Highway Rights Of Way: The Controversy Over Claims Under R.S. 2477

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ABSTRACT

This report reviews the wording and history of the Congressional grants of rights of way for the construction of highways that is known as "R.S. 2477". It also reviews some of the principal issues, and the administrative and judicial interpretation surrounding those issues.

SUMMARY

In 1866, Congress enacted a grant of rights of way over unreserved public lands for the "construction of highways." The grant originally was section 8 of the Mining Act of 1866, and later became section 2477 of the Revised Statutes (R.S. 2477), then 43 U.S.C. §932, until its repeal in 1976, subject to valid existing rights, as part of the Federal Land Policy and Management Act (FLPMA). Recently a controversy has arisen as to whether and which rights of way still may be claimed under the former grant. The issue is a significant one because such rights of way could still be important to the infrastructure of some states and counties, but could also disrupt management of the federal lands, possibly even resulting in disqualifying areas that are currently considered "roadless" from inclusion in the National Wilderness Preservation System.

In the conference report for the 1993 Appropriations Act for the Department of the Interior, Congress directed the Department to complete a report to Congress on the Act and its implementation, and to submit recommendations for criteria by which to evaluate remaining R.S. 2477 claims.

This CRS report examines the language of the Act and its context, subsequent enactments, and some aspects of the administrative and judicial interpretations of the Act to date.

Because of the surveying system used by the United States, some form of access across federal lands was essential to accomplish the settling of the West. Given the historical position of the federal government in readily permitting individual access across the federal lands, combined with early federal subsidies for major transportation corridors, R.S. 2477 seems to have been intended to grant rights of way for "highways" in the sense of significant roads. This meaning is supported by contemporary dictionaries and by subsequent Congressional enactments, notably the 1885 Unlawful Inclosures Act that guaranteed continued individual access, and by the use of the word "road" in §603 of FLPMA, which is explained in report language as a road improved by mechanical means. It would be incongruous that the lesser term "road" should have this meaning, but that the term "highway" should mean something less.

It also appears that the highways must be constructed to meet the second major element of the statute. The Department implementing the Act has allowed state law on "the construction or establishment of highways" to define how the grant could be accepted. However, this position did not eliminate the requirement that the two elements of construction and highways be met. The acquiescence of the federal government in state court determinations over the years before FLPMA may be more a reflection of the historical context than it is probative of a federal legal position obviating the elements of the 1866 Act. Furthermore, a close reading of the cases indicates that typically the roads in question would qualify under the terms of the Act, and many of the state cases are cited for principles beyond their actual holdings. Therefore, it appears that the government is not precluded from establishing criteria for final R.S. 2477 determinations that comport with the statutory language, although the statute of limitations for contesting such determinations may well have run.

HIGHWAY RIGHTS OF WAY: THE CONTROVERSY OVER CLAIMS UNDER R.S. 2477

INTRODUCTION

In 1866, Congress enacted a grant of rights of way over unreserved public lands for the construction of highways. The grant was originally section 8 of the Mining Act of 1866, which became section 2477 of the Revised Statutes.[1] The grant was repealed in 1976, subject to valid existing rights, as part of the Federal Land Policy and Management Act (FLPMA),[2] an act that modernized management of the public lands. Recently, controversy has arisen as to whether and which rights of way still may be claimed under the former grant. The issue is a significant one because remaining rights of way could be important to the infrastructure of some states and counties, but could also disrupt management of the federal lands, and possibly result in disqualifying areas that are currently considered "roadless" from inclusion in the National Wilderness Preservation System.

Language in the conference report that accompanied the 1993 Appropriations Act for the Department of the Interior and related agencies directed the Department to study and report to the appropriate Congressional committees on the history and certain aspects of R.S. 2477 and other rights of way. The report also is to make recommendations for assessing the validity of R.S. 2477 claims "consonant with the intent of Congress both in enacting R.S. 2477 and FLPMA, which mandated policies of retention and efficient management of the public lands." The report of the Department is due by May, 1993.[3] As part of the process of preparing the report, the Bureau of Land

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[1] Although the provision was later codified until repeal at 43 U.S.C. 932, it generally is known as R.S. 2477.

[2] Pub. L. No. 94-579, 90 Stat. 2744.

[3] H.R. Rep. 901, 102 Cong., 2d Sess. 71 (1992) states:

"Amendment No. 155: Deletes House proposed language that would have prohibited the use of funds to process rights of way claims under section 2477 of the Revised Statutes, as proposed by the Senate.

The managers agree that by May 1, 1993, the Department of the Interior shall submit to the appropriate committees of the Congress a report on the history of rights of way claimed under section 2477 of the Revised Statutes, the likely impacts of current and potential claims of such rights of way on the management of the Federal lands, on the access to Federal lands, private lands, State lands, Indian and Native lands, on multiple use activities, the current status of such claims, possible alternatives for assessing the validity of such claims and alternatives to obtaining rights of way, given the importance of this

Management is compiling historical materials and agency interpretations over the years.

The issues presented are complex, and the current study being conducted by the Department may produce further clarification of many facets of R.S. 2477. This CRS report preliminarily examines the history of roads and rights of way in public land law, analyzes possible interpretations of the right of way grant in question, discusses some aspects of the administrative and judicial interpretations to date, and offers some possible alternatives for resolving some of the R.S. 2477 issues.

Based on a review of the contemporary meaning of the language used in the Act, the history of access and rights of way, and context of the 1866 provision together with subsequent enactments, and the position of the Department over the years, it appears that Congress intended "highways" to mean significant roads, and that such roads had to have been constructed or improved by mechanical means by 1976 to qualify.

BACKGROUND

After the United States acquired the vast territories West of the Mississippi, Congress debated how best to encourage settlement of the lands. Rapid settlement was considered desirable both to secure the new lands from foreign encroachment and to speed the conveyance of lands from federal to state and private ownership in order to build the new nation. Although Congress enacted many piecemeal laws in furtherance of these goals, the westward movement outpaced Congressional efforts at comprehensive legislation. As a result, many explorers, developers, and settlers were already on the western lands by the time the first national homesteading and land laws were enacted.

Mining and mineral development is an example of an area in which federal law was playing "catch up" with events. Private individuals and companies entered upon the federal public domain lands in search of mineral wealth before there was legislated authorization to do so. Sometimes the influx of miners was quite significant, as when thousands of miners flocked to California after the

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study to the Western public land States. In preparing the Report the Department shall consult with Western public lands States and other affected interests.

The managers expect sound recommendations for assessing the validity of claims to result from this study, consonant with the intent of Congress both in enacting R.S. 2477 and FLPMA, which mandated policies of retention and efficient management of the public lands.

Such validity criteria should be drawn from the intent of R.S. 2477 and FLPMA.

The managers further expect that any proposed changes in use of a valid right of way shall be processed in accordance with the requirements of applicable law."

discovery of gold in 1849. Because in many areas even territorial governments had not yet been established, claimants developed local rules and customs to govern the location (establishment) of mining claims and priorities among claimants.

In the 1860's, Congress enacted several pieces of legislation that both legitimized existing occupations of the federal lands and addressed their use prospectively. One of these was the Homestead Act of 1862[4] which provided a system by which citizens could obtain title to public lands for agricultural settlement purposes. The Mining Act of 1866[5] provided an initial system for the recognition of mining claims and for obtaining title to the lands on which mining claims were established. Section 8 of the 1866 Act provided:

> *And be it further enacted,* That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.[6]

This provision became section 2477 of the Revised Statutes (R.S. 2477) and later was codified as 43 U.S.C. §932 until its repeal by FLPMA, an act that repealed many previous land laws and put in place a new, comprehensive system for the retention and management of the federal public lands. Title V of FLPMA sets out new provisions for the granting of all kinds of rights of way. Section 706 of FLPMA repealed R.S. 2477 in its entirety, and repealed as to issuance of rights of way almost all other rights of way statutes. However, section 701 states that nothing in the Act terminates any valid right of way existing on the date of approval of the Act. Similarly, section 509 of FLPMA states that nothing in Title V on rights of way "shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted." Therefore, R.S. 2477 rights of way that were valid on October 22, 1976, the effective date of FLPMA, were protected.

After the repeal of R.S. 2477, the Bureau of Land Management issued a regulation permitting persons, or state or local governments who had constructed public highways under the authority of R.S. 2477 to file maps with BLM showing the locations of highways claimed to be valid existing rights.[7]

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[4] Act of May 20, 1862, ch. 75, 12 Stat. 392, as amended.

[5] Act of July 26, 1866, ch. 262, 14 Stat 251.

[6] *Id.*, 14 Stat. 253.

[7] *See* proposed regulations for 43 C.F.R. §2802.3-6 at 45 Fed. Reg. 44518, 44521, 44531 (July 1, 1980); and final regulations for 43 C.F.R. §2803.5 at 47 Fed. Reg. 12568, 12570 (March 23, 1982).

A 1988 Departmental Policy Statement set out generous terms for claiming R.S. 2477 rights,[8] and at the same time there was a growing awareness that claiming such roads might disqualify areas previously considered "roadless" from being eligible for inclusion in the National Wilderness Preservation System. Therefore, controversies arose as to which roads still might be claimed as R.S. 2477 rights of way, even though the statute of limitations for suits to quiet title to disputed claims arguably has run.

R.S. 2477 highway grants played an important role in the development of the West; many developed roads in the West today originated as R.S. 2477 roads. However, it is essential to note that R.S. 2477 rights of way are not now, nor were they ever, the only type of road or access allowed across federal lands. In any particular instance, a denial of a R.S. 2477 right of way is not dispositive of whether and how a road or other access was or may now be recognized or permitted.

Because R.S. 2477 was a federally enacted grant, questions involving its proper interpretation are questions of federal law.[9] There are times when federal law incorporates state law as part of the law to apply; this is expressly true of the mining law provisions in the rest of the 1866 Act. In interpreting the right of way grant, it appears that some aspects may be defined by state law, but the parameters within which state law applies are subject to debate, as will be discussed later in this report.

The next section of this report will examine afresh the statute itself, the historical context in which it was enacted, and proffer a possible interpretation.

1866 ACT

It is a fundamental rule of statutory construction that every issue of statutory interpretation should begin with a close textual examination,[10] and that the "plain meaning" of a provision must guide its interpretation.[11] The provision reads:

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[8] *Departmental Policy Statement on Section 8 of the Act of July 26, 1866, Revised Statute 2477 (Repealed), Grant of Right-of-Way for Public Highways (RS2477)*, December 7, 1988 ("1988 Policy Statement").

[9] Hughes v. Washington, 389 U.S. 290 (1967); United States v. Oregon, 295 U.S. 1, 27-28 (1935).

