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**STATE OF ALASKA**
**COMMENTS ON PROPOSED RULES REVISED STATUTES 2477 RIGHTS-OF-WAY**
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I. Introduction

The rights-of-way granted by Congress under RS 2477 are important to Alaska. Upon acceptance RS 2477 rights-of-way are vested interests in real property. The cases and previous Department of the Interior ("DOI") regulations interpreting the statute all conclude that as a matter of federal law, state law governs the method of acceptance and the scope of the right-of-way. We believe the proposed regulations are defective to the extent they deviate from established law.

These regulations attempt to disable the grants already made under the statute. In many ways RS 2477 rights-of-way are unique and irreplaceable under any other federal act. Alaska only desires that the statute be interpreted as Congress intended.

Our comments are organized to first advise DOI of the state policy justifying Alaska's support of the Congressional intent behind RS 2477. The second section informs DOI of the state's perception of federal policy. We then provide DOI our general legal opinion on the deficiencies of the regulations. Finally we make comments on specific sections of the proposed regulations.

II. State Policy Perspective

An important public policy objective of this state is to serve Alaska's overall economic and social well-being. As interpreted by a hundred years of judicial decisions and DOI regulation, RS 2477 supports this goal. As our oil reserves are depleted, state revenues decrease and governmental services decline. Prudent public policy requires that the state assess its assets and endeavor to make up the shortfall. Reasoned and balanced development of natural resources and tourism are important components of our economic base which can assist in offsetting declining oil revenues. Properly managed and utilized RS 2477 rights-of-way will support the growth of these industries and enhance Alaska's economic and social well-being.

Many of the RS 2477 rights-of-way were established to gain access to mineralized areas. The intent of the 102,500,000 acre land grant to the state by Congress in the Statehood Act was to provide Alaska with a solid economic foundation. RS 2477 routes across federal lands should be available for access to valuable mineral deposits on these and other lands.

Another purpose of these routes was to connect communities with each other and with the trail and water transportation system historically used in Alaska. Many communities across the state used routes traversing federal land that may not meet the standards in the regulations, but those

routes supported community interaction, trade, and commerce across rural Alaska. RS 2477 was intended to protect those routes.

Many of the routes also have the potential to be used for recreational and tourism purposes. These historical trails could be used for a variety of recreational uses to promote tourism in the state. Under state management, the uses would range from scenic highways to foot trails so the gambit of recreational and tourist desires can be addressed.

The state will control the use of the rights-of-way through existing regulation and new regulations now under consideration. The foundation of our regulatory scheme is to allow reasonable use consistent with the purpose of the route while ensuring that the servient estate is protected from unreasonable degradation.

The clear intent of RS 2477 was to memorialize traveled ways across public lands as public highways. As a result of a project to compile RS 2477 trail information the state has solid documentation of the extensive trail system established in Alaska from 1900 through 1940. The proposed regulations should not eliminate the public's option of using these transportation routes.

RS 2477 is extremely important to Alaska. Unlike other states, Alaska is relatively young and sparsely populated, without a highly sophisticated and well-developed transportation system. Its communities are widely scattered over vast, unpopulated areas of land and access is vital to those communities and to the development of the state's resources. Many RS 2477 trails and roads were originally pioneered by dog mushers, miners, teamsters, traders, and trappers, and some have evolved into Alaska's existing transportation network. It is significant that the impact to the environment has been minimal.

Other than grants created by RS 2477, there are only three other principle methods for obtaining rights-of-way and access in Alaska to or through lands managed or previously controlled by DOI in Alaska:

1. Title XI of the Alaska National Interest Lands Conservation Act (ANILCA);

2. Section 17(b) of the Alaska Native Claims Settlement Act (ANCSA); and

3. Title V of the Federal Land Policy Management Act (FLPMA).

During recent exhaustive efforts to complete the state's final land selections under the Alaska Statehood Act, it became obvious that the access provisions in the statutes referenced above, including the repealed RS 2477, do not fully meet the complete access needs of the public, individuals, or agencies seeking to use or manage the vast land and resource base in Alaska. The four laws contain distinctly different access provisions which, in conjunction with the Statehood Act land

selections, provide a barely adequate means of ensuring that future generations will have access to Alaska lands. Therefore, it is important to preserve the RS 2477 process.

Unfortunately, some of the significant access provisions in these statutes, particularly Title XI of ANILCA, are cumbersome and difficult to use, causing these access promises to remain largely unfulfilled.[0] For example, rather than relying on ANILCA's Title XI provisions to establish access to a major zinc deposit in northwest Alaska, the NANA Corporation (a corporation created by ANCSA) instead requested Congress to enact a bill directly providing access. While the eventual success of the NANA Corporation in developing the Red Dog Mine and the Delong Mountain Road is a source of pride in Alaska, NANA's difficulties only serve to underscore the problems associated with obtaining access to Alaska's vast country. The statutes are, to date, largely empty promises. Likewise, due in part to rapid conveyances and narrow interpretations, the easements authorized in section 17(b) of ANCSA have proved an unreliable means of providing access across Native land.

There are other effects of RS 2477 in Alaska. Multiple-use activities in Alaska during the later part of this century have been affected by boat and airplane access due to the size and ruggedness of much of the terrain. Although the advent of aviation in the twentieth century was a blessing in many respects, it probably arrested a significant portion of trail, road and highway development in Alaska. As a result, fewer roads and trails were established than in other states.

In addition, the checkerboard land ownership patterns created by ANCSA and ANILCA and the statutory restrictions in those statutes are unique to Alaska, directly affecting access options and associated multiple-use activities. Therefore, where roads and trails were established, the RS 2477 grants are critical to the ability of residents to continue multiple-use activities.

Limitations on access are also detrimental to federal and state agencies whose ability to continue management associated with fisheries, wildlife, water quality, mining, logging, and tourism is directly related to access. In some instances, access restrictions would deny public use of federal public lands even where the activities are permitted or where those activities further the express purposes of the conservation unit. Because of these limitations on land transportation options, it is crucial that the state retain its right to use RS 2477 grants.

Access issues are extremely important to the State of Alaska. Because Alaska is a young and sparsely populated state and is only now experiencing the kinds of growth and development most states experienced long ago, Alaska's access rights, of which RS 2477 is a key element, must be protected.

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[0] In addition, we understand new regulations under Title XI will be proposed soon which will further limit the use of Title XI.

In sum, the state believes the RS 2477 system in Alaska is important to the future of the state, cannot be replaced by other federal access laws, and through proper management, the impact on the lands will be minimal.

