

Message 745-2443
Subj: IM 90-589

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

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In Reply
Refer To:
2800(323)
8560(342)

Affects Manual Section
H-8560-1.II.C5&6

EMS Transmission 8/17/90
Instruction Memorandum No. 90-589
Expires 9/30/91

August 15, 1990

To: All SD's
From: Director

Subject: BLM's Responsibilities Relative to Proposed Activities Within
RS 2477 Rights-of-Way

Recently several questions have been raised from field offices regarding the Bureau of Land Management's (BLM) authorization and environmental assessment responsibility for proposed actions within RS 2477 rights-of-way (R/Ws), especially when such R/Ws are boundaries of wilderness study areas (WSAs) or designated wilderness areas.

Section 8 of the Act of July 26, 1866, provided:

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

Although this statute, 43 U.S.C. 932 (RS 2477), was repealed by Title VII of the Federal Land Policy and Management Act (FLPMA) of October 21, 1976, many R/Ws for public highways obtained under the statute exist or may exist on lands administered by the Department and other Federal agencies, including the BLM.

DEPARTMENTAL POLICY ON RS 2477

It should be emphasized that the Secretary's policy (issued 12/7/88) provides the necessary guidance and direction in regard to most issues relative to RS 2477 R/Ws (see BLM Manual 2801, Appendix 3). To briefly reiterate the policy, please remember that under the grant offered by RS 2477 and validly accepted, the interests of the Department are that of owner of the servient estate and adjacent lands/resources. In this context, the Department has no management control under RS 2477 over proper uses of the highway and highway R/W unless we can demonstrate unnecessary degradation of the servient estate (BLM Manual 2801.48 B).

Manual

Reasonable activities within the highway R/W are within the jurisdiction of the holder. The holder of the R/W has no requirement to inform the BLM of its activities on or within the R/W. As such, the Department has no authority under RS 2477 to review and/or approve such reasonable activities. The project proposal may, however, be subject to review and approval by an appropriate official, depending upon the applicability of other Federal, State or local laws to the proposed project.

For example, where a county government holds a valid RS 2477 R/W for a public highway and wants to maintain or improve the road from its current primitive condition to a paved, two-lane highway, no additional authorization is required from BLM as long as the proposed improvements are restricted to the width of the existing R/W.

State law which specifically addresses highway widths under RS 2477 shall be used to determine the width of the R/W. Where State law is silent relative to the width issue or otherwise does not apply, the area required for the road uses existing at the time of acceptance or repeal of RS 2477 shall determine the extent of the RS 2477 R/W width.

When brought to its attention, the BLM should review proposals only in terms of the rights granted under RS 2477 and whether the proposal can be implemented within the scope of the valid existing rights. Thus, where the width of the RS 2477 R/W can fully accommodate a proposed road improvement project, no additional authorization is needed from BLM.

If additional area or width is needed for the proposed action, it should be evaluated according to the regulations in 43 CFR 2800 and BLM Manual 2801. Likewise, if any of the existing roadway and associated features (borrow ditches, bridges, culverts, fences, etc.) exceed the R/W width as provided for under State statute, that area is in trespass and needs to be resolved in accordance with BLM Manual 9232. New ancillary uses or facilities (electric transmission lines, communication lines, etc.) proposed within a RS 2477 R/W area are to be authorized as separate R/Ws under 43 CFR 2800.

COMPLIANCE WITH RS 2477

Since the holder has no requirement to advise the BLM of proposed changes in the use, operation or maintenance of the public highway, the BLM has nothing to review in the formal sense. As with all R/Ws, BLM has a compliance responsibility. In RS 2477 cases this compliance is to ascertain that the holder has not exceeded the uses or use area obtained under RS 2477 or has unnecessarily impacted the servient estate or adjacent public lands.

Should compliance checks find that the holder has exceeded the uses or the area granted under RS 2477, such would constitute a trespass and appropriate action to terminate or resolve the trespass should be taken. If the finding is degradation of the servient estate, the proper course of action is negotiation with the holder to correct and, if that fails, to seek redress in U.S. District Court.

COMPLIANCE WITH OTHER LAWS, INCLUDING THE NATIONAL ENVIRONMENTAL POLICY ACT

Appropriate actions by the holder within the scope of RS 2477 are not a matter for approval by BLM under those provisions. Therefore, the BLM is not required to review any such proposed actions, including documentation pursuant to the National Environmental Policy Act (NEPA).