[10] Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976), quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975).

[11] *See*, INS v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12 (1987); TVA v. Hill, 437 U.S. 153 (1978). W.Va. Div. Izaak Walton League, Inc. v. Butz, 367 F. Supp. 422, 429 (1973), *affirmed* 522 F. 2d 945 (4th Cir. 1975).

> *And be it further enacted,* That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

Succinct though the section is, it is clear that R.S. 2477 is a grant; is a grant for the construction of something; and it is a grant for the construction of highways across unreserved lands.

Because the purpose of the grant -- for highways -- sheds light on what Congress might have meant by "construction", the term "highways" will be examined first.

In most discussions of R.S. 2477, there is a tendency for speakers to use "highway" and "road" interchangeably, or to substitute other words such as "ways" or even "trails" and cease to refer to "highways" at all. This is a significant shift in emphasis. There appears to be a distinction between "highway" and "road", and between "road" and still lesser terms, such that only "highways", the term chosen by Congress, should properly be used.

Like many words in the English language, the term "highway" has had more than one meaning; unfortunately, two of its meanings have somewhat opposite connotations. Although it is not one of the principal definitions of the term, at times the term highway was sometimes used generically to indicate *any* avenue of travel open to the public, even such non-ground transportation routes as rivers.[12] Congress has used the term in this sense when it has referred to rivers being free highways.[13]

However, American dictionaries published near the time of enactment of R.S. 2477, do not define highway as the generic term for a travel corridor of any kind. Rather, they use "road" as the more generic term, and "highway" (at least in the context of ground transportation), to mean a more significant road. In

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[12] *See*, Black's Law Dictionary, 4th Ed. 862 (1968), which points out both meanings and states: "The generic name for all kinds of public ways, whether carriage-ways, bridle-ways, foot-ways, bridges, turnpike roads, railroads, canals, ferries or navigable rivers .... There is a difference in the shade of meaning conveyed by two uses of the word. Sometimes it signifies right of free passage, in the abstract, not importing anything about the character or construction of the way. Thus, a river is called a "highway;" and it has been not unusual for congress (sic), in granting a privilege of building a bridge, to declare that it shall be a public highway. [On the other hand], it has reference to some system of law authorizing the taking of a strip of land, and preparing and devoting it to the use of travelers. In this use it imports a roadway upon the soil, constructed under the authority of these laws." (Citations omitted.)

[13] *See*, Act of March 3, 1811, ch. 46, 2 Stat. 606, R.S. 5251, 33 U.S.C. §10, which states that "All the navigable rivers and waters in the former Territories of Orleans and Louisiana shall be and forever remain public highways."

which sense Congress used the term is obviously of great significance in interpreting R.S. 2477.

According to the 1865 Webster's Dictionary, a "road" is

> a riding, a riding on horseback, that on which one rides or travels, a trackway, a road, from *ridan*, to ride ....
>
> a place where one may ride; an *open way* or public passage; *a track for travel*, forming a communication between one city, town, or *place*, and another.[14]

According to the same 1865 dictionary, a "highway" is a public road, a way open to all passengers.[15]

The 1860 Webster's Dictionary also indicates that "road" is the general term for any ground appropriated for travel, while "highway" is a significant type of road:

> Road: an *open way* or public passage; *ground appropriated for travel*, forming a communication between one city, town, *or place*, and another. The word is generally applied to highways, and as a generic term it includes highway, street and lane .... [16]
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> Highway: a public road; a way *open to all* passengers; so called, either because it is a *great or public* road, or because the *earth was raised* to form a dry path. Highways open a communication from one *City or town* to another.[17]

Comparing these definitions, it appears likely that it was the understanding of the Congress in 1866 that in the context of ground transportation at least, a highway was a significant type of road; namely, one that was open for public passage, received a significant amount of public use, had some degree of construction or improvement, and that connected cities, towns, or other significant places, rather than simply two places. It is especially interesting to note that some degree of constructed improvement typically inheres in the concept of a highway in order to support the greater public use that characterizes such roads. Of course, it must be kept in mind that highways in

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[14] Webster's *American Dictionary of the English Language*, 1143 (1865). (Emphasis added.)

[15] *Id.*, at 627.

[16] Webster's *American Dictionary of the English Language*, 959 (1860). (Emphasis added.)

[17] *Id.*, at 552. (Emphasis added.)

times past were not 6-lane paved roads, and that the historical amount and type of travel in an area and era must be taken into account in evaluating what qualifies as a great, public, improved road.

Although the terms at times are used interchangeably, "roads" appears to be the more general term and "highways" the more specific term. In other words, while all highways are roads, not all roads are highways, since highways are a public and more significant kind of road.[18]

That the understanding of Congress in 1866 was probably of highways in the sense of significant public roads is supported by the historical context in which the 1866 Act was passed,[19] and by Congressional enactments since.

There is no legislative history that sheds light on why Congress included the highway grant as section 8 in the Mining Act of 1866 (Act), or on exactly what Congress intended by the language of the section.

The Mining Act of 1866 established a system for the recognition of several practices that had been taking place on public domain lands. Some of the provisions directly addressed mining, other provisions related to the use of water and to rights of way. These latter provisions addressed practices that were related to mining, but had implications beyond the mining context. The Act legitimized mining claims in accordance with federal laws or regulations, state and local law, and even the local customs of miners, and provided that claimants could obtain full title to the lands on which mining claims were located. Because water was necessary for some types of mining, the Act acknowledged rights to use water, if such rights were recognized by local customs, laws, and the decisions of courts, and the act also confirmed established rights of way for ditches for the transport of water. As noted, section 8 of the Act granted the highway rights of way in question.

The principal focus of the floor debates on the Act was on the alternative proposed systems for disposing of the mineral lands of the United States, and section 8 was not discussed.[20]

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[18] This distinction is still evident in modern usage: the 1977 Webster's New Collegiate Dictionary defines "highway" as "a public road, *esp. a main direct road.*" (Emphasis added.)

[19] Ute Indian Tribe v. Utah, 521 F. Supp. 1072, 1080, 1087 (C.D. Utah 1981).

[20] Rep. Julian, Chairman of the House Committee on Public Lands had introduced H.R. 322, a bill to sell the mineral lands of the United States in 40 acre parcels. This bill as introduced and as reported did not contain a right of way provision. (*See*, H.R. Rep. 66, 39th Cong., 1st Sess. (1866).) S.257 also proposed a system that regulated the occupation of mineral lands, extended preemption rights to claimants, and allowed the acquisition of full fee title to lode claims. Section 8 was not in S. 257 as introduced, but was section 10 of the

Therefore, in seeking clarification of the intent of Congress in enacting R.S. 2477, we can look only to the words Congress actually used and to the historical context in which they were enacted.

HISTORICAL CONTEXT

Roads and access were fundamental problems implicit in the surveying system the federal government used to divide and dispose of public lands. The federal government applied the same system of surveying since the Continental Congress passed the Land Ordinance of 1785, that was later enacted by the new federal government.[21] Under this system, a principal meridian, base, standard and guides were first measured and marked, and "townships" squares six miles on a side were surveyed. The township tracts were then divided into "sections" one mile on a side, each of which contained 640 acres (the amount of land allowed under the Stock-Raising Homestead Act of 1916). These sections were divided into halves (the 320 acres allowed under the Desert Land Entry Act of 1877), or further divided into quarters (the 160 acres allowed under the Homesteading Act of 1862), or smaller subdivisions allowed under certain other acts.

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bill as reported from the Senate Committee on Mines and Mining. No committee report is available on this measure. Note that when section 5 of the final Act was proposed as an amendment on the floor of the Senate it was defeated by a vote of 21-10. Section 5 recognizes the operation of state law in defining certain aspects of miners' rights, including "easements". This provision was included in the final version. It is not known what was intended by state law allowing "easements", or whether any states enacted laws allowing access easements to mines on federal lands. The title of the Senate bill was amended to read: "A bill to legalize the occupation of mineral lands and to extend the right of preemption thereto."

When S. 257 reached the House, Rep. Higby attempted to have it sent to the Committee on Mines and Mining, but Rep. Julian succeeded in having it sent to his Committee on Public Lands, where it languished.

The Senate then amended H.R. 365, a bill to grant rights of way to ditch and canal owners in California, Oregon and Nevada, to substitute the text of S. 257. H.R. 365 did not originally contain a provision like section 8. That measure was sent to the House on a Saturday afternoon and was brought up under a rule precluding debate. Rep. Julian protested this "plot to obtain legislation under false pretenses" as a "reproach to public decency and common fair play". CONG. GLOBE, 39th Cong., 1st Sess. 4049 (1866). Rep. Julian attempted to amend the bill to substitute a system such as that in his bill, H.R. 322, again without a right of way section. This amendment was defeated and the Senate version was passed 73 to 37.

See also, the discussion of the enactment of the 1866 act in: Paul W. Gates, *History of Public Land Law Development*, 715-721.

[21] Act of May 18, 1796, c. 29, 1 Stat. 464.

These sections and blocks available for settlement and disposal were absolute, that is each surveyed subdivision abutted the next one without access corridors intervening. This practice, combined with the fact that many sections of lands were granted to the states and other entities for school and other public purposes to spur development, resulted in "checkerboard" land patterns and meant that access needs were a pressing exigency. Congress did not resolve the issue, choosing instead to acquiesce in whatever access solutions developed on unreserved federal lands. Access problems typically were resolved among settlers as the local topography and circumstances indicated; usually, settlers simply created roads and ways across lands as needed. Subsequent settlers took title subject to established roads and ways.[22] Later, as areas became more developed, access needs were resolved by negotiation and purchase of the necessary rights. Given the intermingled patterns of land ownership, establishment of roads was typically of mutual benefit, which apparently facilitated resolution of this difficulty that was inherent in the survey system. Territorial and state laws also played a role in the resolution of access and roads issues, as will be discussed.

A court has discussed the problem caused by the surveying system as follows:

> [The sections] touch at their corners and their points of contact, like a point in mathematics, are without length or width. If the position of the company were sustained, a barrier embracing many thousand acres of public lands would be raised, unsurmountable except upon terms prescribed by it. Not even a solitary horseman could pick his way across without trespassing. In such a situation the law fixes the relative rights and responsibilities of the parties. It does not leave them to the determination of either party. As long as the present policy of the government continues, all persons as its licensees have an equal right of use of the public domain, which cannot be denied by interlocking lands held in private ownership.[23]

In an 1890 case the Supreme Court declined to enjoin sheepherders from driving sheep across sections owned by plaintiffs in order to reach open public lands, stating:

> We are of the opinion that there is an implied license growing out of the custom of nearly a hundred years, that the public lands of the United States ... shall be free to the

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[22] Surveyors were to note all existing roads and trails on their field notes and final surveys. *See*, the 1889 instructions of the Commissioner of the General Land Office, in C. Albert White, *A History of the Rectangular Survey System*, 574 (1982).