III. State Comments on Federal Policy

A. RS 2477 Access

It is not unreasonable for DOI to determine the RS 2477 routes traversing federal lands under its jurisdiction. A reasonable regulatory scheme to meet that goal would not be opposed by the state. However, it is unreasonable for DOI to attempt to administratively repeal Congressional acts by enacting regulations contrary to Congressional intent. These regulations go too far by replacing longstanding, Congressionally approved, judicial and Departmental interpretations with unreasonably restrictive agency views.

The federal policy should consider that in the Alaska Statehood Act, Congress recognized that natural resources were destined to be the linchpin of Alaska's economy. This congressional viewpoint should be a significant consideration in Interior's dealings with Alaska on RS 2477 and other issues. It is contrary to Congress' intent in both RS 2477 and FLPMA for DOI to interpret RS 2477 counter to one hundred years of case law, forty years of Interior Department regulations and one hundred-ten years of congressional acquiescence. The case law and previous department regulations uniformly hold that as a matter of federal law, state law determines acceptance of the grant and the scope of the right-of-way. The proposed regulations purport to supplant this considerable body of law with regulations clearly restricting Alaska's ability to access its mineral properties.

In enacting RS 2477, the 39th Congress intended to ensure that traditional transportation routes across public lands would be protected. Wherever there was a route used by the public with the intention of getting from one point to another, Congress intended that the public should have a legal right to cross public lands. An example are the routes in rural Alaska. RS 2477 memorializes the routes of travel, trade and commerce between rural Alaskan communities. Interior's restrictive interpretations run counter to congressional intent.

B. Title XI of ANILCA (16 USC 3116 et seq)

Title XI, ANILCA, has been suggested as an alternative method for ensuring access in Alaska. However, Title XI is of limited application because it applies only to conservation system units, i.e., national parks, monuments and preserves, national wildlife refuges, wild and scenic river corridors, National Forest Monuments, wilderness areas, national conservation areas and national recreation areas. Therefore, the process contained in Title XI is not applicable on millions of acres of BLM, National Forest or military lands in Alaska.

In addition, it only supplements existing methods, such as RS 2477, for providing access and/or rights-of-way across conservation system units. 16 USC §3169. Likewise, §1110(b)

(16 USC §3170(b)), also guarantees the owners of "inholdings" the right of adequate and feasible access for economic and other purposes and specifically recognizes that other rights of access may exist.

> The Committee understands that the common law guarantees owners of inholdings access to their land, and that rights of access might also be derived from other statutory provisions, including other provisions of this title, or from constitutional grants. This provision is intended to be an independent grant supplementary to all other rights of access, and shall not be construed to limit or be limited by any other right of access granted by the common law, other statutory provisions, or the Constitution. (House Report 96-97, Part I, p.240. emphasis added)

"Inholdings" for the purposes of Title XI are not simply non-federal property interests which lie within the external boundary of a conservation system unit. The term is specifically defined by §1110(b) as

> [S]tate owned or privately owned land, including subsurface rights of such owners underlying public lands, or a valid mining claim or other valid occupancy [which] is within or is effectively surrounded by one or more conservation unit. . . .

Accordingly, private property or property interests are also considered inholdings for the purpose of Title XI, even if they are located outside the external boundaries of a conservation system unit, where the only "adequate and feasible" access is across the unit.

Given Congress' recognition of other access rights, as referenced above, Title XI only compliments RS 2477 right-of-ways and other means for providing access. Its application is limited. Where an RS 2477 right-of-way or another appropriate statutory authority does not exist, Title XI would have to be used. And, because it is an ineffective and cumbersome means for establishing access, in the 14 years since the passage of ANILCA, not a single right-of-way has been authorized under Title XI. Therefore, it remains to be seen whether Title XI is a truly viable tool for providing access within Alaska's conservation units.

C. Section 17(b) of ANCSA

In enacting ANCSA, Congress created a means for providing public access which has been suggested as an alternative to RS 2477 rights-of-way in Alaska, commonly called the 17(b) easement. Like the Title XI access procedure, these easements complement, rather than replace, the RS 2477 grant. These easements only establish access across specific private lands and are subject to significant limitations.

Authorized by section 17(b) of ANCSA, these easements are designed to provide public access across lands conveyed to Native corporations to state and other public lands and waters. However, a 17(b) easement can only be identified and reserved at the time the lands are conveyed. Experience in recent years has shown that due to the rate at which lands are being conveyed and conveyance patterns, it is not always possible for the state and the public to identify the necessary easements at the time of a particular conveyance. To further complicate the issue, in many instances where an easement is identified and reserved in the conveyance documents, funding shortages have prevented actual location of the easement on the ground. When they are located on the ground, the BLM has found that they are not always useable as reserved.

Additionally, while an RS 2477 right-of-way is irrevocable, a 17(b) easement can be extinguished if it is not used for the purpose for which it was reserved by the date specified in the conveyance, if any, or by December 18, 2001. Finally, a 17(b) easement may be reserved for the future construction of a road only if construction of the road will occur within 5 years of the date of conveyance. This precludes reservation of 17(b) easements as a long range transportation planning tool.

D. FLPMA

FLPMA also provides authority for granting rights-of-way across certain federal public lands. However, just as Title XI is of limited application and utility by only applying to lands within conservation system units, the authorities in FLPMA apply only to BLM managed and National Forest System lands and, therefore, provide no alternative to RS 2477 on other federal lands in Alaska.

In addition, although FLPMA repealed RS 2477, it clearly preserved all RS 2477 rights-of-way created prior to the effective date of FLPMA. This is clearly stated in Sections 509 and 701:

> Section 509 EXISTING RIGHTS-OF-WAY
>
> (a) Nothing in this title shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted.
>
> Section 701 EFFECT ON EXISTING RIGHTS
>
> (a) Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act.
>
> . . .
>
> (h) All actions by the Secretary concerned under this Act, shall be subject to valid existing

rights.

Further, unlike an RS 2477 right-of-way, a right-of-way grant under FLPMA is made for only a specified period of time and only for those purposes specified in the authorization. A FLPMA right-of-way may also be extinguished by the agency if the holder fails to meet certain conditions. The applicant for a FLPMA right-of-way must also post bond, pay rental fees and meet numerous other criteria before authorization is made. Clearly, because of its inherent limits, a FLPMA right-of-way can only be used as an alternative to an RS 2477 right-of-way in limited circumstances.

