ranger, Ranger Activities Division of the National Park Service; Duncan Brown, Counselor to the Division of Refuges, U.S. Fish and Wildlife Service; and Karen Mouritsen, Barry Roth, Renee Stone, and Ruth Ann Storey from the Office of the Solicitor.

It is hereby determined that this proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment, and that no detailed statement pursuant to Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4332(2)(C)) is required. The Bureau of Land Management has determined that this proposed rule would not create environmental impacts. No critical element of the human environment would be affected because the proposed rule would merely establish a process for determining whether claimed rights-of-way across Federal lands were validly acquired pursuant to R.S. 2477. No new rights-of-way would be authorized under the proposed rule. The Department would use these regulations to determine, in individual situations, whether valid existing rights-of-way exist under a law repealed eighteen years ago. If such rights are determined to exist under these regulations, they will be subject to regulation under other laws, and NEPA is applicable to these processes.

This rule has been review under Executive Order 12866.

The Department has determined under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) that the proposed rule will not have a significant economic impact on a substantial number of small entities. The rule principally affects governmental entities that own and operate public highway rights-of-way that cross Federal land.

The Department certifies that this proposed rule does not represent a governmental action capable of interference with constitutionally protected property rights. There would be no taking of private property by this rule. The entities principally affected by the rule are public in nature and the

only proceedings authorized by the proposal are assessments of whether valid rights exist. Therefore, as required by Executive Order 12630, the Department of the Interior has determined that the proposed rule would not cause a taking of private property.

The Department has certified to the Office of Management and Budget that this proposed rule meets the applicable standards provided in section 1(a) and 2(b)(2) of Executive Order 12788.

The information collection requirement contained in this rule have been submitted to the Office of Management and Budget for approval as required by 44 U.S.C. 3501 et seq. The collection of this information will not be required until it has been approved by the Office of Management and Budget.

List of Subjects

43 CFR part 39

Highways and roads, Public lands—rights-of-way, Reporting and record-keeping requirements

Office of the Secretary

43 CFR Subtitle A

For the reasons set forth in the preamble, and under the authorities stated below, subtitle A of title 43 is proposed to be amended by adding a new part 39 to read as follows:
PART 39—REVISED STATUTE 2477 RIGHTS-OF-WAY

Sec.
39.1 Purpose.
39.2 Applicability and authority.
39.3 Definitions.
39.4 Recognition of a validly acquired right-of-way.
39.5 Interests granted and retained by the United States.
39.6 Filing process for administrative determination.
39.7 Effect of failure to file a claim.
39.8 Processing of claims.
39.9 Appeals procedure from administrative determinations.
39.10 Interim activity.
39.11 Information collection.

Authority: 43 U.S.C. 1201, 1733 and 1740.

§ 39.1 Purpose.

The purposes of the regulations in this part are to:

(a) Establish procedures for the orderly and timely processing of claims for rights-of-way pursuant to R.S. 2477 over lands managed by the Bureau of Land Management, National Park Service, and U.S. Fish and Wildlife Service;

(b) Define key terms;

(c) Establish public notice and appeal processes of claims for rights-of-way pursuant to R.S. 2477; and

(d) Provide for the use of rights-of-way validly acquired pursuant to R.S. 2477, consistent with the management of adjacent and underlying Federal lands.

§ 39.2 Applicability and authority.

These regulations apply to right-of-ways claimed pursuant to R.S. 2477 on Federal lands administered by the Bureau of Land Management, National Park Service, and U.S. Fish and Wildlife Service, all land managing agencies under the U.S. Department of the Interior. R.S. 2477, Section 8 of the Act of July 26, 1866, 43 U.S.C. 932, granted a right-of-way for the construction of highways on public lands not reserved for public uses.

R.S 2477 was repealed by Section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701-1784. Existing rights-of-way were not terminated. 43 U.S.C. 1769(a). FLPMA created a new process for the issuance of rights-of-way to provide access to and across Bureau of Land Management and U.S. Forest Service lands. 43 U.S.C. 1761-1771.

