United States Department of the Interior

June 1993

Report to Congress on R.S. 2477

The History and Management of R.S. 2477 Rights-of-Way Claims on Federal and Other Lands

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Introduction

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

Origin of R.S. 2477 Rights-of-Way

With this seemingly simple, 20-word federal statute Congress offered to grant rights-of-way to construct highways over unreserved public lands. Originally, the grant was Section 8 of a law entitled "An Act Granting Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes." The law was also known as the Mining Act of 1866. Several years after the Act was passed, this provision became Section 2477 of the Revised Statutes, hence the reference as R.S. 2477. Later still, the statute was recodified as 43 United States Code (U.S.C.) § 932.

Historic Importance

R.S. 2477 was passed during a period in our history when the federal government was aggressively promoting settlement of the West. Under the authority of R.S. 2477, thousands of miles of highways were established across the public domain. It was a primary authority under which many existing state and county highways were constructed and operated over federal lands in the Western United States. Highways were constructed without any approval from the federal government and with no documentation of the public land records, so there are few official records documenting the right-of-way or indicating that a highway was constructed on federal land under this authority.

Repealed

One hundred and ten years after its enactment, R.S. 2477 was repealed by the Federal Land Policy and Management Act (FLPMA) of 1976.

The Issue

Although this century-old provision was repealed over 16 years ago, its impact is still being felt, because highways established before October 21, 1976 (the effective date of FLPMA) were protected, as valid existing rights-of-way.

Grandfathered rights

In recent years, there has been growing debate and controversy over whether specific highways were constructed pursuant to R.S. 2477, and if so, the extent of the rights obtained under the grant.

Concerns

However, there is concern that public lands withdrawn for National Parks, National Forests, National Wildlife Refuges, and other special management areas may be subject to grandfathered R.S. 2477 rights-of-way. R.S. 2477 claims could affect federal land currently managed under various management objectives by the Bureau of Land Management (BLM), including areas either designated as, or under study for, wilderness.

Some commenters are concerned that historical public access to federal lands is being closed by private land owners. R.S. 2477 claims may also affect land previously in federal ownership that was conveyed to private entities subject to preexisting rights-of-way. This issue is important to some state and county governments and some federal land managers who value the rights-of-way as important to their infrastructure.

Evolution of Controversy

Prior to the late 1970s, there was little hint of the ensuing controversy over R.S. 2477. The Department of the Interior (DOI) did little to manage these rights-of-way, primarily deferring to state law and control.

Link to wilderness

The issue began to emerge with the initiation of the wilderness inventory process for BLM lands outside of Alaska in 1977. For purposes of wilderness inventory, (specifically for what constitutes a "roadless" area) the DOI followed FLPMA's legislative history and adopted a definition of a road that included a requirement for some type of construction by mechanical means. This definition allowed for inventory of large blocks of public land for wilderness consideration, but it also created confusion because the definition of what constituted a "road" over public lands could be seen as different from the definition of a "right-of-way."

State Differences

There have been few problems regarding R.S. 2477 rights-of-way in most public land states although states have handled the issue differently. This may be because of the differences among state laws, although a number of other factors also influence this situation.

Some states have no recognized R.S. 2477 highways and other states have hundreds. The number of recognized highways is, however, neither an indication of problems associated with R.S. 2477 nor of the potential for controversy in the future. Oregon currently has the greatest number of recognized R.S. 2477 highways, with 450, but few problems have resulted from these recognized claims. On the other hand, a state with a large number of recently asserted claims may be an

indication of potential controversy. At the present time, Utah has the greatest number of assertions, with over 5,000, while only 10 R.S. 2477 highways have been recognized.

R.S. 2477 in Utah

To date, Utah has been the focal point for most of the controversy. The issue erupted in 1987 over a popular Southern Utah back-country road called the Burr Trail that borders BLM Wilderness Study Areas (WSAs) and passes through two units in the National Park System. With recognition of the Burr Trail as an R.S. 2477 highway, the local county holder of the right-of-way initiated maintenance and upgrading of the existing road. Plans for road realignment and resurfacing led to extensive litigation in Federal District Court and ultimately in the 10th Circuit Court of Appeals. Issues in contention included the scope of the R.S. 2477 grant and what rights, if any, the county had to improve the road and the federal government's ability to impose mitigation of impacts to WSAs and National Parks and Recreation Areas.