SECTION 603(c) OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT

Recent decisions by the Interior Board of Land Appeals (IBLA) and Federal courts have identified the obligations of the Secretary (BLM) under Section 603(c) of FLPMA. While these decisions relate to situations involving RS 2477 R/Ws, the principle applies to any action, on public or other lands, that may impair the suitability of WSAs for preservation as wilderness.

For example, in SIERRA CLUB ET AL. (111 IBLA 122, decided 9/29/89), IBLA affirmed BLM's finding that a RS 2477 R/W exists for the entire length of the Burr Trail (Boulder to Bullfrog Road) in southeastern Utah. In addition, because Burr Trail passes between and bounds two WSAs and abuts a third WSA, IBLA ruled that BLM has the obligation under Section 603(c) of FLPMA to manage the public land so as to avoid unnecessary and undue degradation of WSAs. This obligation, according to IBLA, may require preparation of an environmental assessment with respect to the impact of construction of road improvements proposed by the holder to ascertain whether they may involve any unnecessary or undue degradation to WSAs which would require preparation of an environmental impact statement. The BLM's interim management policy for WSAs (H-8550-1) is also consistent with IBLA's interpretation of BLM's responsibilities to manage such lands so as to prevent unnecessary or undue degradation.

The IBLA also ruled that "an EA of a proposed road improvement project will be set aside and remanded where the scope of the project is segmented and the assessment fails to consider the impact of connected actions which are interdependent parts of a larger action and depend on the larger action for their justification." (111 IBLA 123).

OTHER

Other authorities, such as Section 302(b) of FLPMA, may also apply to activities conducted on public lands or other lands adjacent to public lands. Although not specifically referenced in the above IBLA decision, BLM's obligation to avoid unnecessary and undue degradation extends to all public land (Sec. 302(b) of FLPMA) and not just to WSAs. Therefore, even in those actions which appear to require no further authorization from BLM such as the above examples involving RS 2477 R/Ws, the BLM still has the obligation to manage all the public lands so as to avoid unnecessary and undue degradation to the servient estate and/or adjacent land and resources. This determination can be incorporated within a NEPA document in accordance with BLM Manual H-1791 if the proposed action warrants the preparation of such a document. In those situations not requiring a NEPA analysis (see RS 2477 above), a separate determination regarding unnecessary and undue degradation can be made which is independent of any NEPA document. Compliance checks may be necessary to confirm the on-the-ground activities and associated impacts.

In situations where a land use has been previously authorized but not fully developed or implemented on-the-ground (as can happen with a RS 2477 R/W), and where BLM may now have concerns that a resource value(s), i.e., endangered species, cultural values, etc., may be impacted by the authorized use, the authorized officer can negotiate with the holder to avoid or lessen the conflict. However, such negotiations are independent from the approval process, and are properly funded by the benefitting activity, and not the lands program in the instance of a RS 2477 R/W.

When a proposed action, which does not require approval from BLM, is anticipated to have unnecessary and undue degradation on public land, and the proponent is unwilling to mitigate or alter the proposal to avoid such degradation, BLM's only recourse is to seek injunctive relief in Federal court.

MANAGEMENT CONSIDERATIONS - WSA/WILDERNESS BOUNDARIES AND RS 2477 R/W GRANTS

During the WSA inventory process, some WSA boundaries were established along the edge of the physically disturbed and utilized area of the roadway. As previously discussed, the actual width of the road R/W may extend beyond the disturbed area of the existing road. When such overlaps occur, the WSA/wilderness designation is subject to the terms and conditions of the pre-existing R/W grant. Proposed actions consistent with a public highway under RS 2477 are not subject to the Interim Management Policy (more specifically, the nonimpairment standard) if they are contained within the recognized width of the R/W. Thus, when it is determined that the rights conveyed can be enjoyed only through activities that will impair wilderness suitability, the activities will only be regulated to prevent unnecessary or undue degradation.