(a) Department of the Interior. The Secretary of the Interior has broad authority to promulgate regulations for the management of Department of the Interior lands pursuant to 43 U.S.C. 1201 and 1457.

(b) Bureau of Land Management. Sections 302(b) and 310 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1732(b) and 1740, authorize the Bureau of Land Management to promulgate regulations to prevent unnecessary or undue degradation of lands managed by the Bureau of Land Management and to implement the purposes of FLPMA and other public land laws. Section 603(c), 43 U.S.C. 1782(c), requires the Secretary of the Interior to manage wilderness study areas, by regulation or otherwise, to prevent unnecessary or undue degradation and to prevent impairment of wilderness characteristics.

(c) U.S. Fish and Wildlife Service. 16 U.S.C. 668dd authorizes the Secretary, acting through the Director of the U.S. Fish and Wildlife Service, to issue regulations relating to public use of any area within the National Wildlife Refuge System. In addition, 16 U.S.C. 460k-3 authorizes the Secretary to issue regulations relating to public use of national wildlife refuges, game ranges, national fish hatcheries, and other conservation areas administered by the Department for fish and wildlife purposes. With respect to any unit of the National Refuge System located in Alaska, the Alaska National Interest Lands Conservation Act (ANILCA) requires the Secretary to prescribe regulations to ensure that activities carried out under any use or easement granted "under any authority" are compatible with the purposes for which the refuge was established. ANILCA, Section 304(b), Pub. L. 96-487, 94 Stat. 2371, 2395 (1980).

(d) National Park Service. The National Park Service Organic Act, 16 U.S.C. 1 - 4, provides that the purpose of the National Park Service is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations. The Secretary has

specific authority to make rules and regulations in furtherance of these purposes. 16 U.S.C. 3.

§ 39.3 Definitions.

The following definitions apply to this part:

(a) Administrative determination means the decision issued by an authorized officer under this part that determines the validity and/or scope of a claim of a right-of-way pursuant to R.S. 2477.

(b) Authorized officer means the State Director of the Bureau of Land Management, or the Regional Director of the U.S. Fish and Wildlife Service, or the Regional Director of the National Park Service, or their respective designee, with jurisdiction over the Federal land over which a claim pursuant to R.S. 2477 lies.

(c) Claim means the filing of appropriate documentation under this part asserting the existence of and a property interest in a right-of-way pursuant to R.S. 2477 across lands managed by the Department of the Interior. Claim also means the filing of appropriate documentation under this part showing that a judicial determination has been made of the existence of a right-of-way pursuant to R.S. 2477 across lands managed by the Department of the Interior and asserting any rights not expressly recognized in the judicial determination.

(d) Claimant means any person or governmental entity that asserts the existence of and a property interest in a right-of-way pursuant to R.S. 2477 across lands managed by the Department of the Interior under this part or in any Federal court action. Where State law, in effect on the latest available date, further limits the class of persons who may own or operate highways, these limits also apply.

(e) Construction means an intentional physical act or series of intentional physical acts that were intended to, and that accomplished, preparation of a durable, observable, physical modification of land for use by highway traffic. Where State law, in effect on the latest available date, further limits the definition of construction, these limits also apply.

(f) Highway means a thoroughfare that is currently and was prior to the latest available date used by the public, without discrimination against any individual or group, for the passage of vehicles carrying people or goods from place to place. Where State law, in effect on the latest available date, further limits the definition of highway, these limits also apply.

(g) Holder means a claimant who has received an administrative or judicial determination that its claim to a right-of-way pursuant to R.S. 2477 is valid.

(h) Improvement means any maintenance or construction activity that expands the scope of the right-of-way.

(i) Judicial determination means a decision by a United States District or Territorial court, or higher United States Federal court, that holds that a claimant holds a right-of-way pursuant to R.S. 2477.