Burr Trail litigation

The R.S. 2477 controversy soon spread to other parts of the state. For several years, citizen groups have proposed that there be additional public lands, beyond BLM recommendations, considered for wilderness designation. In response, some counties began asserting R.S. 2477 rights-of-way on federal lands managed by BLM and the National Park Service. Many of these claims, if deemed valid, could potentially disqualify areas in citizen wilderness proposals.

Controversy spreads

R.S. 2477 in Alaska

Prior to 1959, nearly all of Alaska was public domain under federal control. This, along with the great size of the state, its sparse population, few constructed roads, and dependence upon nontraditional means of transportation, complicates the issue of access in Alaska.

R.S. 2477 emerged as an issue in Alaska in the mid-1980s when the U.S. Fish and Wildlife Service and National Park Service began to prepare their land-use plans for Refuges and Parks in Alaska. This federal action precipitated the State of Alaska's interest in using R.S. 2477 to obtain rights-of-way over federal lands as state and local governments in the Lower 48 States had during their own early developmental periods. The state began to identify historical access routes across federal lands (including Conservation System Units which are areas designated for special protection by the Alaska National Interest Lands Conservation Act (ANILCA) that potentially qualified as R.S. 2477 highways. These access routes were identified under Alaska state law in 1961 in the AS §19.45.001(9) Act. This law included seasonal trails, footpaths, and traditional roads and trails used by wheeled and tracked vehicles.

Access an issue

Trails and footpaths included

Secretarial policy defines construction

In 1985, representatives from diverse Alaska interests began a concerted effort to deal with the R.S. 2477 issue. Responding to this intense interest, the Secretary of the Interior issued in 1988 new policy on R.S. 2477 in the form of a policy statement that applied to all public land states using criteria contained in the 1986 BLM Rights-Of-Way manual and expanded to include criteria defined under Alaska state law. The policy statement included a definition of construction that in certain instances accepted mere use or passage as proof of the existence of a highway. As might be expected, the policy is viewed quite differently among competing public interests. Some view the current policy as extremely important to the economic and social development of Alaska because it maximizes access options over federal and possibly even private lands. Others view the policy as a new threat to federal lands, particularly the newly established National Forests, Refuges, Park Units, and other specially designated areas.

Congress Debates the Issue and Directs This Report

The growing number of road assertions in Utah and Alaska and the growing controversy over the issue between states and counties and interest groups caught the attention of Congress. In 1991, the House of Representatives passed H.R. 1096. This bill would have imposed a cutoff date for claims and specified how the DOI would handle future claims. The Senate adjourned without acting on H.R. 1096.

Moratorium proposed and dropped

In addition, the House-passed fiscal year 1993 appropriations bill for the DOI and related agencies provided for a moratorium on further processing of claims by the DOI, pending completion of legislation. There were no comparable provisions in the Senate version. In conference, the House's moratorium provision was dropped from the appropriations bill, but the conference report did direct the DOI to conduct a study of the history and management of R.S. 2477 rights-of-way. (Appendix I, Exhibit A.)

Report to be prepared

The DOI was directed to prepare a report to Congress on a number of aspects of R.S. 2477. The directive to prepare the report requested that the following information be addressed:

Included in the report

- The history of rights-of-way claimed under R.S. 2477.
- The likely impacts of current and potential claims of such rights-of-way on the management of the federal lands.
- The likely impacts of current and potential claims of such rights-of-way on the access to federal lands, state lands, private lands, Indian and Native lands.
- The likely impacts of current and potential claims of such rights-of-way on multiple-use activities.
- The current status of such claims.

- Possible alternatives for assessing the validity of such claims.
- Alternatives to obtaining rights-of-way.
- Sound recommendations for assessing the validity of claims, consonant with the intent of Congress in enacting R.S. 2477 and FLPMA, that mandated policies of retention and efficient management of the public lands.