IV. State Comments On Validity Of Regulations

A. RS 2477 - History and Interpretation

1. Background

RS 2477, formerly codified as 43 USC 932, was enacted as section 8 of the Mining Law of 1866.[1] RS 2477 provided:

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

RS 2477 was repealed by FLPMA on October 21, 1976. Pub.L.No. 94-579, Title VII, Sec. 706(a), 90 Stat. 2793. However, all rights-of-way existing on the date of repeal were expressly preserved. §509(a) and §701 of FLPMA. Similarly all RS 2477 rights-of-way are preserved as "valid and existing rights" under the Alaska Native Claims Settlement Act and under the Alaska National Interest Lands Conservation Act. See Aleknagik Natives, Inc. v. United States, 806 F.2d 924, 926-7 (9th Cir. 1986) and Northern Environmental Center v. Lujan, 872 F.2d 901, 903 (9th Cir. 1989).

RS 2477 was an open ended and self-executing grant by the federal government that could be accepted by public use. Sierra Club v. Hodel, 848 F.2d 1068, 1083 (10th Cir. 1988). The statute was enacted at a time when the national government encouraged expansion and development of public lands. Luchetti v. Bandler, 777 P.2d 1326, 1328 (N.M. App. 1989) (citing Wilkenson v. Department of Interior of United States, 634 F.Supp. 1265 (D. Colo. 1986)). "This suggests that the concept of acceptance by public usage is to be applied liberally." Id.

State courts have recognized "acceptance" of the RS 2477 right-of-way "grant" in numerous ways:

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[1] The Act of July 26, 1866 (14 Stat. 251) was actually titled "An Act granting the Right-of-Way to Ditch and Canal Owners over the Public Lands, and for other Purposes," but is commonly known as the Mining Law of 1866.

1. use (various states, including Alaska);

2. user plus some mode of formal dedication and acceptance (e.g., Nebraska);

3. statutory dedication, such as of section lines, without more (e.g., Kansas, North Dakota, South Dakota, Alaska);

4. construction plus formal dedication (e.g., Arizona).

Upon acceptance of the grant, RS 2477 operates to convey irrevocably a right-of-way to the public across the federal lands. Wilderness Society v. Morton, 479 F.2d 842, 882 (D.C. Cir. 1973).

Case law and DOI's own prior regulations[2] are clear that RS 2477 was an offer to dedicate unreserved public lands for the construction of highways.[3] Dillingham Comm. Co. v. City of Dillingham, 705 P.2d 410 (Alaska 1985). With respect to public lands that were open and unreserved, no federal application for such a right-of-way was required and no notation appeared in land office records.

Although RS 2477 granted a "right-of-way for the construction of highways," in its proper historical context, the "highway" language does not mean a modern public street. The word "highway" was used generically at the time to include any public way, such as a path, wagon road, pack trail, street, alley and other transportation routes common and customary in an area.

2. Legal History of RS 2477 in Alaska

Public trails have historically been an integral element of the Alaskan highway system. See Act of January 27, 1905, as amended, 48 U.S.C.A. §§ 322-325; Act of June 30, 1932, as amended, 48 U.S.C.A. §§ 321a-321d; United States v. Rogge, 10 Alaska 130 (1941); Cf. AS 19.45.001(9).

The Alaska Supreme Court outlined the operation of the statute and the procedure for acceptance of an RS 2477 right-of-way as follows:

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2 From 1938 to 1876 DOI's regulations stated: "[R.S. 2477] grants become effective upon the construction or establishment of highways, in accordance with state laws, over public lands, not reserved for public uses." E.g., 43 CFR 244.53 (1962); 43 CFR 2234.2-5(b) (1970); 43 CFR 2822.2-1 (1974). This regulation has since been repealed.

3 The meaning of the term "highway" in the historical context of RS 2477 is broad and included common and customary transportation routes used by automobiles, off-road vehicles, equipment, snow machines, dog sleds, and any other mode of transportation, including travel on foot. See, e.g., Cincinnati v. White, 33 U.S. 431, 432 (1831).

> The operation of this statute in Alaska has been recognized. The territorial District Court and the highest courts of several states have construed the act as constituting a federal grant of right-of-way for public highways across public lands. But before a highway may be created, there must be either some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept, or there must be public user for such a period of time and under such conditions as to prove that the grant has been accepted.

Hamerly v. Denton, 359 P.2d 121, 123 (Alaska 1961). In Alaska as in other states, use rather than construction of the right-of-way is the focus of the acceptance inquiry.

B. The Interior Department's Proposed Regulations are Impermissible Because They Reverse The Long-Standing Interpretation of RS 2477.

1. The regulations proposed by the Department of the Interior conflict with the long-standing construction of RS 2477

As consistently interpreted by DOI through Solicitor's Opinions[4], Interior Board of Land Appeals decisions[5], the courts,

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[4] Cf. Solicitor's Opinion M-36274, 62 I.D. 158, 161 (1955) which provides: "Section 2477 is an unequivocal grant of the right-of-way for highways over the public lands without any limitation as to the manner of their establishment. The grant becomes fixed when a public highway is definitely established in one of the ways authorized by the laws of the State where the land is located. The act did not specify nor define the extent of the grant contemplated over the public lands, the width of the right-of-way nor the nature and extent of the right thus conferred, both as against the Government and subsequent patentees. Whatever may be construed as a highway under State law is a highway under Rev. Stat. sec. 2177, and the rights thereunder are interpreted by the courts in accordance with the State law. The lands over which the right-of-way is located may be patented to others subject to the easements and in whatever rights may flow to the State and to the public therefrom. (citations omitted)

[5] The administrative decisions of the Department of the Interior have consistently held that the existence of an RS 2477 right-of-way is a question of state law. See e.g. Leo Titus, Sr., 89 IBLA 323, 337 (1985) (existence of RS 2477 to be determined by law of the state in which the public land is located); Edward A. Nickoli, 90 IBLA 273, 275 (1986) (BLM has no jurisdiction to determine validity of RS 2477); Courtney Ayers, 122 IBLA 275, 278 (1992) (adjudication of RS 2477 right-of-way involves questions of

and DOI regulations prior to the proposal of these regulations, RS 2477 operates as follows: legal title to rights-of-way passes to the state upon an act which constitutes acceptance under state law. The regulations proposed by DOI are designed to repeal that long-standing interpretation.