[23] Mackay v. Uinta Development Co., 219 F. 116, 118 (8th Cir. 1914).

> people who seek to use them where they are left open and unenclosed, and no act of government forbids this use ....
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> The whole system of the control of the public lands of the United States as it had been conducted by the Government, under acts of Congress, shows a liberality in regard to their use which has been uniform and remarkable.[24]

The Court, in the course of distinguishing between access rights the federal government might have retained and those of settlers in the context of a federal land grant for the construction of a railroad, also stated:

> Congress obviously believed that when development came, it would occur in a parallel fashion on adjoining public and private lands and that the process of subdivision, organization of a polity, and the ordinary pressures of commercial and social intercourse would work itself into a pattern of access roads .... It is some testament to common sense that the present case is virtually unprecedented, and that in the 117 years since the [railroad] grants were made, litigation over access questions generally has been rare.[25]

It is interesting to note that an 1895 Solicitor's opinion found that the government has always allowed miners to build access roads without either a permit or the payment of a fee:

> Since it has traditionally been customary for mining locators, homestead and other public land entrymen to build and/or use such roads across public lands other than granted rights-of-way as were necessary to provide ingress and egress to and from their entries or claims without charge, the question whether a fee may be charged for such use is not only of broad, general interest but to make such a charge now would change a long practice.
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> ... Congress knew, when it enacted the mining laws, that miners necessarily would have to use public lands outside of the boundaries of their claims for the running of tunnels and for roads.

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24 Buford v. Houtz, 133 U.S. 320, 326-327 (1890).

25 Leo Sheep Co. v. United States, 440 U.S. 668, 686-687 (1979).

> The Department has recognized that roads were necessary and complementary to mining activities....[26]

The opinion never mentioned section 8 of the 1866 Mining Act (R.S. 2477) as relevant to the discussion of mining road access, a fact that argues for an interpretation that section 8 was speaking of roads other than mere access roads.

To summarize, the federal government made no specific provision for individual or public access or roads as part of its surveying and disposal systems, but consistently allowed the use of the public lands for roads and other access ways -- both before and after the 1866 Act.

If the 1866 Act is read to mean highways in the generic sense of all kinds and types of ways rather than significant roads, the act arguably was superfluous since the federal government at that time was allowing such use without requiring any permits or attaching any management significance to doing so. On the other hand, one could argue that the 1866 provision was intended to legitimize all transit and access routes across the public domain. Obviously, however, this reading raises significant difficulties in reconciling Departmental interpretations and in ascertaining who the holders of such grants might be, who could claim the rights, articulate the scope, or maintain and regulate the granted rights of way.

The other meaning of "highways" -- significant public roads -- avoids many of these difficulties and arguably is more consistent with other measures Congress enacted that both addressed continued easy individual access on the one hand and the development of significant transportation corridors on the other.[27]

In the Unlawful Inclosures of Public Lands Act of 1885, Congress regulated the fencing off of public lands (even when the fences were on private lands[28]) and the obstruction of free access to the lands. On the subject of obstruction of access Congress provided:

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[26] Opinion of Edmund T. Fritz, Acting Solicitor, M-36584, 66 I.D. 361, 362, 364 (1959). The granted rights of way referred to are those for tram roads and other purposes under the act of January 21, 1895, 28 Stat. 635.

[27] One of the leading cases cited for the principle that an R.S. 2477 road can be established by public use alone, actually distinguished between the *origin* of the road "by the passage of wagons, etc., over the natural soil", and the later status of the road as a *public highway* laid out and declared by the county in 1859, and ever since maintained, that served as one of the main arteries of travel. Central Pacific Railway v. Alameda County, 284 U.S. 463, 465-467 (1932)

[28] Camfield v. United States, 167 U.S. 518 (1897).

> No person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands: *Provided*, This section shall not be held to affect the right or title of persons, who have gone upon, improved, or occupied said lands under the land laws of the United States, claiming title thereto, in good faith.[29]

If R.S. 2477 granted rights of way for all forms of access roads, it is difficult to see why Congress enacted the Unlawful Inclosures Act in 1885. If R.S. 2477 granted rights of way for highways in the sense of significant public roads, the 1885 Act is more easily reconciliable because it speaks to continued unimpeded individual access across the public lands.

During the time of settlement of the new national lands to the West, Congress also provided land grants for the construction of important transportation routes by canals, railroads, or "wagon roads". These grants, including those made for wagon roads, typically were for the construction of particular routes between named destinations, with some legislated detail as to the type and timing of construction. Such grants typically included grants of lands sufficient both for the bed of the transportation route itself, and extra lands to be sold so that the proceeds could be put toward completing the work. If construction did not occur, there typically was language providing for the reversion of the lands to the United States.

Several statutes enacted before 1866 provided for wagon roads, which were to be large, well constructed roads adequate for the movement of troops and the mail. They were typically required to be built to very substantial standards, involving considerable earth-moving activities, even to the extent of leveling hills. For example, several acts specified an overall right of way 6 rods wide with the

> road-bed proper to be not less than thirty-two feet wide, and constructed with ample ditches on both sides, so as to afford sufficient drains, with good and substantial bridges and proper culverts and sluices where necessary. All stumps and roots to be thoroughly grubbed out between the ditches the entire length of said road, the central portion of which to be sufficiently raised to afford a dry road-bed by means of drainage from the centre to the side ditches; the hills to be

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[29] Act of February 25, 1885, ch. 149, 23 Stat. 321, codified at 43 U.S.C. §§1061, 1063.

> levelled and valleys raised so as to make as easy a grade as practicable.[30]

Some of these statutes provided simply that the roads were to be "public highways"; others stated that the road must remain a public highway "for the use of the government of the United States, free from tolls or other charge upon the transportation of any property, troops, or mails of the United States."[31]

It is important to reiterate that the problem of securing access and constructing roads throughout the federal public lands subject to the surveying system existed and had been resolved for almost a century before Congress enacted R.S. 2477. Before and after R.S. 2477, the federal government tolerated the creation of access ways and roads across its open lands; settlement was the sole interest of the federal government in the eighteenth and nineteenth centuries, and allowing individual access was such a given factor that it is seldom discussed. Even after enactment of R.S. 2477, the principal work that reviews federal land grants does not discuss access issues, nor even mention the 1866 provision.[32]

After enactment of R.S. 2477, Congress adopted many other rights of way provisions for various types of rights of way, especially with respect to crossing federal reservations. This potpourri of other rights of way acts argues again for an interpretation of the 1866 Act as *not* meaning generic ways of all types, but rather as referring to significant roads.

Before enactment of R.S. 2477, in addition to acquiescing in the creation of individual access, Congress had authorized and made land grants for the construction of transportation arteries, including large, well constructed roads in some instances. We have found only one land grant for a wagon road enacted after the enactment of the 1866 Act. It is arguable that, since the federal government continued to acquiesce in the creation of access ways to individual properties as settlers spread westward, perhaps R.S. 2477 was an express grant of rights of way for all more significant roads -- those "highways" that were to be open to the public, to serve as important connectors, and that were to involve some degree of construction to support such use.

Therefore, at the time of the enactment of the 1866 Act, one sees a federal policy of acquiescence to and protection of acquisition of routine private or individual rights of way on the one hand, together with a policy of subsidizing through land grants major transportation arteries -- whether canals, railroads,

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30 Act of June 25, 1864, ch. 153, 13 Stat. 183.

31 Act of July 2, 1864, ch. 213, 13 Stat. 355.

32 Thomas Donaldson, *The Public Domain. Its History, with statistics*, (1884). This work of 1,343 pages discusses only land grant wagon roads and railroads, but does not mention normal access roads.

or large wagon roads suitable for defense purposes. Congress then granted rights of way for the "construction of highways".

In 1872, Congress revisited the mining issues and modified many of the provisions of the 1866 Act.[33] The 1872 Act did not change section 8 of the 1866 Act on rights of way, and there is no discussion of the section or its retention in the legislative history of the 1872 Act.

In 1899, Congress enacted a provision of permanent law as part of an appropriations act:

> That in the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad, *or other highway* over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby.[34] (Emphasis added.)

On the face of this provision, Congress arguably again used "highway" to indicate significant types of transportation corridors. The legislative history of the provision is inconclusive.[35]

Section 603 of FLPMA in 1976 directed the BLM to conduct a wilderness suitability review of the large roadless areas under its management. Although "roadless" was not defined in the statute, the section by section discussion in the House report clarifies that:

> The word 'roadless' refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road ....[36]

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[33] Act of May 10, 1872, ch. 152, 17 Stat. 91.

[34] Act of March 3, 1899, ch. 427, 30 Stat. 1214, 1233, codified before repeal at 16 U.S.C. §525 re national forests and 43 U.S.C. §958 re reservoirs.

[35] The discussion focused on a railroad issue, and its sponsor, Sen. Carter, indicated that the 1897 Organic Act for the national forests already authorized "highways" across national forests, but that the Secretary of the Interior had interpreted that as not including railroads. In fact, the act in question had authorized ingress and egress and "wagon roads" necessary to reach settlers homes, and did not use the term highway. 32 CONG. REC. 2800 (1899).

[36] H.R.Rep. 1163, 94th Cong., 2d Sess. 17 (1976). An 1980 opinion by Deputy Solicitor Ferguson to Assistant Attorney General Moorman states that the transcript of the House Committee markup session reveals that Congressman Steiger of Arizona suggested the definition of "road" that appears

The explanation set out in the Committee report was reflected in the regulations implementing the wilderness review, which defined roadless areas in part as areas within which there is no improved road that is suitable for public travel by means of four-wheeled, motorized vehicles intended primarily for highway use.[37]

The Wilderness Inventory Handbook, prepared to assist personnel with completing the wilderness suitability inventory, adopted the Committee report language as the definition of "road", and also defined several other relevant terms in connection with evaluating roads:

> "Improved and maintained" -- Actions taken physically by man to keep the road open to vehicular traffic. "Improved" does not necessarily mean formal construction. "Maintained" does not necessarily mean annual maintenance.
>
> "Mechanical means" -- Use of hand or power machinery or tools.
>
> "Relatively regular and continuous use" -- Vehicular use which has occurred and will continue to occur on a relatively regular basis. Examples are: access roads for equipment to maintain a stock water tank or other established water sources; access roads to maintained recreation sites or facilities; or access roads to mining claims.[38]

Additional explanatory material also stated that:

> A route is not a road if no tools -- either hand or machine -- have been used to improve or maintain it. The intent of the definition of the phrase "mechanical means" in the inventory handbook is that it refers to hand machinery, power machinery, hand tools, or power tools. Sole use of hands or

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in the House Report. Arizona is an arid state where "ways" can be created and used as roads merely by the passage of vehicles, and Congressman Steiger took some pains to draw the distinction between such a "way" and a "road" for wilderness purposes. The latter, he insisted, was any access route improved or maintained in any way, such as by grading, placing of culverts, or making of bar ditches. Transcript of Proceedings, Subcommittee on Public Lands of House Committee on Interior and Insular Affairs, Sept. 22, 1975, at 329-333. Cases typically accord considerable weight to committee reports in interpreting statutes, because they are considered the most reliable and persuasive element of legislative history. Thornburg v. Gingles, 478 U.S. 30, 43 n. 7 (1986).