(j) Latest available date means the latest date on which a right-of-way pursuant to R.S. 2477 could have been acquired, which shall be prior to:

(1) October 21, 1976, in the case of lands that were unreserved public lands as of that date; or

(2) The date the public lands were reserved for public uses (such as the date of withdrawal from entry or designation of public use by statute, Presidential Proclamation or Executive Order, Secretarial Order, or administrative decision) in the case of public lands reserved for public uses before October 21, 1976.

(k) Maintenance means recurring or periodic actions that repair or prevent damage to an existing right-of-way surface and keep an existing right-of-way surface suitable for travel by the intended vehicles.

(l) Public Lands Not Reserved for Public Uses or Unreserved Public Lands means lands owned by the United States that were available and open to the public under various public land laws that provided for disposition to the public, but that had not yet been set aside, dedicated, withdrawn, reserved, settled, preempted, entered, appropriated, disposed of, located, or otherwise reserved.

(1) The terms "public lands not reserved for public uses" and "unreserved public lands" do not include:

(i) Lands that were set aside, dedicated for specific purposes, withdrawn, or otherwise reserved from disposition under the public land laws by an Act of Congress, Presidential Proclamation or Executive Order, Secretarial Order, or classification actions authorized by statute that specified that the land would be used for a specific purpose or that prevented certain uses;

(ii) Lands that were settled, preempted, entered, appropriated, disposed of, located, or otherwise reserved to private parties or States under the public land laws or mining laws;

(iii) Lands that were owned by the United States, disposed of to a private party, and later reacquired by the United States (unless expressly re-opened prior to the latest available date);

(iv) Lands that were acquired by the United States from a party other than a foreign sovereign (unless expressly re-opened prior to the latest available date); or

(v) Other reserved lands.

(2) Lands are removed from the status of "public lands not reserved for public uses" on the date of the withdrawal or other reservation.

(3) If a settlement, claim, or entry does not proceed to patent, is declared invalid, is abandoned or relinquished, or the United States revokes the withdrawal or other reservation, the land may return to the status of "public lands not reserved for public uses," on the date on which the public land records so reflect that status.

(m) Public land records means the records of the Bureau of Land Management or its predecessor agency, the General Land Office.

(n) Routine maintenance means maintenance activities that are within the scope of the right-of-way.

(o) Scope means the width, surface treatment, and location actually in use for public highway purposes at the latest available date, unless otherwise determined by a United States Federal court. Where State law, in effect on the latest available date, further limits the scope of a right-of-way, these limits also apply.

(p) Secretary means the Secretary of the Interior.

§ 39.4 Recognition of a validly acquired right-of-way.

(a) The Department of the Interior will recognize that a right-of-way was validly acquired pursuant to R.S. 2477 only if that determination is made by one of the following:

(1) A United States District or Territorial court, or higher United States Federal court; or

(2) The authorized officer in accordance with this part.

(b) The Department of the Interior will recognize the scope of a right-of-way pursuant to R.S. 2477 only if it is described by one of the following:

(1) A United States District or Territorial court, or higher United States Federal court; or

(2) The authorized officer in accordance with this part.

§ 39.5 Interests granted and retained by the United States.

(a) Interests validly acquired pursuant to R.S. 2477. Upon valid acquisition, a claimant received a right-of-way for public access for highway purposes. The right to acquire new rights under R.S. 2477 was terminated as of the latest available date. A holder may perform routine maintenance. Routine maintenance, construction, improvement, use, and operation of the right-of-way shall be subject to regulation.

(b) Interests retained by the United States. R.S. 2477 granted a right-of-way upon the construction of a highway across public land not reserved for public uses. All other rights were retained by the United States, including all rights not actually acquired prior to the latest available date. These rights include but are not limited to continuing rights to regulate, enter, and authorize other uses of the right-of-way. The United States retains the authority to regulate routine maintenance, construction, improvement, use, and operation of the right-of-way.

§ 39.6 Filing process for administrative determination.