BLM Defers Processing Most Claims Pending Completion of Report

Until completion of the report, the DOI has deferred processing of pending claims unless there is an immediate and compelling need to recognize or deny claims. (Appendix II, Exhibit A.)

CRS Report

The Library of Congress Congressional Research Service (CRS) has also prepared a report for Congress entitled, *Highway Rights Of Way: The Controversy Over Claims Under R.S. 2477*, issued January 15, 1993 and updated April 28, 1993. The CRS Report was one of many sources reviewed by DOI in preparation of this report.

The Department of the Interior Study Process

Interagency task force

The DOI was directed to consult with Western Public Land States and other affected interests in preparing the report. This report was prepared in consultation with the BLM Washington Office and other federal offices. To address this important public land issue in a manner that responds to Congressional direction, the DOI assembled a study task force comprised of representative(s) from each BLM state organization, the BLM Headquarters Office, the Office of the Solicitor, the National Park Service, the Bureau of Indian Affairs, and the U.S. Fish and Wildlife Service. The BLM was given the responsibility to lead the Departmental team. The U.S. Forest Service, part of the Department of Agriculture, was consulted in this process.

Public involvement

The active involvement of affected interests from the Western Public Land States has been an essential element of this study. On November 18, 1992, several hundred letters and "scoping" packages were mailed to state and local governments, land-use organizations, and other affected interests. Notification of the study was published in the December 15, 1992 *Federal Register*. News releases were distributed to national, regional, and statewide media outlets announcing the initiation of the study and requesting information from the public.

In addition, several public meetings were held to gain input during November and December 1992 and January 1993. Meetings were conducted in Alaska, California, Idaho, Oregon, Montana, Nevada, and Utah.

Approximately 300 individuals and organizations responded to the task force with several thousand pages of written information, which was helpful in preparing the draft report. See Appendix III, Exhibit A.

Beginning in March of 1993, nearly 4,000 copies of the Draft Report were mailed to interested parties. Seven public meetings were held in western states and attended by approximately 400 persons. In addition, approximately 1000 pages of written comments were received. The information derived from the public meetings and written comments have been considered in the preparation of this final report.

Constituency Positions

Some members of the public view remaining R.S. 2477 rights-of-way as important components of state and local infrastructure, essential to the economic growth and social well-being of the rural West. Some State and local governments argue that existing R.S. 2477 rights-of-way are interests in property for which they should be compensated if lost.

Others see the potential recognition of additional R.S. 2477 roads as conflicting with the goals of the FLPMA and a severe threat to federal lands, including many areas either currently designated or under study for designation as part of the National Wilderness Preservation System. They stress that R.S. 2477 was repealed in 1976 and that pre-existing rights should be construed narrowly.

Some users of public land are concerned that historical and traditional access to federal lands might be limited. A related issue is the growing movement to use the R.S. 2477 right-of-way authority as a means to continue or reopen historical access through private lands to adjacent public lands. In cooperation with local citizens groups, this has been actively pursued in Colorado, Idaho, Montana, and Nevada.

The Federal Interest

Federal agencies have several major areas of concern regarding the R.S. 2477 issue. The first arises out of the open-ended, inchoate character of these claims. R.S. 2477 rights-of-way that existed pre-FLPMA are protected, but there are currently no provisions for inventorying these claims or bringing finality to this issue. This creates a continuing cloud on Federal agencies' ability to manage federal lands, including their power to manage or to control improvements to state or county rights-of-way. The ability to manage natural resource values, consider appropriate contemporary legislation in day-to-day management, and manage for special values like wilderness or areas of critical environmental concern can be compromised by this uncertainty.

A second area of concern arises out of the unique terms used in R.S. 2477. What is the definition of a highway? What constitutes construction? Which public lands are "not reserved for public uses"? What law, state or federal, should answer these questions? This confusion can result in inconsistency, unfairness, and difficulty in wise planning.

A third area involves defining the rights and responsibilities of both the federal agency and the holder of the right-of-way, especially in relation to federal responsibilities to manage federal lands and resources under contemporary laws, and the federal mandate to manage some areas for special values, such as Congressionally-designated National Parks, National Forests, National Wildlife Refuges, National Wilderness Areas, and areas established pursuant to Congressional authority, such as National Monuments, Wilderness Study Areas, and Areas of Critical Environmental Concern.