[37] 43 C.F.R. §19.2.

[38] USDI, Bureau of Land Management, *Wilderness Inventory Handbook*, 5 (September 27, 1978).

> feet to move rocks or dirt without the use of tools or machinery does not meet the definition of "mechanical means."[39]

Other sections of FLPMA repealed R.S. 2477 and other rights of way statutes and replaced them with a new system of rights of way that integrated such rights better with the new planning processes required by FLPMA and which better protected the federal lands and resources. Congress undoubtedly was aware of R.S. 2477 when it used and commented on the term "roadless".

It would seem incongruous, given this 1976 use of the term "road" as an improved way, to maintain that the more significant term "highway" in fact meant something less than a road. If the term "road" in 1976 connoted to Congress a way that had been "improved and maintained by mechanical means to insure relatively regular and continuous use," this is consistent with an 1866 definition of highway as a constructed and improved road that served as a significant public connector.

Given the rules of statutory interpretation that statutes are to be construed in a manner that makes them consistent and harmonious,[40] and that statutes over time should be construed so that effect is given to every provision in all of them,[41] it appears most correct to give "highways" in the 1866 highway grant its then-preferred and ordinary meaning as referring to significant public roads. Reading "highway" and "road" together, highways would be roads that were improved and maintained by mechanical means to insure relatively regular and continuous use, that were used regularly by the public, and that served as important connectors, such as by connecting towns and villages.

ADMINISTRATIVE AND JUDICIAL INTERPRETATION

With this look at the language and historical context of the 1866 Act in mind, we turn now to the administrative and judicial interpretation of the provision. Some of this interpretation to date is at odds with the above analysis in several respects.

The federal government historically seems to have adopted a position of benign neglect of R.S. 2477. No application or approval from the government was considered necessary to perfect a grant. Although we know of no contemporaneous agency interpretation of the Act, a 1938 regulation that was

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[39] Organic Act Directive No. 78-61, Change 2, at 4 (June 28, 1979).

[40] Allen v. Grand Central Aircraft Co., 347 U.S. 535 (1954); Peters v. City of Shreveport, 818 F. 2d 1148 (5th Cir. 1987); United States v. Carr, 880 F. 2d 1550 (2d Cir. 1989).

[41] *See,* Sutherland, *Statutory Construction*, 5th Ed. §51.02 and cases cited n. 11 at 129.

repeated over time simply stated that a highway grant became effective "upon the construction or establishing of highways in accordance with the State laws."[42] We note, however, that this position retains the crucial statutory elements of "construction" and "highways", and does not mean that state interpretations that change or eliminate these elements in a way that no longer comports with the intent of Congress as to R.S. 2477 are necessarily valid. This issue will be more fully discussed later.

Too much can be read into this silence of the federal government. In reviewing the cases, it is important to distinguish those decided before FLPMA, when the federal government had much less interest in the validity or existence of rights of way of *any type* across its lands.[43] For much of the time before the enactment of FLPMA it may well simply not have mattered whether a particular right of way was a highway that qualified under R.S. 2477, or was some other type of road for which some other federal permission could readily be obtained.

Over the years, federal policies increasingly stressed retention of the public lands in national ownership and the conservation and protection of the federal lands and resources increasingly became the federal policies. In 1976, both FLPMA and a comprehensive statute governing planning and management of the national forests were enacted. These two acts modernized the management of the majority of federal lands. As noted, FLPMA expressly recognized a policy of retention of the remaining public lands together with management to preserve their scientific and ecological values and to prevent unnecessary and undue degradation.[44] FLPMA also repealed many of the piecemeal right of way statutes, including the 1866 Act.

Therefore, early state cases not involving the federal government are questionable precedent for testing the validity of R.S. 2477 claims now, not because the criteria for testing validity have changed, but because the context in which the inquiry arises has changed. Because before FLPMA there was no reason to focus on this issue, arguably the past failure of the federal government to litigate R.S. 2477 claims is more indicative of the historical context and past federal policies regarding rights of way than it is probative of a particular federal legal position on R.S. 2477. In any event, Congress ended past practices and policies in 1976.

After the repeal of R.S. 2477, the Bureau of Land Management issued a regulation permitting persons, or State or local governments who had constructed public highways under the authority of R.S. 2477 to file maps with BLM showing the locations of highways claimed to be valid existing rights. The regulation states that the filings were not conclusive as to the existence or non-

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[42] Par. 55, Circ. 1237a, May 23, 1938; 43 C.F.R. §244.55.

[43] *See*, Wilkenson v. Dept. of Interior of United States, 634 F. Supp. 1265, 1274-1275 (D. Colo. 1986).

[44] 43 U.S.C. §§1701(a); 1732(b).

existence of the highways (leaving that final determination to the courts), but were to facilitate management of and planning for the public lands. As originally proposed, the regulation set out a 3-year period for such filings, but this time limit was eliminated in the final regulations in 1982.[45]

R.S. 2477 highways have played a significant role in the development of the West; many state highways today originated under R.S. 2477. Most of these were clearly qualifying roads by 1976, having been improved and maintained by the states or counties for years. After the repeal of R.S. 2477, states submitted few new claims. There does not seem to have been any controversy until after the issuance of the 1988 Policy Statement, which contained generous terms for qualifying highways,[46] together with a growing awareness that R.S. 2477 roads could be used to frustrate the designation of new wilderness areas by disqualifying areas from being considered to be "roadless" (and hence qualifying) areas.

The position of the Department consistently has been that the elements set out in the statute must be complied with: that there must be construction of a highway across unreserved public lands.[47] However, some of the details of the articulation of the Agency's position on these elements have changed over the years, as will be discussed, and some aspects of past agency interpretations may not comport with the probable intent of Congress, as analyzed above.

The contemporaneous and reasonable interpretation of the agency entrusted with implementing a law is entitled to deference.[48] In this instance, the BLM is the principal agency dealing with R.S. 2477 rights of way, since the grants were for highways across public lands that were not reserved at the time of the establishment of the roads.[49]

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[45] *See* proposed regulations for 43 C.F.R. §2802.3-6 at 45 Fed. Reg. 44518, 44521,44531 (July 1, 1980); and final regulations for 43 C.F.R. §2803.5 at 47 Fed. Reg. 12568, 12570 (March 23, 1982). The current language remains at 43 C.F.R. §2803.5(b).

[46] *Departmental Policy Statement on Section 8 of the Act of July 26, 1866, Revised Statute 2477 (Repealed), Grant of Right-of-Way for Public Highways (RS 2477)*, December 7, 1988 ("1988 Policy Statement").

[47] *See*, Bureau of Land Management Manual, Part 2801.48 (evolving through Release 2-152, 2-229, 2-263, and 2-266); Letter and Memorandum from Deputy Solicitor Ferguson to Ass't Attorney General Moorman, April 28, 1980; and 1988 Policy Statement.

[48] Udall v. Tallman, 380 U.S. 1 (1965); Red Lion Broadcasting v. F.C.C., 395 U.S. 367 (1969).

[49] Other agencies that manage reserves of various types that were created after the establishment of such rights of way also are faced with these issues, but BLM usually was the managing agency at the time the right of way was

However, as noted, there does not appear to have been any contemporaneous interpretation adopted by the Department. Perhaps the current extensive study will compile more of the history of the pre and post-FLPMA positions of the Department on R.S. 2477 issues. At the present time, it appears that except for the 1938 regulation and a few other pre-FLPMA documents, the Department's analysis has been almost entirely post-FLPMA. As noted, the Department has consistently taken the position that a prospective grantee must comply with the federal elements set out in the granting law, but has been inconsistent as to the details of those elements. Inconsistent agency interpretations are not entitled to deference.[50]

The post-FLPMA Departmental analyses of the highway grant provision primarily emphasize that qualifying highways must be open to the public, and the 1988 Policy Statement also states that roads or ways, or even possibly foot or pack animal trails that are open to the public may qualify.[51] The Policy Statement does not explain the derivation or reasoning of this position.

The Department of the Interior does not seem to date to have extensively analyzed the intended meaning of "highways" in the 1866 Act,[52] or to have correlated that definition either with the statutory "construction" requirement, or with the Department's own analyses of mining access rights discussed previously, or "road" for purposes of wilderness review.

Judicial interpretation

Judicial interpretation of R.S. 2477 has been inconsistent and provides little clear precedent. For the most part, the cases predate the enactment of FLPMA, were in state courts, typically were cases in which the federal government was not a party, and therefore are not binding on it with respect to possible federal issues.[53] It also appears from an examination of the principal cases at least, that courts sometimes indulged in sweeping dicta (non-binding judicial discussion). A close examination of the facts of these cases often indicates that the road in question clearly was a constructed highway and, therefore, there was

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created.

50 Secretary of the Interior v. California, 464 U.S. 312, n.6 at 320 (1984).

51 *See,* 1988 Policy Statement, at 2.

52 *See*, Ferguson opinion, *supra*, at 8.

53 *See, e.g.* Federal Power Commission v. Oregon, 349 U.S. 435 (1955) in which the Supreme Court held that Congressional language on severance of water rights on federal public lands (including a section of the 1866 Act at issue here), which cases in state courts had concluded meant that all use of water in the West would be governed by state law, did not apply to federal reservations and hence did not bind the United States as to its own use of water.

no need to resort to the broad generalizations or sweeping rules for which the cases are cited.

The following discussion is not a definitive consideration of all cases and issues, but rather an initial look at some of the more important principles and most frequently cited cases and issues that have arisen in litigation involving R.S. 2477.

Role of State law.

One of the most fundamental and thorny issues is the proper role of state law in defining R.S. 2477 rights of way. Clearly there is some role for state law to play, but some of the state court holdings seem to have overstated this role.