(a) Requirement to file a claim. All claimants shall file their claims with the appropriate office in the State or Region in which the claim lies, not later than [30 days plus 2 years after date of publication of final rule]. All holders of judicial determinations shall file a claim, including a copy of the judicial determination and any other necessary information, with the appropriate office in any State or Region in which the claim lies, not later than [30 days plus 2 years after date of publication of final rule]. Any aspects of a judicial determination not addressed by the court, including scope, will be determined under this part.

(b) Determination of appropriate office. The appropriate office is determined by the following:

(1) If any part of the claim crosses lands managed by the National Park Service, the appropriate office is the Regional Office of the National Park Service. Contact the nearest National Park for the address of the appropriate Regional Office.

(2) If any part of the claim crosses lands managed by the U.S. Fish and Wildlife Service, and does not cross lands managed by the National Park Service, the appropriate office is the Regional Office of the U.S. Fish and Wildlife Service. See 50 CFR 29.21-2(c) for the address of the appropriate Regional Office.

(3) For claims that cross lands managed by the Bureau of Land Management, but not the National Park Service or the U.S. Fish and Wildlife Service, the appropriate office will be the State Office of the Bureau of Land Management. See 43 CFR 1821.2-1 for the address of the appropriate State Office.

(c) Information required in claim. A claim shall contain sufficient information to demonstrate to the authorized officer that each element of R.S. 2477 and each requirement of this part have been met (unless the claimant already holds a judicial determination of validity), and any additional information necessary to determine the scope of the right-of-way. At a minimum the claim shall contain:

(1) The name and affiliation of the claimant;

(2) The address where service may be made on the claimant, including name(s) or agent(s) authorized to act for it, and the statute, resolution, ordinance, or other warrant authorizing such officer(s) or agent(s) to act on behalf of the claimant;

(3) A general description of the highway on which the claim is based, including at least the local name, State or county number, beginning and ending points, type of surface, width and other relevant information, and identification of the claim on maps in sufficient detail to allow location on the ground by a competent engineer or surveyor.

(4) A summary of the history of the construction and use of the right-of-way up to the present.

(5) A statement of whether any profiles, constructions, as-built or similar detail maps or diagrams of the right-of-way are available and, if so, where such material may be viewed or copies obtained;

(6) If the right-of-way has been the subject of a prior judicial or administrative determination, the case or file identification number, results of the last action taken, and the dates thereof.

(7) If applicable, a citation to relevant State law in effect on the latest available date;

(8) Evidence of construction, which shall include evidence of each part of the definition of construction, including:

(i) Intentional physical acts, which may be shown by evidence that the roadbed was prepared with the use of tools, either hand tools, power tools, or machinery; and

(ii) Preparation of a durable, observable, physical modification of land, which may be shown by records of expenditures for, or other records of, highway construction activities or maintenance after the initial construction at necessary and appropriate intervals so that the right-of-way was a relatively continuous route for travel;

(9) Evidence that the claimed right-of-way is a highway, which shall include evidence of each part of the definition of highway, including:

(i) Public use, which may be shown by records establishing that the right-of-way is currently and was prior to the latest available date officially acknowledged, funded, or maintained by a State or local government public highway management agency;

(ii) Vehicular use, which may be shown by historic evidence or records of use for commercial or personal purposes by vehicles appropriate to the time and terrain; and

(iii) The thoroughfare served as a connection between public destinations, which may be shown by describing the places that the right-of-way connects or provides access to; and

(10) Evidence that the land over which a claim of a right-of-way pursuant to R.S. 2477 lies was public land not reserved for public uses at the time of construction.

§ 39.7 Effect of failure to file a claim.

The failure to file a claim by [30 days plus 2 years after date of publication of final rule] shall be deemed to constitute a relinquishment of any rights purported to have been acquired under R.S. 2477. Claims received after that date will not be processed. A decision refusing to process a claim submitted after the above date will constitute final agency action. These regulations, from the effective date, shall serve as notice for purposes of the Quiet Title Act, 28 U.S.C. 2409a, that the United States claims an adverse interest in any purported rights-of-way traversing Federal lands claimed pursuant to R.S. 2477; provided, however, that this provision will not interfere with or affect any prior notice that might have been given of an adverse Federal claim.