The History of R.S. 2477 Claims

This section examines the history of R.S. 2477 from legislative, administrative, and legal perspectives.

As noted earlier, R.S. 2477 was one section of a law entitled "An Act Granting Right of Way To Ditch and Canal Owners Over The Public Land, and For Other Purposes." The law was more commonly known as the Mining Act of 1866.

Historical perspective

This legislation was passed during a period when the federal government was aggressively promoting the settlement of the West. Mining and homesteading had been occurring on the public domain without statutory authority, as had construction of roads, ditches, and canals to support these undertakings. Passage of the Homestead Act in 1862 began a new era of settlement of the federal lands. Access was promoted by Congress through railroad land grants and special legislation for major transportation routes but was ignored when it came to the handling of private and individual access. These important but smaller access matters were generally left to local customs or state law. The Mining Act of 1866 not only established the first system for the patenting of lode mining claims, but it also provided for access.

Legislative Setting

A brief look at how Congress passed this legislation provides some clues as to how right-of-way provisions for highways and canals were assembled into a mining law.

The Mining Act of 1866 was enacted in the midst of a major dispute among factions of Congress over the handling of federal mineral deposits. Some, led by California, favored a do-nothing approach as mining, unrestricted by the federal government, continued. Others favored the sale of the mineral lands for paying off the federal debt incurred by the Civil War and other federal activities. There was also continued movement to encourage people to use their War scrip and settle the Western Territories.

The House of Representatives enacted a bill authorizing the sale of mineral lands (H.R. 322). The Senate countered with a bill providing for preemption of lode minerals (S. 257). The Senate bill was bottled up by the House Committee on Public Lands, so the Senate amended a House-

passed ditch and canal right-of-way Bill (H.R. 365) with a revised version of S. 257 in order to keep the legislation out of the hands of the House Committee on Public Lands. This last version was then approved by the House and enacted into law on July 26, 1866. When the Senate amended H.R. 365 with its mining bill (S. 257), there were a number of differences with or revisions to S. 257. Most of the differences or revisions appear to be either technical changes or additions, possibly suggested by the California mining interests. One significant revision was the addition of Section 8, the grant of right-of-way for highways.

Reenacted, Later Repealed

Section 8 of the Mining Act was reenacted and codified as part of the Revised Statutes in 1873. This was the result of recommendations from the Public Land Review Commission, authorized in 1866 to review existing legislation affecting public lands and to suggest codification into related groups. The designation "R.S. 2477" thus replaced "Section 8 of the Mining Act."

In 1938, as part of the recodification of the statutes, R.S. 2477 became 43 U.S.C. §932 until its repeal in 1976 by FLPMA.

The significance of Congressional reenactment of this right-of-way provision is a subject of debate. Some view the Congressional action as a conscious move to retain a broad right-of-way authority. Others see this as an oversight by Congress that has allowed the language of R.S. 2477 to take on a meaning that was probably unintended in the 1866 Act.

What Does R.S. 2477 Grant?

A search of its legislative history reveals little hard evidence of what Congress was thinking when it included Section 8 in the Mining Act of 1866. The Congressional Record offers few clues to the answer.

Issues and questions

The words in the statute are straightforward. R.S. 2477 is a grant of a right-of-way for the construction of highways across unreserved public lands. One hundred and twenty seven years after enactment, however, the intent and scope of this statute remains elusive.

Core "intent" questions

Several historical and legal questions remain. What did Congress grant and to whom? If a grant was established, to what extent were rights conveyed? How and when should these rights be applied? Who has jurisdiction over these rights?

The Department has considered these questions carefully and reviewed the wide range of public input supplied. The legal and policy issues are

complex and must be interpreted according to sound and coherent principles. The Department will examine these questions comprehensively at a later date. The parameters of the issues are outlined below.

Positions of affected interests

While a wide variety of interpretations was offered to answer these and other questions, most of the discussion can be grouped into two, very general, opposing viewpoints.

Many state and local governments and access groups

Some argue that the Congressional grant and its application are very broad--a blanket authority, to be accepted by state and local governments, to build access across the public domain. They argue that the right was without reservation or limitation.