At least since 1938, the Secretary of the Interior has interpreted RS 2477 as granting a right-of-way upon the construction or establishment of a highway in accordance with state law. For example, in 1938 43 CFR 244.55 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. [Par. 55, Circ. 1237a, May 23, 1938]

DOI's interpretation has remained unchanged until these proposed regulations. See, e.g., 43 CFR 244.46, (1943); 43 CFR 244.58, (1952); 43 CFR 2234.2-5 (1970); 43 CRF 2822.2-1 (1974); Southern Utah Wilderness Alliance et al., 111 IBLA (1989) ("[i]t is not the function of Department of the Interior to determine the legal status of roads claimed under RS 2477 by state and local governments . . .").

The federal courts have confirmed DOI's long-standing interpretation of RS 2477. In Sierra Club v. Hodel, the court concluded that the weight of federal regulations, state court precedent, and tacit congressional acquiescence compels the use of state law to define the scope of an RS 2477 right-of-way, 848 F.2d 1068, 1082 (10th Cir. 1989). See also Schultz v. Dept. of Army, 10 F.3d 649, 655 (9th Cir. 1993)(rehearing granted).

DOI's interpretation of RS 2477 has been consistently upheld by both federal and state courts since it was first promulgated over a half century ago. According to the D.C. Circuit in Wilderness Society v. Morton, RS 2477 "acts as a present grant which takes effect as soon as it is accepted by the State." 479 F.2d 842, 882 (D.C. Cir. 1973), cert. denied, 411 U.S. 917 (1973). In fact, the court observed that because "the section acts as a present grant, it is normally not even necessary for the builder of the highway to apply for a right-of-way." Id., 479 F.2d at 882 n.90. As support for its holding, the court cited state court cases dating back to the turn of the century which construed RS 2477 in similar fashion. Id. (citing Kirk v. Schultz, 119 P.2d 266, 268 (Idaho 1941); Koloen v. Pilot Mound Township, 157 N.W. 672, 675 (N.D. 1916); Streeter v. Stalnaker, 85 N.W. 47, 48 (Neb. 1901)).

Passage of the FLPMA in 1976 confirmed the agency's original interpretation of RS 2477. That Act repealed RS 2477

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state law).

altogether but stated that "[n]othing in this subchapter shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted." FLPMA § 509, 43 USC § 769. The savings provision implicitly acknowledged that because RS 2477 rights-of-way vest upon acceptance, they cannot be extinguished or limited by subsequent congressional (or agency) action.

Under DOI's new interpretation of the 1866 Act, however, DOI does not recognize the passage of legal title until DOI makes a determination or a U.S. District Court rules on the existence or scope of a "claim." § 39.4. The regulations would invalidate almost a century of state jurisprudence by ignoring existing state court determinations of the existence and scope of RS 2477 rights-of-way. Id. DOI's proposed regulations are contrary to federal law, because as a matter of federal law, state law is utilized to determine when the grant in accepted and to define the scope of an RS 2477 right-of-way.

2. Administrative reversal of a long-held statutory construction is impermissible.

DOI's long-standing interpretation of RS 2477 has been confirmed by Congress and the courts. DOI may not repeal that interpretation. In Blackfeet Tribe of Indians v. Groff, 729 F.2d 1185, 1191 (9th Cir. 1982), DOI attempted to repeal its "long-term administrative interpretation upholding the right of states to tax oil and gas production on the reservations. . . ." 729 F.2d at 1190. The court rejected the agency's effort, holding that

> [u]nless the original interpretation of the statute by the Department was clearly wrong, . . . it is not appropriate for the Department to reverse its long held construction of a statute.

Id. at 1191.

In a case involving the Treasury Department's construction of the Internal Revenue Code, the U.S. Supreme Court held that as

> [a]gainst the Treasury's prior longstanding and consistent administrative interpretation[,] its more recent ad hoc contention as to how the statute should be construed cannot stand.

United States v. Leslie Salt Co., 350 U.S. 383, 396, 76 S.Ct. 416, 424 (1956). The Court reasoned that

> "administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful."

Leslie Salt, 350 U.S. at 396, 76 S.Ct. at 424 (quoting Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315, 53 S.Ct. 350, 358 (1933)) (citations omitted).

Relying on Leslie Salt, the D.C. Circuit refused to defer to a Bureau of Alcohol, Tobacco, and Firearms regulation which conflicted with a long-standing administrative policy. National Distributing Co. v. U.S. Treasury Dept., 626 F.2d 997,

1019 (D.C. Cir. 1980). The court observed that the new interpretation was "at odds with the interpretation adopted by the Bureau's predecessor agency at least as early as 1949 and maintained by the Bureau until 1974." Id. In adopting the new policy, the court noted that the Bureau failed to thoroughly consider the need for the change and "provided no persuasive reason to believe that its change of heart accurately reflects the intention of Congress." Id.

Where Congress has acquiesced in an agency's interpretation of the law, judicial deference to that interpretation is even more appropriate. See Leslie Salt, 350 U.S. at 396-97, 76 S.Ct. at 424. Rejecting an administrative construction which conflicted with long-standing Department policy, the Supreme Court in Leslie Salt found particularly compelling the fact that the

> original interpretation has had both express and implied congressional acquiescence, through the 1918 amendment to the statute, which has ever since continued in effect, and through Congress having let the administrative interpretation remain undisturbed for so many years.

350 U.S. at 396-97, 76 S.Ct. at 424. See also Blackfeet Tribe of Indians, 729 F.2d at 1190-91 ("the [initial] construction of a statute by the agency charged with its administration is entitled to great weight, especially when, as here, Congress has refused to alter the administrative interpretation").

A presumption of congressional acquiescence arises when Congress is silent in the face of "a notorious, consistent, and long-standing interpretation" by an agency. Sierra Club v. Hodel, 848 F.2d at 1080. According to the Tenth Circuit,

> "[g]overnment is a practical affair intended for practical men. Both officers, lawmakers, and citizens naturally adjust themselves to any long-continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that, in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself, even when the validity of the practice is the subject of investigation."

Sierra Club v. Hodel, 848 F.2d at 1080 (quoting United States v. Midwest Oil Co., 236 U.S. 459, 472-73, 35 S.Ct. 309, 312-13 (1915)).

In this case, Congress confirmed DOI's original interpretation of RS 2477 with regards to the transfer of title when it passed FLPMA. Section 509 of that Act implicitly recognizes that existing rights-of-way under RS 2477 have vested regardless of an administrative or judicial determination of their

existence or scope. The failure of Congress to disapprove DOI's long-standing and well-established reliance on state law constitutes congressional acquiescense. Congress also acquiesced to DOI's reliance on state law to implement RS 2477. The failure of Congress to disapprove DOI's long-standing and well-established reliance on state law constitutes congressional acquiescence.