§ 39.8 Processing of claims.

(a) Additional information. The authorized officer will review the claim to determine whether it is complete and provides sufficient information to allow a review of the claim. Where the authorized officer determines that additional information is necessary, he or she will notify the claimant in writing of the deficiencies and afford a reasonable opportunity for the claimant to supply such information. Failure of a claimant to respond to a request for additional information shall be deemed to constitute a relinquishment of any rights purported to have been acquired under R.S. 2477. The authorized officer will not process claims if the claimant fails to respond to a request for additional information. A decision refusing to process incomplete claims will constitute final agency action.

(b) Consultation with other Federal agencies. The authorized officer will consult with any other Federal agencies that have management authority over lands crossed by the claim.

(c) Consultation with the Bureau of Indian Affairs. The authorized officer shall consult with the appropriate Area Office of the Bureau of Indian Affairs in any case in which a claim crosses land in any of the following categories:

(1) Land that is individually owned by Indians or Alaska Natives or any interest therein that is held in trust by the United States for the benefit of individual Indians or Alaska Natives and land or any interest therein held by individual Indians or Alaska Natives subject to Federal restrictions against alienation or encumbrance;

(2) Tribal land, which is land or any interest therein, title to which is held by the United States in trust for an Indian tribe, or title to which is held by any tribe subject to Federal restrictions against alienation or encumbrance, including such land reserved for Bureau of Indian Affairs administrative purposes. Also included in this category are lands held by the United States in trust for an Indian corporation chartered under Section 17 of the Act of June 18, 1934, 48 Stat. 988, 25 U.S.C. 477; or

(3) Government owned land, which is land owned by the United States and under the jurisdiction of the Secretary and that was acquired or set aside solely for the use and benefit of Indians or Alaska Natives; or land for which an allotment application is pending and that was not included in the lands set forth in paragraphs (1) and (2) of this section; or land that has been selected by but not yet conveyed to corporations created pursuant to the Alaska Native Claims Settlement Act, Pub. L. 92-203, 7-8, 85 Stat. 688, 691-4 (1971).

(d) Public notification of filing of a claim. The authorized officer will publish in a newspaper of local distribution in the vicinity of the claim once a week for 3 consecutive weeks a notice of filing of the claim. The public comment period will begin the day after the last publication date and last for a minimum of 30 days. The notice of filing will include:

(1) The name and mailing address of the claimant;

(2) The name or number and location of the right-of-way claimed to have been validly acquired pursuant to R.S. 2477 as identified on the claimant's formal public highway records;

(3) The office in which the claim was filed;

(4) Notice of availability of the claim for public inspection and review;

(5) The address where public comments may be mailed; and

(6) The date after which public comments will not be considered.

(e) Disqualification of the claim. The authorized officer will not process a claim if the subject right-of-way has been previously judicially or administratively determined not to be a validly acquired right-of-way pursuant to R.S. 2477.

(f) Review of the claim. The authorized officer will review the claim and determine whether it contains sufficient evidence to prove that the right-of-way was validly acquired pursuant to R.S. 2477.

(g) Administrative determination.

(1) After review of the information submitted by the claimant, review of Bureau of Land Management official public land records, review of any applicable State law, consultation with affected Federal agencies, and consideration of public comment, if any, the authorized officer will prepare an administrative determination.

(2) The administrative determination will not be final until it is concurred in by the authorized officer of the Bureau of Land Management, U.S. Fish and Wildlife Service, and National Park Service that has jurisdiction over lands crossed by the claim.

(3) The administrative determination will include a finding of whether a right-of-way pursuant to R.S. 2477 on lands in the jurisdiction of the Bureau of Land Management, U.S. Fish and Wildlife Service, and National Park Service was validly acquired, and, if so, will describe the scope of the right-of-way.

(4) The final administrative determination will be sent to the claimant.