The grant of highway rights of way is a federal law, and its interpretation raises questions of federal law.[54] A federal grant usually is construed in favor of the government. However, this strict interpretation has been held to be rebutted with respect to many of the grants made to assist in the settlement of our country, because of the great public interests intended by those grants, and this reasoning may apply in this instance.[55]

Clearly, federal law may incorporate state law as federal law in some instances, and the 1866 Act appears to be such an instance. The Act does not address how the highway grant is to be accepted, and state law can play a proper role in defining this and certain other aspects.

Nevertheless, state law may not contradict the express statutory granting language. The portions of the 1866 Act that pertain to mining and mineral rights expressly recognize and permit state and local law and even local customs to apply if they are "not inconsistent with the laws of the United States." Here the requirement that state and local law comport with the related federal requirements is express. Although the highway grant in section 8 of the 1866 Act does not expressly incorporate state law, there are many aspects of the highway grant on which the Act is silent, giving rise to the implication that state law may supply those details. As noted above, the BLM has taken the position that state law on the construction of highways applies to determine at what point a grant under the section becomes effective.

It appears, given the interpretation of the role of state law in similar contexts, that state law may govern only if it comports with the federal requirements. For example, section 8 of the Reclamation Act of 1902 expressly states that the Secretary of the Interior shall comply with state laws in carrying

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[54] Hughes v. Washington, 389 U.S. 290 (1967); United States, v. Oregon, 295 U.S. 1, 27-28 (1935).

[55] *See, e.g.* cases on railroad grants, such as Denver & R.G.R. Co., 150 U.S. 1 (1893); Oregon & C. R. Co. v. United States, 238 U.S. 393 (1915).

out that Act and is silent as to consistency, yet the Supreme Court held that state law could not contravene federal law or frustrate the federal purposes.[56] Therefore, it would seem that as to R.S. 2477, state law may apply to elaborate on the Act, but must comport with the requirements of the Act.

The highway grant is succinct, but does contain discernible elements that must be complied with as part of the federal grant. The grant is for the purpose of 1) the construction of 2) highways 3) across public lands that 4) are not reserved at the time of acceptance.

Within these parameters, it appears that, absent further Congressional action, state law can provide many of the details regarding acceptance of the grants. If the governing rule is defined as being that a valid R.S. 2477 highway is one that is both a valid public highway under the laws of the accepting state and also meets the federal requirements, the disparate state case law then makes sense and can be seen as essentially harmonious. This interpretation is also consistent with the Department's earliest and fundamental interpretations.

Because R.S. 2477 was repealed in its entirety in 1976, it is state law in effect on that date that is applicable.

One of the principal cases cited for the proposition that state law determines when the offer of a grant has been accepted by the construction of highways is an Arizona case.[57] This "rule" is correct with reference to that state's law, since Arizona law required both construction and designation of public highways by official action.[58] Indeed, the rule would always be correct -- that state law determines when the offer of a grant has been accepted *by the construction of highways* so long as state law does not contravene the two elements of construction and highways,[59] and so long as the lands across which a highway runs were not reserved at the time the highway was constructed.

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[56] California v. United States, 438 U.S. 645 (1978).

[57] County of Cochise v. Pioneer National title Ins. Co., 115 Ariz. 381, 565 P. 2d 887, 890 (Ariz. Ct. App. 1977).

[58] Arizona Revised Statutes, §§2736 *et seq.* (1887).

[59] *See*, Warren v. Chouteau County, 265 P. 676 (Mt. 1928), in which the Supreme Court of Montana stated that a R.S. 2477 grant of a right of way for highway purposes over the public domain does not become operative until accepted by the public by the construction of a highway according to the provisions of the laws of the state. Moulton v. Irish, 67 Mont. 504, 218 P. 1053. The court found that the road in question "was never actually opened to travel, and was never traveled by the general public, nor was there a formal order made by the board declaring it a public highway, as required in this state...." *Id.*, at 680.

However, the rule arguably ceases to be correct *as applied* if a state's law provides a meaning for the terms construction, highways, or reserved other than the meanings intended under federal law. If so, the state's articulation would not comport with the requirements of the grant. Furthermore, in many of the cases in which a court indicated that even state law that deviates widely from the federal requirements prevails, a close examination reveals that the statements have been dicta because under the actual facts before the court, the road in question appears to qualify.[60] Therefore, the extent to which these cases serve as good precedent is far from clear.

Some of the western territories and new states expressly addressed the issue of roads, especially after the enactment of the 1866 provision. Some state statutes clearly articulated how the highways were to be established and hence how the grant was to be accepted. Where state law was clear, there are few disputes today as to which roads qualify under R.S. 2477. Again, for example, the early Arizona law that provided that all roads and highways in the territory of Arizona which have been located as public highways by order of the board of supervisors, or recorded as public highways, were declared to be public highways.[61]

The law of other states is not as clear, and hence controversies now exist as to whether a valid R.S. 2477 right of way exists. In Utah, for example, evidently there was no formal procedure for accepting the highway grant and the status of roads in that state consequently is unclear.

Some states addressed roads in several ways, speaking both to establishment of highways, and to roads serving individual properties. South Dakota is an example of such a state, having provided both for highways along section lines and for private access roads.

In contrast to the American system, the Canadian system of surveys also used a township/section system, but expressly provided for road corridors along

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[60] *See, e.g.* Wilkenson v. Dept. of Interior of United States, 634 F. Supp. 1265, 1272 (D. Colo. 1986), in which the court reviews some aspects of Colorado law that appear to contravene the federal requirements, such as the fact that under Colorado law "highways" may include footpaths. However, the roads in question were described as surveyed and actually built; as visited by approximately one thousand people a year at the turn of the century; as traveled by wagons; as built in part under a county contract; completed with volunteer labor, financial contributions from Glade Park residents, and payments from the County; and as serving as connectors between towns and the next state. Therefore, the road in question seems to qualify under R.S. 2477 and broad generalizations as to situations not before the court were not necessary. (*Id.*, at 1268-1269.)

[61] Arizona Revised Statutes, §§2736 *et seq.* (1887).

all section and township lines.[62] Some states adopted the Canadian approach and specified that rights of way existed along section lines. South Dakota law states:

> There is along every section line in this state a public highway located by operation of law, except where some portion of the highway along such section line has been heretofore vacated or relocated by the lawful action of some authorized public officer, board, or tribunal.[63]

If a territorial or state government enacted such a law in response to the 1866 grant, the strips along section lines were considered as dedicated for highway purposes and subsequent patentees took title subject to these rights of way. Eventually, most of these roads were actually constructed, relocated, or vacated in accordance with state law.

States might also separately address the issue of other roads. Again, South Dakota is instructive. Roads that developed simply by dint of public use could be public highways if the local government accepted them as such, worked on them and kept them in repair as such for a period of 20 years. Mere usage of a way by the public did not suffice.[64] Other (non-public highway) roads could be established in other ways: a 1909 law provided relief for owners of isolated tracts of land, enabling them to obtain a right of way across adjacent lands to reach a public highway, and providing for the payment of compensation to the landowners yielding up the easement.[65] In many states, private property interests also could be obtained by adverse possession against the property of another.[66]

One sees in the laws of South Dakota, a gradation of provisions, some of which address private and access roads, and others of which address establishment of public highways that clearly are R.S. 2477 roads. Questions remain, however.

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62 "The Dominion lands shall be laid off in quadrilateral townships, containing thirty-six sections of one mile square in each (except in the case of those sections rendered irregular by the convergence or divergence of meridians as hereinafter mentioned), together with road allowances of one chain and fifty links in width, between all townships and sections." (Act of May 15, 1879, 42 Victoria, Chap. 31.)

63 §31-18-1, South Dakota Codified Laws (1984 Revision). The width of these highways is stated as being 66 feet. *Ibid*, §31-18-2.

64 §§31-3-1 and 31-3-2, South Dakota Codified Laws (1984 Revision).

65 Ch. 108, Laws of 1909, Compiled Laws of South Dakota (1910).

66 §47-0603, North Dakota Revised Code of 1943.

Is construction necessary to comply with the grant?

One example of a situation in which the construction requirement arises is in the context of section line rights of way. If section line highways, or other public highways dedicated by operation of law, were not constructed by the time the federal grant was repealed, what is the status of such highways? Are they valid existing rights within the intent of FLPMA simply because they were segregated and dedicated "for highway purposes", or did they need to have been actually constructed by the time of the rescinding of the federal grant? The issue is an important one, because some states may press such claims now.[67]

The cases usually cited as authority for the conclusion that section line right of way dedications suffice as acceptance of the R. S. 2477 grant are pre-FLPMA cases between a state or state subdivision and a citizen, not between the federal government and a state.

In this context of pre-FLPMA litigation between the state governmental entity that dedicated the section line rights of way at a time when the federal offer of grant was still outstanding, it is reasonable that the state dedication of the lands is effective against a subsequent titleholder of the lands crossed by a

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[67] Alaska evidently may claim section line rights of way even if they were not constructed by 1976, because so much of the state was not even surveyed at that time, and the state has extensive infrastructure needs as yet unmet that were served by R.S. 2477 in other states. *See*, the Alaskan state report: Senate Transportation Committee RS 2477 Task Force, Phase II Report 67 (1986) citing AS 19.10.010 (1975). The Task Force Report also gives "highways" a generic definition that includes paths, trails, walks, etc. *Id.*, at 86. As discussed above, this does not appear to be the meaning intended by Congress.

In enacting the Alaska National Interest Lands Conservation Act (Pub. L. No. 96-487, 94 Stat. 2374)(ANILCA), Congress took note of the undeveloped status of Alaska's transportation system and provided special rights of way provisions for crossing federal conservation areas in that state. The Committee reports do not indicate that Congress considered R.S. 2477 as providing any prospective help on the issue.(*See*, S. Rep. 1300, 95th Cong., 2d Sess. 53, 249 (1978), and H.R. Rep. 1045, Part 1, 95th Cong., 2d Sess. 207, 243 (1978).

During the FLPMA debates there was a discussion between Senators Stevens of Alaska and Haskell of Colorado about whether Alaska could continue to claim roads created from trails that "have been graded and then graveled and then are suddenly maintained by the state", or which *in fact had been built*, (emphasis added) but which might not have been formally declared to be public highways. Sen. Haskell responded that formal perfection was not necessary if the existing use was recognized as a public highway under state law. 120 Cong. Rec. 22283-22284 (July 8, 1974). Obviously, the roads being discussed were constructed and hence were not unconstructed section line roads.