Environmental organizations

Others argue that Congress viewed R.S. 2477 in much narrower terms, with specific limitations to the establishment and application of rights. These groups take the position that R.S. 2477 rights-of-way over federal lands should be narrowly defined and limited to their original use and scope.

Statutory terms

Similar differences of interpretation exist regarding many key elements of the statute. Congress' possible intentions in the definitions of the statutory terms "highway," "construction," and "unreserved public lands," not surprisingly, can be imagined to support whichever position is being advocated.

What is a highway?

For example, many voiced support of the inclusive definition of "highway" citing historically broad uses of the term. Under this view, an R.S. 2477 highway embraces any avenue of travel open to the public, including trails, pathways, traces, and similar public travel corridors. Under this expansive definition, these types of ways should be included along with more substantial roads in the definition of an R.S. 2477 highway.

Others argue that Congress intended only to recognize major roads that were mechanically constructed as R.S. 2477 rights-of-way . This position relies on the plain meaning of the term "construction" and on a narrower definition of "highway." Some advance the position that most potential R.S. 2477 highways were originally established by individuals and were private roads with private purposes and, therefore, ineligible as highways under R.S. 2477.

The CRS report addresses the issue of what Congress intended to grant as a public highway. In their report, the definitions of road and highway are compared in modern and historic contexts. The CRS report found

that the most likely interpretation of the statute is that a highway was intended to mean a significant type of road, that is: "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."

What is construction?

The intended meaning of the term "construction" is debated as well. Some believe "construction" requires improvement by mechanical means. Others argue that mere passage may constitute construction. The CRS report found that some construction or improvement is a necessary element of the grant of an R.S. 2477 highway.

What are unreserved Public Lands?

What "unreserved public lands" was intended to mean is also a subject of disagreement and ambiguity. Federal land was withdrawn and dedicated for a wide range of federal purposes and subject to different levels of protection. This allows interest groups to construe the ambiguity and complexity to support their own positions. Some argue that because of broad federal withdrawals there was little or no unreserved public land during the effective life of R.S. 2477. They interpret the term reserved land to include all types of federal actions to classify land. Those who support this viewpoint often cite the establishment of grazing districts under the Taylor Grazing Act as an example of a type of federal classification action that constitutes reserved public land, thus disqualifying any subsequent R.S. 2477 highways. Others argue that reserved lands are those that have been withdrawn or dedicated for a more particular purpose, such as a National Park or Indian Reservation.

Does state or federal law control?

Another important question about the intent of Congress in enacting R.S. 2477 focuses upon whether state or federal law should govern. Some look to the 1866 Mining Act's recognition of state law and local customs pertaining to mineral rights, and its reliance on state law to fill in many of the details for implementation, as ample evidence that state law should govern this grant. Others believe that federal law must control the issue without regard to state law because the statute does not expressly incorporate or even refer to state law.

The CRS Report characterized the proper role of state law in defining R.S. 2477 as one of the "most fundamental and thorniest of issues." It notes: "state law may play some role, but may not contradict the express statutory granting language."

The Department believes that both state and federal law are relevant to a discussion of R.S. 2477. State law cannot override federal law, or accept more than was offered under a federal statute. However, a state can limit or clarify the nature of a grant it accepts, at least for its own

purposes. The Department will explore the proper relationship of state and federal law at a later date.

The Federal Land Policy and Management Act and R.S. 2477

With enactment of FLPMA on October 21, 1976, Congress clearly set forth its intentions for public land management. FLPMA provided for multiple-use management, a presumption that public lands should be retained and definitive processes for granting rights over public lands. For example, FLPMA repealed R.S. 2477 and substituted its own process for issuance of rights-of-way over public lands. With this repeal, subject to valid existing rights, Congress signaled that it intends to provide continued, but managed, access to federal lands.

Many of the commenters to this report misunderstand this relationship. Some perceive no relationship whatsoever, stating that FLPMA is irrelevant to R.S. 2477. Others take the position that FLPMA, being more recent legislation, should supersede whenever a case of conflict arises. Still others indicate that there must be a balance, although conflicting policies, procedures, and judicial interpretations make it difficult to determine where the balance lies.