Federal courts have already considered and rejected use of federal law in place of state law with regards to RS 2477. See Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988); Schultz v. Dept. of Army, 10 F.3d 649 (9th Cir. 1993), reh's granted. When faced with a challenge to DOI's long-standing reliance on state law to implement RS 2477, the Tenth Circuit held that "[t]he federal regulations heavily support a state law definition." Id. The court observed that

> [a]t least since 1938, the Secretary of the Interior has interpreted RS 2477 as effecting the grant of right-of-way 'upon the construction or establishing of highways, in accordance with State laws. . . . BLM, the Secretary's designee, has followed this interpretation consistently and has incorporated it in the Bureau's manual: 'State law specifying widths of public highways within the State shall be utilized by the authorized officer to determine the width of the RS 2477 grant.'

Sierra Club v. Hodel, 848 F.2d at 1080 (citations omitted). DOI may not reverse its long-standing interpretation of RS 2477 especially in light of the congressional acquiescence and judicial confirmation of the original interpretation.

C. DOI's Attempt to Establish an Administrative Process to Adjudicate Rights-of-Way Exceeds Its Statutory Authority.

1. Since the RS 2477 grant occurred prior to 1976, if at all, DOI has no authority to adjudicate those interests.

Cases construing RS 2477 universally state that a right-of-way is "granted" and the grant is self-executing. See, e.g., Sierra Club v. Hodel, supra; Standage Ventures, Inc. v. Arizona, 499 F.2d 248 (9th Cir. 1974). An RS 2477 grant is effective upon "the construction or establishing of highways, in accordance with the State laws." Sierra Club v. Hodel, 848 F.2d at 1078 (quoting 43 CFR §244.55 (1939)). Thus, where the recipient of an RS 2477 right-of-way has accepted the grant, legal title has passed.

Once legal title has passed from the federal government to the interest holder, a federal agency has no authority to adjudicate that interest. See Michigan Land & Lumber Co. v. Rust, 168 U.S. 589, 593, 18 S.Ct. 208, 209 (1897). Considering the Secretary of Interior's authority under the Swamp Lands Act of 1850, the Supreme Court in Michigan Land held that certain lands were susceptible to resurvey because legal title had not yet

passed to the State of Michigan. Id. The Court stated that "the power of the [land] department to inquire into the extent and validity of the rights claimed against the government" ceases when the legal title passes. Id.

> Until the consummation of the title by a grant, the person who acquires an equity holds a right subject to examination. After the issue of the patent, the matter becomes subject to inquiry only in the courts and by judicial proceedings.

Id.; see also Love v. Flahive, 205 U.S. 195, 27 S.Ct. 486 (1907) ("once a patent has issued the jurisdiction of the Land Department over the land ceases, and any right of the government or third parties must be asserted by proceedings in the courts") (citations omitted). The Michigan Land Court added that "a patent is not always necessary for the transfer of the legal title. Sometimes an act of congress [sic] will pass the fee." Id.

Applying this rule to mining claims, the Supreme Court has held that as long as a mining claim is unpatented, the title to the lands in controversy belongs in the United States. Best v. Humboldt Placer Mining Co., 371 U.S. 334, 337, 83 S.Ct. 379, 383 (1963). The court observed that while the Land Department cannot arbitrarily dismiss claims,

> so long as the legal title remains in the government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void.'

Id. Any RS 2477 grant that survived extinguishment under FLPMA was accepted prior to 1976. Thus, those existing grants are perfected and legal title to the right-of-way passed from the federal government. DOI has no authority to adjudicate those interests.

2. Even if legal title does not pass upon acceptance, DOI still lacks authority to adjudicate RS 2477 rights of way.

a. General Authority

DOI's power to promulgate regulations is limited to the authority delegated by Congress. See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208, 109 S.Ct. 468, 471 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress"); see also United States v. United Verde Copper Co., 196 U.S. 207, 215, 25 S.Ct. 222, 225 (1905) ("There is, undoubtedly, ambiguity in the words expressing [the Secretary's power to regulate], but the ambiguity should not be resolved to take from the industries designated by Congress the license given to them, or invest the Secretary of the Interior with the power of legislation").

In Kelley v. EPA, the D.C. Circuit rejected the EPA's

attempt to define and limit a party's liability under section 107 of CERCLA. 15 F.3d 1100 (D.C. Cir. 1994). The court held that the Agency's regulations could not be sustained as legislative or as interpretive rules. The EPA was unable to identify congressional authority to promulgate regulations with the force of law. Id. at 1105. Nor could the Agency rectify the problem by calling the regulations interpretative.[6]

The Kelley court observed that while "Congress implicitly delegated to the agency the authority to reconcile reasonably statutory ambiguities or to fill reasonable statutory interstices," an agency may not exceed that authority. 15 F.3d at 1108. Rather than reconcile ambiguities or fill interstices, the court found that

> EPA does not really define specific statutory terms, but rather takes off from those terms and devises a comprehensive regulatory regimen to address the liability problems facing secured creditors. This extensive quasi-legislative effort to implement the statute does not strike us as merely a construction of statutory phrases. . . .

Id. (citations omitted). Finding no authority for such an effort, the court vacated the regulation.

In this case, DOI is attempting to promulgate legislative regulations. The proposed regulations go far beyond simple construction of the few terms in RS 2477. Like the EPA in Kelley, DOI is making an "extensive quasi-legislative effort" to "devise[] a comprehensive regulatory regimen" without congressional authority. DOI, however, cannot point to a single statute which gives the Department authority to promulgate binding law.

b. Adjudicatory Authority

The authority to adjudicate is distinct from the authority to make rules. Stein, Administrative Law § 14.01 at 14-2 (1993). Administrative adjudication is authorized only by a congressional delegation of judicial power, a delegation identifiable by its statutory and constitutional limits. Id. § 13.01 at 13-7. None of the statutory provisions identified by DOI confer judicial power, nor does RS 2477 set out statutory or constitutional limits for the exercise of judicial power by the Department.