Possible solutions for the special needs of Alaska that may not be adequately met by Title XI of ANILCA and Title V of FLPMA present issues beyond the scope of this paper. Perhaps, however, applying R.S. 2477 even in non-qualifying situations may not be the only or best remedy.

right of way, even if the highway was not yet constructed when that person took title. Under state law, the dedication is the lawful first step of a highway construction process that could be completed over time, and that dedication is enough to impose a state interest in the property that is good against subsequent titleholders.[68]

However, this is not to say that the paper dedication is effective against the federal government if the offer of the federal highway grant is rescinded before construction has been completed. A better argument appears to be that the roads must be constructed to comply fully with the terms of the federal highway grant, and if they were not so constructed by the time the grant offer is repealed, then the opportunity to comply with the grant offer was extinguished upon repeal.

That section line dedications alone, without construction, do not complete grants has long been the consistent position of the Department.[69] This is doubly true if construction was not begun before repeal of the granting statute.[70]

The above discussion focused on the circumstance when roads were not constructed at all by the time of repeal. An additional issue is what constitutes sufficient actual "construction."

Again, the laws of some states did not pose any issues, since the duty to improve and maintain public highways was expressly set out.[71] The position of state law in other states is not so clear.

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[68] Tholl v. Koles, 70 P. 881 (Kan. 1902); Girves v. Kenai Peninsula Borough, 536 P. 2d 1221 (Al. 1975); Bird Bear v. McLean County, 513 F. 2d 190 (8th Cir. 1975). However, even states with section line statutes view the effect of such acts differently depending on the reason for inquiry. In Pederson v. Canton Township, 34 N.W. 2d 172 (S.D. 1948), the South Dakota Supreme Court held that although the section line statute constituted a dedication of section line highways, if a part of a section line highway was not actually constructed, there was no duty for the County government to warn motorists under an abandoned highway statute because in fact there never had been a highway.

[69] 26 L.D. 446 (1898); Ferguson Op., *supra*; 1988 Policy Statement, *supra*, at 2.

[70] The 1988 Policy Statement required that construction had to have been initiated prior to repeal and actual construction had to have followed within a reasonable time.

[71] Arizona Revised Statutes, §§2740 and 2741 (1887) required public highways to be kept clear from obstructions and in good repair, with graded banks, bridges and causeways as necessary, and authorized the use of gravel, dirt, timber, and rock for improving the roads.

The most difficult question is whether mere use by the public can ever suffice to establish a highway under the grant. Again, some of the cases cited for the proposition that public use alone can result in a public highway appear to be overstated. For example, *Central Pacific Railway v. Alameda County* is frequently cited as noting "The original road was formed by the passage of wagons, etc., over the natural soil...."[72] However, the Court also had noted that "A public highway ... was *laid out and declared* by the county in 1859, and *ever since has been maintained*. During that time it has served as one of the *main arteries of travel* between the bay regions of southern Alameda County and the Livermore Valley."[73] Therefore, regardless of how the road originated, it did seem to qualify under R.S. 2477.

There are two issues involved here that sometimes seem to be confused: 1) whether public use without some formal acceptance by a governmental entity may result in a "public highway" and 2) whether a highway established merely by public use without further improvement or construction of the roadway may qualify.

The first point may be answered by the statutory and case law of the state involved. Although some of the cases may not word the issue correctly (as for example, by discussing "adverse possession" against the United States, which does not lie),[74] there is one avenue of analysis that seems valid. Under the laws of some states, public use of sufficient type over sufficient time may result in the creation of a public highway. Where the highway is on unreserved public lands, a valid R.S. 2477 highway may result, not because citizens are adversely possessing title against the United States, but because if public use of a certain type and duration results in a "public highway" under state law that also meets the federal statutory criteria, this is one means of accepting the federal grant offer.[75]

The second issue is, if public use may result in the creation of a public highway under state law, does the resulting highway qualify under federal law even if the road was not "constructed"? In some of the more arid parts of the country, repeated passage may compact a roadbed capable of sustaining regular use. If a road that was never improved or maintained nonetheless served as a well-traveled transportation corridor between towns, and was recognized as a public highway under state law, could such a road qualify under R.S. 2477?

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[72] 284 U.S. 463, 467 (1932).

[73] *Id.*, at 465-466. (Emphasis added.) This case also reinforces the argument that the roads intended as qualifying under R.S. 2477 are significant roads considered public highways.

[74] United States v. California, 332 U.S. 19, 39-40 (1947); Texas v. Louisiana, 410 U.S. 702, 714 (1973), *rehearing denied*, 411 U.S. 988 (1973).

[75] Hatch Brothers Co. v. Black, 165 P. 518 (Wy. 1917); Lindsay Land & Live Stock Co. v. Churnos, 285 P. 646 (Ut. 1930).

It seems unlikely as a factual matter that these circumstances would develop because a road is not likely to be both totally unimproved and still support the kind of regular and continuous use as a significant connector that qualifies as a significant road; even in arid areas, ditches and grading may be necessary at certain places to cope with seasonal rains. It also seems unlikely that a road would remain unimproved once it eventually became formally accepted as a public highway and maintained by the local government, circumstances that typically occurred well before 1976.

Again, an examination of the actual facts regarding the roads involved in the principal cases cited for the proposition that qualifying roads may result from mere public use reveals that the roads would qualify under the terms of the 1866 Act. The rule is more properly stated as the courts did: that use by the public that continues for such a length of time under such conditions as to clearly indicate an intention on the part of the public to accept the grant is sufficient. In one example, the road served several towns and several purposes, and citizens had spent considerable private funds installing ditches, bridges, and dugways.[76] This was also true in the *Lindsay Land & Live Stock* case, a Utah case that has been cited for the proposition that public use *without construction* is sufficient. The court in that case noted that improvements had been made even without public funds, that the road connected points between which there was considerable public travel, and that the use made of the road was as general and extensive as the situation and surroundings would permit had the road been formally laid out as a public highway by public authority.[77] Therefore, *Lindsay* is not necessarily good precedent for the proposition that no construction or improvement of a road is necessary to construct a public highway. Indeed, of the eight Utah cases listed as following *Lindsay*, six specifically indicate that the road in question was constructed or improved; the other two cases do not address the issue.

It may well be that an analytic approach of asking first whether a right of way is a public highway under state law, and then whether the road is a qualifying highway under federal law, in fact will prove to be consistent with most of the case law to date.

The Department of the Interior has consistently maintained that construction must have taken place. As noted, the original regulation of the Department incorporated this element of the statutory language, as did all subsequent regulations, even past the enactment of FLPMA. The 1980 Ferguson opinion stated that the term "construction" must be construed as an essential element of the grant offered by Congress; otherwise Congress' use of the term would be meaningless and superfluous. The states could only accept that which was offered by Congress and not more.[78] The Ferguson opinion also

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[76] Hatch, *supra*.

[77] Lindsay, *supra*, at 648.

[78] Ferguson, *supra*, at 9.

interpreted the Department's regulation, which stated that R.S. 2477 grants were effective "upon construction *or establishment* of highways" in accordance with state law" (emphasis added), not as meaning that state law could provide means other than construction to establish highways, but that state law could impose regulations in addition to construction, such as by specifying formalities.[79]

In the initial regulations of the Department to implement the new FLPMA Title V rights of way, the Department called upon persons "who had constructed public highways" to submit maps locating such highways for notation on the records of the Department in order to facilitate the new federal planning and management mandated by FLPMA.[80] Here again, the Department continued to use the same phrasing; that which is required by the relevant statute.

Given the consistent position of the Department together with the fact that the Congress stated that the grant was for the "construction" of highways,[81] the use of the term "road" by Congress in 1976, together with the 1976 committee explanation of that lesser term as requiring some degree of construction or improvement, it appears that the better argument is that some construction or improvement of a possible R.S. 2477 road is a necessary element, even with respect to roads established by public use in states that recognize such roads as public highways.

What type and amount of construction qualifies also is a difficult question.

The Ferguson opinion does not address what degree of construction might be necessary to qualify. The 1988 Policy Statement is quite generous on the point of qualifying construction, stating that the simple moving of large rocks and removal of high vegetation may suffice in some cases:

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[79] *Id.*, at 10. Although the appeals court in the "Burr Trail" case had only the issue of the scope of an R.S. 2477 right of way before it, the court nonetheless stated that the 1980 opinion should be read not as meaning that construction is a baseline requirement for perfection of a right of way that state law could interpret but not disregard or emasculate, but rather that the 1980 opinion should be read as stating that as a matter of federal law, state law has been designated as controlling even as to the element of construction. (Sierra Club v. Hodel, 848 F. 2d 1068, 1081 (10th Cir. 1988)). This dicta seems to select a strained reading of the 1980 opinion. The more likely reading is that construction is a baseline requirement for perfection of a right of way under the federal statute that state law cannot obviate.

[80] 45 Fed. Reg. 44518, 44521, 44531 (July 1, 1980); finalized at 47 Fed. Reg. 12568, 12570 (March 23, 1982) as 43 C.F.R. §2802.5.

[81] The contemporaneous dictionaries defined "construction" very straightforwardly as "The Act of constructing; the act of building, or of devising and forming; fabrication; composition ...." 1865 Webster's, *supra.*

> Construction is a physical act of readying the highway for use by the public according to the available or intended mode of transportation -- foot, horse, vehicle, etc. Removing high vegetation, moving large rocks out of the way, or filling low spots, etc., may be sufficient as construction for a particular case.[82]

To the extent this statement means that the mere moving of rocks and vegetation by hand qualifies, this does not appear to comport with Congress's intent of granting rights of way for significant roads. Also, as discussed above, the Department incorporated the concept of road improvement *by mechanical means* set out in a FLPMA committee report as the analysis of what could constitute a road under §603 of FLPMA. Again, to require less for a right of way to qualify as a highway than is required to be a road would seem inconsistent.

Therefore, perhaps the 1988 Policy Statement could be clarified as meaning that "construction" must mean at least improvement of the roadbed in the sense used in interpreting §603 of FLPMA, and that the removal of large rocks and vegetation by mechanical means may be sufficient as construction for a particular case. This would result in consistent Departmental interpretations that comport with the 1866 language.

Scope

The 1866 Act is silent as to the extent and features of a right of way, and the regulations of the Department did not elaborate on the scope of R.S. 2477 grants. In a case involving the Burr Trail in Utah, the 10th Circuit recently held that the scope of a valid R.S. 2477 right of way generally is to be determined by the laws of the state in which the right of way is located.[83]

Under this rule, analysis of the scope of a particular right of way will vary depending both on the facts of each case and the laws of the state in which the right of way is located. The role for federal law is open to debate, since there have been few post-FLPMA cases.

The Burr Trail case addressed only the part of the road in question that was adjacent to Wilderness Study Areas (WSAs). The court discussed the relationship of the permissible scope of the right of way under Utah law to the management duties of BLM in that context.

The district court in the Burr Trail case found that a valid R.S. 2477 right of way includes the potential to expand the right of way to a width that is "reasonable and necessary" for the type of use to which the road had been

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82 1988 Policy Statement, at 2.