BLM Position

The BLM manual attempts to follow the mandates of FLPMA while respecting pre-existing rights. It directs the BLM to manage R.S. 2477 rights-of-way using FLPMA as long as the federal manager does not diminish the rights of the holder. Using this approach the holder is authorized to do what is reasonable and necessary within the confines of the right-of-way to maintain the type of use to which it was originally put. At the same time, the federal manager has an express duty to prevent unnecessary and undue degradation of public lands.

Protect existing rights or prevent degradation?

With regard to FLPMA, the relationship between the saving provisions that retain preexisting rights and the statutory mandate to regulate public lands to prevent unnecessary and undue degradation is the central issue.

Other Legal Issues

In addition to the principal legal issues identified above, there are many other important legal questions. A brief discussion of the taking issue, abandonment, the use of R.S. 2477 to gain access over private land, and other questions follow.

The "Taking" Issue

The R.S. 2477 grant authority was repealed in 1976. Some parties claim that holders of R.S. 2477 rights-of-way may lose some of their rights if substantial regulatory burdens are imposed. However, subsequent attempts to clarify and confirm rights that existed before 1976 will not necessarily deprive anyone of the use of their property. Courts have long upheld the power of the state and federal governments to reasonably regulate private property for significant public purposes. Compensation is required when government regulation accomplishes a "total taking" of all economically viable uses or results in a physical invasion of property. Many options exist for clarifying R.S. 2477 issues that do not involved taking of property rights.

Abandonment and Statute of Limitations

Current policy and case law do not recognize any form of federal provision for abandonment of R.S. 2477 rights-of-way. This issue needs further consideration.

In the absence of a waiver of sovereign immunity, no one, including state and local governments, may challenge the title of the United States to federal property. In recognition of this, Congress passed a quiet-title statute that now appears at 28 U.S.C. § 2409a. It allows those who have been put on notice that the United States has a claim adverse to their property interest to file a law suit to quiet-title within 12 years of the date the affected party discovers the adverse federal claim. R.S. 2477 rights-of-way are easements and, therefore, interests in land subject to the quiet title statute. If title is not confirmed within 12 years of the date the federal government takes action inconsistent with their existence, then the right to contest the title expires. An adverse interest to a right-of-way can be shown in many ways including where Congress established a wilderness area, where BLM designated an area as a WSA, or where the U.S. Forest Service blocked off a former way and no one had acted on it for over 12 years. The key question is, what action by the federal government is sufficient to put others on notice that the Government claims an interest that may defeat the potential R.S. 2477 right-of-way claim and trigger the 12-year period? The Department will further consider the merits of this issue.

Assertions by the Federal Government of R.S. 2477 Rights-of-Way Over Private Lands

This issue is quite important to the U.S. Forest Service. It involves the ability of the federal government to assert R.S. 2477 rights-of-way across private land to regain historic public access to federal land. A related issue is whether federal agencies may be able to assert that such access has been established by prescription under state law whether R.S. 2477 is involved or not.

Role of State Law

R.S. 2477 is generally construed as an offer by Congress to state and local governments to construct highways. DOI has looked to state law to determine what constitutes a public highway under R.S. 2477. Federal highway law may also be relevant to this issue and will be explored at a later date.

A legal opinion issued by the Deputy Solicitor to the Assistant U.S. Attorney General on April 28, 1980, agreed that state law may govern how these roads were established, but only to the extent that it is not inconsistent with federal law. (Appendix II, Exhibit J.) Major points of contention among various public interests are the issues of federal versus state control and whose role it is to establish criteria for highway acceptance and define the scope of rights.

Few state laws address R.S. 2477

The majority of state laws concerning public highways do not expressly refer to the R.S. 2477 grant. Most state highway laws focus on what constitutes a public highway, how a public highway is created, and who has the authority to create a public highway.

Some state statutes contain language that is very broad, while others specifically lay out definitions and formal procedures. In other states, only formal petitions through public officials are sufficient to establish a highway. Some statutes declare that public use of a road over time can establish a highway. Other statutes set forth definitions of highways that are open to interpretation. Many states have enacted multiple statutes providing for several factors that may operate to establish a highway. Some state statutes refer to undocumented roads.