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[6] According to the court, "a rule is legislative if it is "based on an agency's power to exercise its judgment as to how best to implement a general statutory mandate," and has the binding force of law." Id. at 1108 (citations omitted). An interpretive rule "is based on specific statutory provisions . . . and represents the agency's construction of the statute that is--while not binding--entitled to substantial judicial deference under Chevron. . . ." Id.

c. Authority to Regulate Retroactively

Where regulations are retroactive, as here where DOI would invalidate all rights-of-way determined by state courts, the delegation of authority must be explicit. Bowen v. Georgetown Univ. Hosp., 488 U.S. at 208, 109 S.Ct. at 472. In Bowen, the Supreme Court reasoned that because "[r]etroactivity is not favored in the law" and "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result,"

> a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. See Brimstone R. Co. v. United States, 276 U.S. 104, 122, 48 S.Ct. 282, 287, 72 L. Ed. 487 (1928) ("The power to require readjustments for the past is drastic. It . . . ought not to be extended so as to permit unreasonably harsh action without very plain words").

Id., 488 U.S. at 208, 109 S.Ct. at 471-72. The statutory provisions cited by DOI do not contain explicit authority to invalidate decades of state jurisprudence.

3. DOI's proposed regulations contravene existing legislation.

In addition to the absence of statutory authority, the regulations are invalid because they conflict with existing legislation. Rulemaking is ineffective in the face of a contrary legislative enactment. State of Georgia v. Heckler, 768 F.2d 1293, 1299 (11th Cir. 1985), cert. denied, 474 U.S. 1059 (1986) ("This reasoning is in accordance with the well established rule that an agency regulation which conflicts with a statute passed by Congress is without any legal effect"). Regulations proposed by DOI conflict with several statutes--FLPMA and the Quiet Title Act, in addition to RS 2477, itself.

a. FLPMA

Rather than provide supporting authority for the proposed regulations, see Fed. Reg. 39224 (Aug. 1, 1994), FLPMA stands in opposition to the regulations. First, apparently dissatisfied with RS 2477, Congress repealed the 1866 Act. By choosing to repeal the act rather than further refine its operation, Congress indicated that it did not intend for DOI to promulgate regulations to implement the Act. In addition, the absence of any mention of RS 2477 rights-of-way, in the face of FLPMA's specific requirements for recording mining claims, see 43 U.S.C. §§ 1719, 1740, indicates that Congress did not intend that DOI take any action. Second, FLPMA specifically preserves existing rights-of-way. The regulations proposed by DOI, however, extinguish grants which are not adjudicated prior to the expiration of the limitations period.

The decision of Congress to preserve existing RS 2477

grants but repeal the Act confirms that the grant was self-executing and that Congress did not intend for DOI to interfere with the grant. Congress enacted FLPMA to address problems in the existing public lands system, following a thorough review of existing public land laws and regulations that comprised that system. Topaz Beryllium Co. v. U.S., 479 F.Supp. 309, 312 (D. Utah 1979). Had Congress intended to address RS 2477 rights-of-way, it could have easily done so in FLPMA. The conspicuous absence of any attempt to determine the existence and scope of rights-of-ways granted under RS 2477 indicates that Congress did not intend to create an elaborate adjudicative process to identify those claims.

Second, § 39.7 of the proposed regulations provides "any rights purported to have been acquired under RS 2477" are forfeited unless a claim is filed with DOI within 2 years and 30 days. Under this provision, DOI takes away what Congress expressly and without qualification preserved in FLPMA § 509. DOI does not have authority to extinguish rights granted and preserved by Congress without explicit congressional authority.

b. Quiet Title Act and Related Statutes

In addition, DOI's proposed regulations conflict with 28 U.S.C. §§ 2409a and 1346(f) which direct that the district court is the exclusive means to adjudicate quiet title claims regarding the existence and scope of RS 2477 rights-of-way. See Block v. North Dakota, 461 U.S. 273, 103 S.Ct. 1811 (1983) (the Quiet Title Act is the exclusive means to resolve title disputes with the federal government). The proposed regulations invalidly establish an adjudicatory process which creates an unnecessary hurdle for right-of-way holders.

Despite a statement to the contrary, the proposed regulations do not constitute "notice" under 28 U.S.C. § 2409a(k). Under the Quiet Title Act, the twelve year statute of limitations begins to run when a claimant receives notice of the adverse interest of the United States. "Notice" must be by use or "by public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands." 28 U.S.C. § 2409a(k). Because the proposed regulations do not specifically identify which rights-of-way the United States stands adverse to, they do not constitute "'notice' for the purposes of the accrual of an action brought by a State." Id. DOI's novel approach to "notice" of an adverse federal claim under the Quiet Title Act is not supported by statutory authorities or by case law.

D. Comments on Specific Provisions of Regulations

1. 39.2 Applicability and Authority

The specific statutory provisions cited by DOI do not authorize the regulations proposed by the department.

**43 U.S.C. § 1201:** The Secretary of Interior has authority to enforce and "carry into execution" by regulation, every part of the title not provided for. This provision does not give DOI unbridled authority to promulgate regulations. In Anchor

v. Howe, a federal court held that DOI did not have authority under § 1201 to require that an adverse claim be accompanied by a survey completed by an official United States surveyor. 50 F. 366, 367 (D. Idaho 1892). The court observed that

> [u]nder [section 1201] the validity of all departmental regulations which are appropriate, and within the limitations of the law, cannot be doubted. This, however, is not a grant of power to legislate; to add to the law; to render its enforcement difficult; to burden the proceedings under it with unnecessary expense or hardship; or to incumber them with onerous and technical considerations. It is designed that the permitted regulations shall simplify and explain, not embarrass, the administration of the law; and certainly they must not only be appropriate, but they must be reasonable, and within the limitations and intent of the statute. . . .

Id. The court noted that "regulations in conflict with the law are invalid." Id. at 367-68. The court added, however, that even if a regulation is not "in exact conflict with or contradiction of [the law]," it is also invalid if it "enlarge[s]" the requirements of the law. Id.

**43 U.S.C. § 1457:** The Secretary of Interior has a duty to supervise all public businesses related to the subjects and agencies listed in the provision. According to United States v. George, 228 U.S. 14, 33 S.Ct. 412 (1913), this section confers administrative power only. The Court added that "under the guise of regulations legislation cannot be exercised." Id., 228 U.S. at 20, 33 S.Ct. at 414. DOI could not require a land claimant to testify regarding matters in an indictment. The Court reasoned

> [i]f rule 7 (the regulation involved) is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation.

Id. (quoting United States v. United Verde Copper Co., 196 U.S. 207, 25 S.Ct. 222 (1905)).

**43 U.S.C. § 1732(b):** The Secretary may regulate the use, occupancy, and development of the public lands and may act to prevent the degradation of those lands. This section along with § 1740 were enacted as part of FLPMA, the Act which specifically repeals RS 2477 while preserving existing rights-of-way. DOI's assertion that provisions in the very Act which repeals RS 2477 serve to authorize new regulations re-interpreting the non-existent law is illogical.