83 Sierra Club v. Hodel, 848 F. 2d 1068, 1080-1081 (10th Cir. 1988).

put.[84] The 10th Circuit affirmed on this point, adding that reasonable and necessary must be read in light of traditional uses to which the right of way was put. Furthermore, the court felt that the basic principles of law governing easements would control abuses, in that owners of the dominant and servient estates must exercise their rights so as not unreasonably to interfere with each other.[85]

Although the appeals court stated that state law controlled and that state law held an easement was limited to the original use for which it was acquired, the court next stated that the county's right of way was not limited to the use to which it was first put, because R.S. 2477 was an open-ended and self-executing grant under which new uses automatically vested. The court apparently meant that all the particular highway uses that developed over the years before 1976 would determine the reasonable and necessary scope of valid expansion.[86] The court noted that the district court had found expanding the road to promote economic development was within the historic uses of the road as a "vital link between the country's major centers of activity.[87]

The district court had directed the county to apply to BLM for a right of way permit for a part of the road segment that needed to be relocated from its historic location. The appeals court agreed, but added that the BLM could not deny the permit or impose conditions it usually could impose on rights of way granted under Title V of FLPMA, but that BLM could specify where the road should be relocated in order to have the least degrading impact on the WSA.[88]

The court had perceived a conflict between the saving provisions of FLPMA that preserved the valid R.S. 2477 right of way, and the duty imposed on BLM in §603(c) to manage WSAs to avoid impairing their wilderness values and to avoid unnecessary and undue degradation. Congress had specified in §603 that certain other uses were to be allowed to continue in WSAs, but did not speak to valid existing roadways. BLM had analogized valid existing highways to other grandfathered uses and afforded them the same protections, an interpretation the court found reasonable.

It is interesting to note that the courts in the Burr Trail case derived the authority of the federal government to have any control over the scope and exercise of the R.S. 2477 right from the duty of BLM to prevent unnecessary and undue degradation of the WSAs under its management. Under the general management section of FLPMA, 43 U.S.C. 1732(b), BLM has a similar duty to

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84 Sierra Club v. Hodel, 675 F. Supp. 594, 607 (C.D. Utah 1987).

85 Sierra Club v. Hodel, 848 F. 2d at 1083, citing Utah cases.

86 *Id.*, 1083-1084.

87 675 F. Supp. at 606.

88 848 F. 2d at 1088.

prevent undue degradation of *all* the lands under its management. In other words, the federal government is no longer in the pre-FLPMA position of having no interest in or responsibilities for the lands impacted by R.S. 2477 highways.

It remains for future agency and judicial exposition to set out how the new management policies and duties of FLPMA relate to regulation of R.S. 2477 rights of way.

The court in *City and County of Denver v. Bergland*[89] pointed out that only R.S. 2477 was repealed *in its entirety* in FLPMA; other rights of way provisions were repealed only as to *issuance* of rights of way, a fact the court felt was relevant to which agency had current management responsibilities for such a right of way. Whether this distinction may also be relevant to the scope of current federal regulatory authority over R.S. 2477 rights of way also awaits further judicial analysis.

Is R.S. 2477 retrospective or prospective?

The court in *United States v. Dunn*, held that the 1866 Act was meant only to sanction trespasses that had occurred on the public domain before its enactment. The court said that the Act was "not intended to grant rights, but instead to give legitimacy to an existing status otherwise indefinable."[90] The court reached this result by relying on two previous cases, both of which addressed those aspects of the 1866 Act that cured past trespasses, because those were the facts before the court. A better reading of both cases is that the 1866 Act served to legitimize past trespasses and to establish priorities of occupancy rights that related back to the establishment of the uses rather than only to the 1866 date of enactment.[91] Neither case held that the 1866 Act *only* addressed

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[89] 695 F.2d 465 (10th Cir. 1982), *rehearing denied*, 1983.

[90] 478 F. 2d 443, 445 n.2 (9th Cir. 1973)

[91] Jennison v. Kirk, 98 U.S. 453, 459 (1878), quoted approvingly the statement of the author of the act that "It merely recognized the obligation of the government to respect private rights which had grown up under its tacit consent and approval. It proposed no new system, but sanctioned, regulated, and confirmed a system already established, to which the people were attached." However, the Court in that case addressed a factual situation where two miners disagreed as to whose rights had priority with respect to a mining claim and a water ditch -- two uses in effect when the 1866 Act was passed. The Court's comments were therefore dicta to the extent they should be construed as indicating the Act had no prospective effects. The better reading, however, seems to be that the author meant that the 1866 Act more closely followed current practices than did the other proposal of Rep. Julian. See discussion above. Central Pacific Railway Co. v. Alameda County, 284 U.S. 463 (1931) presented the issue of whether a R.S. 2477 road should be considered established in 1866 when it was validated by the Act, or whether it should be considered as

past trespasses, and the best reading of these two cases and of the majority of judicial interpretation indicates that the act also was prospective in its application.

The 9th Circuit noted the issue as an open question in a 1982 opinion in *Humboldt County v. United States*.[92] However, two years later, the same Circuit noted that the parties to new litigation agreed that R.S. 2477 operates prospectively to grant rights of way for highways constructed after its enactment. The court then stated: "*Dunn* is questionable authority because it is contrary to the cases cited in *Humboldt County*, 684 F. 2d at 1282 n. 6, and appears to misread *Central Pacific Railway Co. v. Alameda County*, 284 U.S. 463, 52 S. Ct. 225, 76 L. Ed. 402 (1932)."[93]

Therefore, the better interpretation would seem to be that while the 1866 Act confirmed preexisting rights of way, it also applied prospectively.

Does R.S. 2477 apply only to roads for mining or homesteading purposes?

The Ninth Circuit also has held that an alternative ground for finding that Humboldt County did not acquire a right of way under R.S. 2477, is that a right of way could not be acquired under that Act for a road for purposes other than mining or homesteading, which did not include the desired purpose of reaching a recreation area. The court found that although the language of the grant is without limitation as to purpose, the statute of which it was a part addressed solely mining and homesteading claims. The court noted that the holding in

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having been established in 1859 when was layed out and approved by the county. (If the former, it predated the rights of the railroad.) The Court held that the 1866 Act sanctioned existing rights of way rather than creating new ones *as of 1866*. The Court reviewed the *Jennison* case and stated that: "The section of the Act of 1866 granting rights of way for the construction of highways, no less than that which grants the right of way for ditches and canals, was *so far as then existing roads are concerned*, a voluntary recognition and confirmation of preexisting rights, brought into being with the acquiescence and encouragement of the general government." (*Id.*, at 473. Emphasis added.) Quite arguably, the Court in *Central Pacific* corrected the possible reading of the Jennison case that it denied possible prospective rights, and made clear that both cases spoke only to then existing rights, finding that they were ratified as of the time the uses were established, rather than being "new" rights as of 1866.

[92] 684 F. 2d 1276, 1282 n. 6 (9th Cir. 1982).

[93] United States v. Gates of the Mountains Lakeshore Homes, 732 F. 2d 1411, n. 3 at 1413 (9th Cir. 18984).

Wilderness Society v. Morton,[94] was consistent with this interpretation in that the road in that case would facilitate oil drilling, which was completely consonant with Congress' intent in 1866 to facilitate private mineral development.[95]

On this point too, although the argument can be made that section 8 is limited to the context of the act of which it is a part, the language is not so limited on its face, and the provision seems consistently to have been interpreted as being of general import. The meaning of "highway" as a significant road set forth earlier in this paper also refutes the narrow interpretation. Furthermore, when the provision was codified, it was not placed with the remainder of the sections pertaining to mineral claims, but rather was codified as part of the general rights of way provisions as 43 U.S.C. §932. Although unenacted titles of the United States Code are only evidence of the law and cannot change the law,[96] this Code placement is further evidence that the provision should be interpreted as of general import.

The Department also has interpreted the provision as applicable to other than mining access. A 1959 Solicitor's Opinion on access to mining claims states that Congress understood when it enacted the mining laws that miners would have to use the public lands for roads, and that roads were necessary and complementary to mining activities. The opinion does not mention section 8 of the 1866 Mining Act (R.S. 2477) as relevant to the discussion of mining roads, a fact that argues for the interpretation that the highway grant in section 8 was speaking of roads other than mere mining access roads.[97] It also appears that the vast majority of cases have implicitly found that highway right of way is not limited to the mining and homesteading context.[98]

What are unreserved lands?

The 1866 grant was for rights of way across public lands that were not then reserved. Public lands are those lands in the public domain -- the western lands the United States obtained from another sovereign rather than from a state or

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[94] 479 F. 2d 842 (D.C. Cir. 1973)(*en banc*), *cert. denied*, 411 U.S. 917 (1973).

[95] Humboldt Co. v. United States, 684 F. 2d 1276, 1282 (9th Cir. 1982).

[96] 1 U.S.C. §204; Preston v. Heckler, 734 F. 2d 1359, 1367 (9th Cir. 1984); Stephan v. United States, 319 U.S. 423, 426 (1943)(*per curiam*)..

[97] *See*, 66 I.D. 361, 362, 364 (1959).

[98] *See, e.g.* Sierra Club v. Hodel, 675 F. Supp. 594, 601 (D. Utah 1987), which indicates that the road in that case originated as a livestock driveway and a wagon road.

individual -- that were open to the operation of the various public land laws enacted by Congress, such as the homesteading acts.

Reserved lands are those public lands that were withdrawn and dedicated to a particular federal purpose or purposes, such as military reservations or national parks.

The position of the Department is that public lands, not reserved for public uses, do not include public lands reserved or dedicated by Act of Congress, Executive Order, Secretarial Order, or, in some cases, classification actions authorized by statute, during the existence of that reservation or dedication, or lands pre-empted or entered by settlers under the public land laws or located under the mining laws which ceased to be public lands during the pendency of the entry or claim.[99]

Usually, it is clear whether a full-fledged reservation has occurred. The situation may not be as clear, however, when classification actions and certain other federal actions are involved.

For example, the withdrawals and classifications associated with the creation of grazing districts under the Taylor Grazing Act[100] may reserve lands sufficiently to preclude establishment of an R.S. 2477 right of way. The Taylor Grazing Act at 43 U.S.C. §315f provides that affected lands "shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry." Yet 43 U.S.C. §315e states that "nothing contained in this chapter shall restrict the acquisition, granting or use of ... rights -of-way within grazing districts under existing law ...."