The standards for boundary setbacks along existing roads in designated wilderness areas are identified in BLM Manual H-8560-1.II.C5. The setback standard for jeep roads, low standard logging roads, dirt roads used for R/W maintenance, etc., is 30 feet from the centerline. However, the width of some road R/Ws established under RS 2477 (Arizona - 66'; Wyoming - 50 to 100') will exceed the 30 feet from centerline standard just referenced. When such overlaps are identified, an adjustment of the WSA or wilderness boundary to eliminate the encroachment of such boundaries with the RS 2477 R/W area should be made and properly documented. The BLM Manual H-8560-1.II.C5 & 6 will be revised to recognize such possibilities.

RS 2477 ADMINISTRATIVE DETERMINATIONS WITHIN THE BOUNDARIES OF WSAs

Acknowledgment of the existence or absence of a RS 2477 R/W is an administrative action by BLM when such status is a factor in land use decisions. Administrative determinations (acknowledgment) are not subject to appeal to IBLA, because an acknowledgment is not a Bureau decision and does not equal acceptance. Acceptance of the grant occurred when a public highway was constructed on unreserved public lands, irregardless of whether BLM has acknowledged the action. (BLM Manual 2801.48B2).

Some States have established policy whereas BLM will not administratively recognize the presence of RS 2477 R/Ws within the boundaries of WSAs. While such a policy may provide some consistency with the intent of the Bureau's interim management policy for WSAs, it fails to recognize that such a grant may in fact exist within a WSA. For example, certain "ways" within a WSA may actually meet the criteria for a RS 2477 R/W. The BLM's refusal to acknowledge the grant, solely because of its presence within a WSA, does not diminish the existence of a R/W grant for a road or trail which otherwise meets the criteria for a RS 2477 public highway. Therefore, Bureau policy must provide for the authorized officer, on a case by case basis and/or in response to public requests, to make administrative determinations as to the status of R/Ws across public lands (including WSAs) when the presence or absence of a RS 2477 R/W is a factor in land use decisions.

SUMMARY

Reasonable activities within a RS 2477 R/W are within the jurisdiction of the holder. The holder of the R/W has no requirement to inform the BLM of its activities on or within the R/W. When brought to its attention, the BLM should review proposals only in terms of the rights granted under RS 2477 and whether the proposal can be implemented within the scope of the valid existing rights. Appropriate actions by the holder within the scope of RS 2477 are not a matter for review or approval by BLM, including documentation pursuant to NEPA.

As with all R/Ws, BLM has a compliance responsibility to ascertain that the holder has not exceeded the uses or use area obtained under RS 2477 or has unnecessarily impacted the servient estate or adjacent public lands. Should compliance checks find that the holder has exceeded the uses or the area granted under RS 2477, such would constitute a trespass and appropriate action to terminate or resolve the trespass in accordance with BLM Manual 9232 should be taken. The BLM's obligation to avoid unnecessary and undue degradation extends to all public land and not just to WSAs. If there is a finding of undue or unnecessary degradation, the proper course of action is negotiation with the holder to correct the situation and, if that fails, to seek injunctive relief.

Where WSA (or wilderness) boundaries overlap with a RS 2477 R/W, the WSA/wilderness designation is subject to the terms and conditions of the pre-existing R/W grant. Wilderness boundary setbacks should be established to avoid overlapping conflicts with pre-existing grants such as RS 2477 R/Ws.

Bureau policy must provide for the authorized officer to make administrative determinations as to the status of R/Ws across public lands (including WSAs) when the presence or absence of a RS 2477 R/W is a factor in land use decisions.

Finally, in situations where BLM may have concerns that some resource value(s), i.e., endangered species, cultural values, etc., may be impacted by an activity previously authorized or granted (such as a RS 2477 R/W), the authorized officer can negotiate with the holder to avoid or lessen the conflict. Such negotiations are independent from the approval process, and are properly funded by the benefitting activity, and not the lands program in the instance of a RS 2477 R/W.

Questions or comments on the content of this instruction memorandum should be addressed to the Division of Lands and Realty (WO 323), mail stop MIB, Rm. 3643, FTS 268-5441 with duplicate copy to the Division of Recreation, Cultural and Wilderness Resources (WO 342), mail stop MIB, Rm. 3360, FTS 268-6064.

Signed
Michael J. Penfold
Assistant Director for Land and Renewable
Resources

Authenticated
Georgette A. Fogle
Directives (WO 855)

W0855 for AK910 10:31 ADT 17-Aug-90 Message 745-2443 [1] * Priority *