**43 U.S.C. § 1740:** The Secretaries of Interior and Agriculture shall promulgate rules to carry out the purposes of FLPMA and other laws applicable to the public lands.

**43 U.S.C. § 1782(c):** ("Bureau of Land Management

Wilderness Study") In managing the public lands, the Secretary may promulgate regulations to prevent degradation or environmental harm.

**16 U.S.C. § 668dd:** ("National Wildlife Refuge System") This is a detailed grant of authority to the Secretary for the management of the National Wildlife Refuge System. Subsection (d)(1) authorizes the Secretary to promulgate regulations to "permit the use of any area within the System for any purpose, including but not limited to hunting, fishing, public recreation . . . and access whenever he determines that such uses are compatible with the major purposes for which the areas were established." Where a grant of authority is carefully prescribed, an agency has little room to elaborate. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 96 S.Ct. 1375 (1976) ("when a statute speaks so specifically . . . and when its history reflects no more expansive intent, [the court is] quite unwilling to extend the scope of the statute").

**16 U.S.C. § 460k-3:** The Secretary of Interior may issue regulations to carry out purposes of the subchapter related to national wildlife refuges, game ranges, national fish hatcheries, and other conservation areas administered by DOI for fish and wildlife purposes.

**16 U.S.C. § 3:** The Secretary may issue regulations for the use and management of parks, monuments and other National Park Service reservations.

2. 39.3(d) Definition of "Claimant".

Where a private party is a claimant, the regulation should provide that the state department and the local county or borough with jurisdiction over highways should also be advised of the claim. The state or local government entities may claim that the private claim is in actuality a public road, and therefore the governmental entity with jurisdiction over highways should be notified and involved in the determination of the validity.

3. 39.3(e) Definition of "Construction".

The proposed regulations misinterpret the intent of the Thirty-Ninth Congress by making completed construction an element of an RS 2477 grant. Congress intended that local law should govern whether the RS 2477 offer had been accepted. According to Senator Haskell, a prime mover of FLPMA, completed "construction" was not a requirement for acceptance of an RS 2477 right-of-way. Responding to a question regarding which rights would be preserved in the bill, Senator Haskell answered that:

> "To constitute acceptance of congressional grant of right of way for highways across public lands there must be either use sufficient to establish a highway under laws of the State, or some positive act proper authorities manifesting intent to accept." [quoting Koloen versus Pilot Mound Township, 33 North Dakota 529] In other words, a use or some positive act of proper authorities manifesting intent to use. This is the way I would

> apply this one-sentence enacted in 1866; either there is an actual existing public use, or there is a manifest intent which could be put into action by an application to the Department of the Interior, and they would say "yes." In other words, it is a two-way proposition.

120 Cong. Rec. 22284 (July 8, 1974)(discussing an early version of FLPMA) Accordingly, DOI's regulations should continue to defer to state law to determine if the RS 2477 grant has been accepted and the scope of the right-of-way.

The two methods noted by Senator Haskell by which an RS 2477 grant can be accepted were clearly set forth fifteen years earlier by the Alaska Supreme Court in Hamerly v. Denton, 359 P.2d 121, 123 (Alaska 1961), cited with approval in Wilderness Society v. Morton, 479 F.2d 842, at 883. The first method is a positive act by appropriate state authorities that clearly manifests an intent to accept the grant.

The second method of acceptance is a "public user for such a period of time and under such conditions as to prove that the grant has been accepted." When the grant is to be shown by user, there is a two-step test; "(1) that the alleged highway was located 'over public lands,' and (2) that the character of its use was such as to constitute acceptance by the public of the statutory grant."

Use of the right-of-way for a period of time sufficient to meet the Hamerly test constitutes the historic acceptance of the right-of-way in Alaska. No physical, mechanical modification of the surface is required under this test, nor is "user" synonymous with "construction". Although construction is one method whereby a state could accept the grant under the first Hamerly test because it would "clearly manifest an intent to accept the grant", under the second method, if construction occurred at all as a mechanical physical modification of the surface, it would logically occur at some time in the future.[7] The grant "for the construction of highways" would be accepted and title would have passed to the state prior to actual construction having occurred.

Consistent with its long established policy of applying state law to determine whether an RS 2477 grant had been accepted,

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7 The statutory language, "for the construction of highways", logically implies an act that could be done either at the present or at some future time. Of the 31 uses of "for" as a preposition in the Oxford English Dictionary, 2d Edition, Vol VI (Clarendon Press, Oxford, 1989), the most applicable is "**Of purpose or destination. With a view to; with the object or purpose of: as preparatory. . . . Also, in preparation for or anticipation of.**"

in 1981 the Department decided Nick DiRe, et al.[8]. BLM had denied the application for a private right-of-way across unreserved public lands, holding that an RS 2477 right-of-way had already been established by public use and that "the United States has neither the need nor the authority to issue additional rights-of-way across the lands." The first step in the analysis was to identify the nature of an RS 2477 grant. To do so the panel relied on Limitation of Access to Through-Highways Crossing Public Lands, Solicitor's Opinion 62 I.D. 158, 161 (1955), which states:

> Section 2477 is an unequivocal grant of the right-of-way for highways over the public lands without any limitation as the manner of their establishment. Smith v. Mitchess, 58 Pac. 667 (Wash., 1899). The grant becomes fixed when a public highway is definitely established in one of the ways authorized by the laws of the State where the land is located. State v. Nolan, 191 Pac. 150 (Mont., 1920); Moulton v. Irish, 218 Pac. 1053 (Mont., 1923). The act did not specify nor define the extent of the grant contemplated over the public lands, the width of the right-of-way nor the nature and extent of the right thus conferraed, both as against the Government and subsequent patentees (21 L.D. 354 (1895)). Whatever may be construed as a highway under State law is a highway under Rev. Stat., sec. 2477, and the rights thereunder are interpreted by the courts in accordance with the State law. The lands over which the right-of-way is located may be patented to others subject to the easements and to whatever rights may flow to the State and to the public therefrom. Eugene McCarthy, 14 L.D. 105.(1892).

The IBLA panel first determined that Oregon law applied, and that in Oregon an RS 2477 right-of-way

> "may be created by the acts of the counties and other public bodies as well as by public user sufficient to clearly indicate on intent by the public to accept the dedication."