The 9th Circuit has held that the two sections should be read together, such that withdrawals and creation of a grazing district precluded establishment of a road across grazing district lands, unless the entity seeking to acquire a right of way had sought the reopening of such lands under 43 U.S.C. §315f in order to establish the road.[101]

If this reasoning is repeated in other cases, it obviously would have a great impact on the remaining R.S. 2477 validity determinations.

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[99] 1988 Policy Statement at 1.

[100] Act of June 28, 1934, ch. 865, 48 Stat. 1269, codified at 43 U.S.C. §§315 *et seq.*.

[101] Humboldt County v. United States, 684 F.2d 1276, 1281 (9th Cir. 1982). *See also,* the Burr Trail cases, which found that, in that case, a road had already been established by the time of the withdrawals in question: 675 F. Supp. at 604; 848 F. 2d at 1079 n.10.

"Estoppel" and Statute of Limitations

An issue that underlies much of the controversy surrounding R.S. 2477, especially with reference to construction issues, is that of federal "acquiescence" in whatever interpretations the states devised. The argument can be made that because the agency administering the Act allegedly did not assert any federal requirements or dispute state claims for a period of over a hundred years, and because Congress also acquiesced in state articulation of all aspects of these grants, the federal government may not now assert the statutory requirements. Therefore, the argument continues, the valid existing rights that were preserved by FLPMA are those and only those that are recognized as valid under state law.

This issue was discussed in *United States v. California*, a case involving disputed ownership and jurisdiction over the three-mile belt of submerged lands off the coast of California. The Court ruled for the United States (a position Congress later changed by statute), despite a long history of acquiescence by federal officials in the assertion of jurisdiction by the State, even to the point of making federal purchases of rights in the belt. The Court said:

> As a matter of fact, the record plainly demonstrates that until the California oil issue began to be pressed in the thirties, neither the states nor the Government had reason to focus attention on the question of which of them owned or had paramount rights in or power over the three-mile belt. And even assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the government in this ocean area are not to be forfeited as a result. The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property: and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.[102]

The analogy with the current situation is clear. Neither the states nor the government had reason to focus on validity of R.S. 2477 rights of way until after the repeal of the measure, and possibly not until the issuance of the 1988 Policy Statement, which perhaps encouraged claims that had previously not been considered to be valid. Quite arguably, the actions of the federal agents were not as compromising in the R.S. 2477 context as they were in the *California* context because the regulation of the Department did incorporate the elements

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[102] 332 U.S. at 39-40. *See also*, Utah Power and Light Co. v. United States, 243 U.S. 389, 409 (1917).

of the relevant statute, and because of the historical context surrounding rights of way before FLPMA.

In *Utah Power & Light Co. v. United States*, involving another right of way statute and a combination of acquiescence and overt actions on the part of federal agents, the Supreme Court also held:

> This ground also must fail. As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest .... A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane in this and some other respects from the ordinary private suit to regain the title to real property or to remove a cloud from it.[103]

An "estoppel" argument also was raised in *City and County of Denver v. Bergland*, involving another right of way statute. The court quoted from *U.S. v. California, supra.*, with approval, and stated that estoppel, if applicable at all, can lie only against an agency to which Congress has delegated the authority to dispose of lands held in trust for the public.[104] The court did not decide whether some version of estoppel could apply to the agencies regarding the right of way involved in that case, because it concluded that plaintiff had failed to make a traditional case of estoppel against the United States for reasons that may well also pertain in the current R.S. 2477 context.[105] Even if the elements of estoppel are present, when title to public lands is involved, policy considerations demand that estoppel not be applied without compelling reasons.[106]

A strong argument can be made that estoppel is not appropriate in the R.S. 2477 situation, because the elements required by the 1866 Act are evident on the face of the Act and have consistently been required by the Department since its earliest regulation that provided that a grant was effective upon construction or establishment of highways in accordance with state law. This regulation

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[103] 243 U.S. 389, 409 (1917).

[104] 695 F. 2d 465, 482.

[105] *Id. See also*, Oregon v. BLM, 676 F. Supp. 1047, 1059 (D.Or. 1987); United States v. Wharton, 514 F. 2d 406 (9th Cir. 1975; and U.S. v. 31.43 Acres of Land, more or less, 547 F. 2d 479, 482 (9th Cir. 1976.).

[106] *See, e.g.,* Oregon v. Bureau of Land Management, 676 F. Supp. 1047, 1059 (D. Or. 1987), a case in which the General Land Office had made certain determinations involving lands, which the BLM invalidated 40 years later. The court cited with approval, United States v. Ruby, 588 F. 2d 697, 704 (9th Cir. 1978).

incorporates the essential requirements of "construction" and "highway" and does not state that a grant may be effective without them.

In addition, there was a legitimate role for state law to play in implementing the statute. The exact posture of state law on R.S 2477 issues is difficult to ascertain even with a reason to do so, and Congress can hardly be said to have agreed with possible state errors or excesses of which it was not aware and regarding which it had no reason to inquire. Furthermore, Congress has acted to address rights of way in legislation since 1866, and these enactments are consistent with an intent in the 1866 Act to grant rights of way for highways in the sense of significant roads. The previous approach of the government was ended by Congress with the enactment of FLPMA, which established new policies for the management of the federal lands in general, and imposed a new system for the grant of rights of way together with the repeal of most then current rights of way authorities.

Viewing the sequence of Congressional enactments harmoniously, state law would define what constituted a public highway in each state and these would be valid R.S. 2477 highways, if they also met the fundamental elements required by the federal grant.

It appears from a reading of the leading state cases that this analysis would not be disruptive of the current status quo because the status of most qualifying roads was finalized well before 1976. Homesteading and new settlement had ceased decades before the enactment of FLPMA, and typically main roads had been upgraded and taken under local government management long before 1976. After FLPMA, when the BLM asked persons and local governments who had constructed public highways under the authority of R.S. 2477 to file maps for notation on BLM's planning maps, few maps were filed and there was little controversy, a fact that gives credence to the possibility that concerns other than R.S. 2477 issues may be at the center of the current controversies. Furthermore, an examination of the leading state cases indicates that many of the roads that were litigated in fact would have qualified under federal criteria reflective of the 1866 Act.[107]

Perhaps the current study by the Department will provide additional information about the Department's position over the years, provide an in-depth analysis of the legal interpretation of some the states currently asserting claims, develop federal criteria consistent with Congressional enactments over the years, and provide information from which it can be ascertained whether and to what degree those federal criteria actually would be disruptive of remaining legitimate state assertions and concerns. But once the Department adopts a final position on R.S. 2477 determinations, another issue remains.

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[107] The opinion of the 10th Circuit in the Burr Trail case envisioned that changing to a federal standard defining the scope of rights of way would have a severe and adverse affect on existing property relationships. 848 F. 2d 1082.

When Congress repealed R.S. 2477 in its entirety in 1976, this constituted notice that R.S. 2477 rights of way could no longer be initiated. In addition, BLM notified the states that R.S. 2477 was no longer effective and that all new claims would be under Title V of FLPMA.[108] In 1980, BLM proposed regulations for Title V rights of way, and included a request for all persons, state or local governments that had "constructed public highways" under the authority of R.S. 2477 to file maps showing the locations of the highways.[109]

Currently, if there is an instance of a controversial road which the United States determines is valid under R.S. 2477, the United States can clear title questions by filing a disclaimer of interest in the right of way under 43 U.S.C. 1745. If, however, the United States disagrees with and denies a claimed R.S.2477 right, it appears that the appropriate course of action would be for a claimant to file a quiet title action against the United States. In order to sue the sovereign federal government, it is necessary that the government have consented to suits of the type sought to be brought. In 28 U.S.C. §2409a, the United States has consented to be sued for the purpose of quieting title to real property. However, except for state suits involving tidal or submerged lands, that statute imposes a statute of limitations of 12 years.

Quite arguably, the repeal of R.S. 2477 in 1976 began the running of the statute of limitations. Certainly, the repeal, together with the BLM notices to the states of that fact, and the regulations proposed in 1980 calling upon persons, states, and localities to submit asserted valid existing rights constituted adequate notice. In any event, 12 years from repeal would have been October 21, 1988; 12 years from the proposed regulations was July 1, 1992. The only starting date that would leave time remaining on the 12 year period would be the 1982 date of the final regulations. The most reasonable starting date, however, appears to be the date of repeal.[110] Therefore, it appears that claimants may be without a means of contesting adverse determinations.

Conclusions

Because of the surveying system used by the United States, some form of access across federal lands was essential to accomplish the settling of the West. Given the historical position of the federal government in readily permitting

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[108] Organic Act Directive No. 76-15 at 5, December 14, 1976.

[109] 45 Fed. Reg. 44518, 44521, 44531 (July 1, 1980); finalized at 47 Fed. Reg. 12568, 12570 (March 23, 1982). 43 C.F.R. §2802.5. As proposed, the regulation set out a time period of 3 years for the filing of such maps, but this period was eliminated in the final regulations.

[110] The district court in City and County of Denver, v. Bergland, 517 F. Supp. 155 (D.Colo. 1981) had dismissed for lack of jurisdiction because the statute of limitations under 28 U.S.C. §2409a had run. The appeals court did not reach the issue. 695 F. 2d 465, 484 (10th Cir. 1982), *rehearing denied*, 1983.

individual access across the federal lands, combined with early federal subsidies for major transportation corridors, R.S. 2477 seems to have been intended to grant rights of way for "highways" in the sense of significant roads. This meaning is supported by contemporary dictionaries and by subsequent Congressional enactments, notably the 1885 Unlawful Inclosures Act that guaranteed continued individual access and by the use of the word "road" in section 603 of FLPMA, which is explained in report language as a road improved by mechanical means. It would be incongruous that the lesser term "road" should have this meaning, but that the term "highway" should mean something less.

It also appears that the highways must be constructed to meet the second major element of the statute. The Department implementing the Act has allowed state law on "the construction or establishment of highways" to define how the grant could be accepted. However, this position did not eliminate the requirement that the two elements of construction and highways be met. The acquiescence of the federal government in state court determinations over the years before FLPMA may be more a reflection of the historical context than it is probative of a federal legal position obviating the elements of the 1866 Act. Furthermore, a close reading of the cases indicates that typically the roads in question would qualify under the terms of the Act, and many of the state cases are cited for principles beyond their actual holdings. Therefore, it appears that the government is not precluded from establishing criteria for final R.S. 2477 determinations that comport with the statutory language, although the statute of limitations for contesting such determinations may well have run.

Both because of the issues regarding the proper interpretation of the 1866 Act and FLPMA, and because of the apparent absence of a judicial avenue now to contest adverse R.S. 2477 determinations by the Department, Congress may wish to consider further action to clarify the statutory questions or to provide a deadline and final process and standards for ratifying clearly qualifying highways and making and appealing disputed R.S. 2477 claims.