(h) Public notification of administrative determination. The authorized officer will publish a notice of the administrative determination in a newspaper of general distribution in the vicinity of the claim and in the Federal Register. A copy of the administrative determination will be sent to the claimant.

§ 39.9 Appeals procedure from administrative determinations.

(a) Administrative determinations of the authorized officer will be put into full force and effect 30 days after publication in the Federal Register unless an appeal under this section is filed during that time.

(b) Any person or entity adversely affected by an administrative determination under this part may appeal the administrative determination to the Director of the Bureau or Service of the authorized officer.

(1) The appeal shall be in writing and shall be filed with the Director within 30 days of the date of publication in the Federal Register. If the appellant is other than the claimant, the appellant shall send a copy of the appeal to the claimant at the same time.

(2) The appeal shall contain:

(i) The name, address, telephone number, and interest of the person filing the appeal;

(ii) A statement of the issue or issues being appealed; and

(iii) A concise statement explaining why the appellant believes that the authorized officer's administrative determination is factually or legally wrong.

(c) The official files of the authorized officer and any statements or documents submitted by the claimant or the public on which the decision of the authorized officer was based shall constitute the record on appeal. If the appellant is other than the claimant, the claimant shall be offered an opportunity to respond to the appellant's statements under paragraph (a)(2).

(d) If the Director considers the record inadequate to support the decision on appeal, he or she may require the production of such additional evidence or information as deemed appropriate, and may provide for a hearing as deemed appropriate.

(e) The Director will promptly render a decision on the appeal. The decision will not be effective until it is concurred in by the Director of each Department of the Interior land managing agency that has jurisdiction over lands crossed by the claim. The decision will be in writing and will set forth the reasons for the decision. The decision will be sent to the appellant, and if the appellant is other than the claimant, to the claimant.

(f) The decision of the Director will be the final agency action of the Department of the Interior.

§ 39.10 Interim activity.

(a) During the processing of a claim and any administrative appeal, a claimant may perform routine maintenance.

(b) A claimant performing routine maintenance shall notify the appropriate office at least 3 business days in advance of the date the work is to be performed. Routine maintenance is subject to the approval of the appropriate office. The appropriate office as it applies to this section is the area or district office is the Bureau of Land Management, the Superintendent of the National Park System Unit, or the Manager of the National Wildlife Refuge, that has jurisdiction over the lands crossed by the portion of the claim on which the routine maintenance will take place.

(c) Interim activity authorized under this section shall be limited to those rights-of-way currently maintained by the claimant and after [30 days plus 2 years after date of publication of final rule] only those routes actually claimed by a claimant.

§ 39.11 Information collection.

(a) The information collection requirements contained in part 39 have been approved by the Office of Management and Budget under 44 U.S.C. 3507 and assigned clearance number(s) 1004-xxxx. The information is being collected to permit the authorized officer to determine the validity and scope of rights-of-way claimed to have been acquired under R.S. 2477. The information will be used to make this determination.

(b) Public reporting burden for this information is estimated to average __ hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Information Collection Clearance Officer (873), Bureau of Land Management, 1849 C Street, N.W., Washington, DC 20240, or the Service Information Collection Officer, U.S. Fish and Wildlife Service, MS-224 ARLSQ, 1849 C Street, N.W., Washington, D.C. 20240, or Chief, Management Analysis and Control Branch, Management Services Division, National Park Service, P.O. Box 37127, Washington, D.C. 20013-7127, and the Office of Management and Budget, Paperwork Reduction Project, 1004-xxxx, Washington, DC 20503.

Assistant Secretary of the Interior

Assistant Secretary of the Interior

cc: Secy's File
Secy's RF (2)
Fed. Reg. (Orig. & 2)
LLM: AS/LMM, AS/FWP, 260, 110, 130, 150,
NPS, FWS
140 Regs, 140 Chron
LLM:TStephenson/RStone/THudson/th:4/14/94:208-4256: Doc.No. RS2477PR.WPF