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8 55 IBLA 151, Decided June 8, 1981. Although this decision is considered as creating an exception to the general rule that state courts are the proper forum for determining whether an RS 2477 right-of-way has been established under state law, it is a limited decision that allows administrative determination of a § 501 application for a private right-of-way. Leo Titus, Sr., 89 IBLA 323, 92 I.D. 578, 587 (1985). It is a clear statement of the two methods that are available to accept an RS 2477 grant.

The panel found no evidence that any public body had taken any action to establish the road in question as a public highway. It then turned to the second method available to determine acceptance:

> "The question is whether there is sufficient evidence in the record of public user to indicate clearly an intent by the public to accept the dedication."

The IBLA panel, like the court in Hamerly, decided that there had been no public acceptance because there had not been sufficient use.

Interior has attempted administratively to eliminate "user" as an alternative method by which the public may have demonstrated its acceptance of an RS 2477 grant. "User" is well-supported in practice and in law as a means of acceptance of the grant, and not simply as evidence that construction has occurred. If construction has not occurred as the physical manifestation of the public's acceptance of the grant, then under the second Hamerly alternative it is a future activity for which the grant and acceptance have taken place. Interior should modify its definition of "construction" to recognize "user", without construction, as one of the means by which a state can demonstrate its acceptance of an RS 2477 grant.

It is interesting to note that the DOI narrative on this section provides that ordinary rules of statutory construction dictate every word in this statute must be given effect. The regulation then goes on to ignore the rule. The words that precede and guide the word "construction" in the statute are ignored - "a right-of-way for the construction . . ." The obvious and reasonable understanding of the phrase "for the construction," conveys that the route does not have to be constructed at the time of the acceptance of the grant. It is and has been common practice to get and dedicate rights-of-way for the construction of highways prior to the formal construction.

4. 39.3(f) Definition of "Highway".

The requirement that an RS 2477 route is currently being used is irrelevant. As a matter of federal law, state law defines the term "highway". Even, if federal law did control, the term should be defined in light of the meaning of "highway" in 1866. See e.g., Burrell's Law Dictionary, (1867); Abbott's, Dictionary of Terms and Phrases Used in American or English Jurisprudence, (1879); Bouvier's Law Dictionary, (1866). The common understanding of "highway" in 1866 was a route for foot, animal, or wheeled travel. In Alaska, foot trails or pack animal trails could result in the acceptance of a grant under RS 2477. The term "thoroughfare" should be replaced with the word "way". "Thoroughfare" is not consistent with congressional intent and may lead to restrictive interpretations of the type of use that results in the acceptance of the grant. "Way" is more consistent

with congressional intent in 1866.

A definition of "highway" which requires evidence of current use misinterprets RS 2477 and FLPMA. Under FLPMA, the only RS 2477 rights-of-way that survive are those which existed prior to 1976. Under state law, the rights were conveyed upon acceptance. DOI's proposed regulations attempt to add a new requirement to a property right which was perfected over 18 years ago.

5.39.3(h), (k), (n), (o) Definitions of "Improvement", "Maintenance", "Routine Maintenance", and "Scope"

As a matter of federal law, state laws control the definition of all of these terms. For example, in Alaska the width of an RS 2477 right-of-way may be ditch to ditch, 60 feet, or 100 feet depending upon the facts of the particular case. Each of these definitions should take into account the applicable state law concerning the width of rights-of-way and the state laws protecting the servient estate from activities conducted on the dominate estate.

6. 39.3(i) Definition of "Judicial Determination".

DOI's refusal to honor state court determinations violates federal law. See Sierra, Schultz.

7. 39.4 Recognition of a Validly Acquired Right-of-Way.

As previously discussed, state courts may determine when a right-of-way was validly acquired pursuant to RS 2477. That determination is made pursuant to state law.

8. 39.5 Interest granted and retained by the United States.

The Department requested comments on the issue of whether these regulations should authorize the U.S. to receive a conveyance of an RS 2477 right-of-way from a claimant or a holder. The language of subsection (a) skews the intent of Congress by assuming concepts that are neither included in nor intended by RS 2477. The first sentence should be amended to read, "Upon acceptance a grantee received a right-of-way for highway purposes". There is no authority for the Department to retain the right to regulate "routine maintenance, construction, use, and operation of the right-of-way". Those rights were given to the state upon acceptance of the grant, so long as those rights are exercised within the scope of the grant. All references to these rights being retained by the United States should be removed.

9. 39.6 Filing process for administrative determination.

Interior has no authority either to require that a claim be filed or to impose a forfeiture if the claim is not filed. Congress has specifically authorized the continued existence of

RS 2477 rights-of-way in FLPMA. Independent of that deficiency, the two-year deadline for filing claims is unreasonable. The state has made a serious effort to document routes that may qualify as RS 2477 rights-of-way in Alaska. Over the past two years, a staff of researchers and adjudicators have investigated approximately 1,000 routes documenting more than 400 likely RS 2477 rights-of-way. We have completely processed only eleven routes out of the 400. Even given another two years, we cannot meet this unrealistic deadline.

10. 39.8 Processing of the RS 2477 claim.

Subsection (e). DOI lacks authority to process existing RS 2477 rights-of-way for the reasons described above. Thus, the state objects to the proposed processing provisions. The Department has specifically requested comments on whether other types of Congressional or administrative determinations, such as a designation of Wilderness Areas or Wilderness Study Areas, should automatically disqualify a claim from consideration in the Department's administrative process. An RS 2477 is a real property interest. Thus, any subsequent designation of Wilderness Area or Wilderness Study Areas may constitute a taking. This "automatic disqualification" would warrant with compensation to the holder of the right-of-way.

Subsection (f). The regulations should reflect that the appropriate standard for any administrative evaluation of claims must be based upon the laws of the state in which the right-of-way is located.

Subsection (g). A fundamental flaw in DOI's approach is evidenced by this subsection. The Department of the Interior is on the one hand attempting to adjudicate the existence of vested real property interests. On the other hand, it appears that DOI will consider public comment on the need and advisability of the particular right-of-way being adjudicated. If the Department desires to adjudicate real property rights it should limit its inquiry to the facts attendant to the acceptance of the RS 2477 grant. Public or agency comment on whether a particular right-of-way is prudent land management is not relevant in an adjudication of real property interests and would render the agency determination or adjudication arbitrary.

11. 39.10 Interim Activity.

Once again, DOI's proposed regulation mischaracterizes the nature of RS 2477. As described above, a right-of-way either does or does not exist. DOI cannot exert control over an existing right-of-way held by someone else.

The State of Alaska reserves the right to identify other defects in the regulations in any future proceeding.