Section line dedications

Several states have dedicated all section lines as public roads. If section lines could be accepted as R.S. 2477 highways an extensive cross-hatching grid of rights-of-way would be established over the existing road network. Rights-of-way would be established at one-mile intervals (north and south, east and west) across federal lands.

Was R.S. 2477 Retrospective or Prospective?

The argument has been raised that the grant was only retrospective; i.e., it validated existing roads when the Act was passed. Those who claim that the grant was retrospective cite court cases which support this. The alternative argument is that R.S. 2477 provided authority for the future granting of rights-of-way. The majority of state and federal courts have taken the latter view.

Does R.S. 2477 Apply Only to Roads for Mining or Homesteading Purposes?

The argument has been raised that R.S. 2477 provides a right of access only to homestead or to mine. The vast majority of cases have found that highway rights-of-way are not limited to the mining and homestead context. The common logic of these cases is that Section 8 of the 1866 Act has been reenacted, in a distinct and independent statute, Revised Statute 2477, separate from the other provisions of the 1866 Mining Act.

Federal Case Law Summaries

A great many state cases deal with the establishment of highways pursuant to R.S. 2477. Almost all state cases predating FLPMA typically involve only non-federal litigants and are, therefore, not dispositive on federal R.S. 2477 issues.

There are a few federal cases that deal with R.S. 2477. However, these cases have established no clear judicial precedents. While existing judicial interpretation of R.S. 2477 has been inconsistent, it is still instructive to take a brief look at some of the key federal cases.

Federal Case Law

U.S. Supreme Court Cases

Kleppe v. New Mexico, 426 U.S. 529 (1976)

The U.S. Supreme Court dealt with the plenary power of the Congress over the public lands arising from the Property Clause of the U.S. Constitution, Article IV, Section 3. The Court noted its earlier 1925 decision in Colorado v. Toll, infra, and stated, "Congress had not purported to assume jurisdiction over highways within the Rocky Mountain National Park, not that it lacked the power to do so under the Property Clause." 426 U.S. at 544.

Central P.R. v. Alameda County, 284 U.S. 463 (1932).

The Supreme Court held that a railroad right-of-way accepted by the Central Pacific in 1868 was subject to the highway right-of-way laid out by Alameda County in 1859 and subsequently established by the passage of wagons. This was approved by Congress with the passage of R.S. 2477 in 1866.

Colorado v. Toll, 268 U.S. 228 (1925).

The Supreme Court held that the creation of Rocky Mountain National Park by Congress did not take jurisdiction away from the State of Colorado over existing roads within the Park. The Park Service had tried to assert exclusive control over the roads within the Park.

U.S. v. Vogler, 859 F.2d 638, (9th Cir. 1988), cert. denied, 488 U.S. 1006 (1989).

U.S. Court of Appeals Cases

The Ninth Circuit dealt with an assertion of an R.S. 2477 highway as access to a mining claim within a National Park. The court declined to rule on the R.S. 2477 issue but did hold that the Park Service had authority to regulate access reasonably pursuant to legislation passed by Congress pursuant to Article IV, Sec. 3 of the U.S. Constitution.

Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988), See also Sierra Club v. Lujan, 949 F.2d 362 (10th Cir. 1991).

This case involved attempts by Garfield County to improve the Burr Trail in Utah. The Tenth Circuit held that the scope of an R.S. 2477 right-of-way was determined under state law and the law in Utah was that the road was what was reasonable and necessary for the kind of road that existed as of the repeal of R.S. 2477 in 1976. The federal land manager determines what is reasonable and necessary. The Court also ruled that because of the strong interest expressed by Congress in preserving WSAs, the requirements of the National Environmental Policy Act (NEPA) were triggered by the county's desire to improve the road next to WSAs and, therefore, the BLM was required to prepare an Environmental Assessment to determine whether or not an Environmental Impact Statement was required. The question of the impact of Taylor Grazing Act withdrawals on R.S. 2477 was raised in this case, but it was not addressed because the Burr Trail was found to have been established prior to 1934.

U.S. v. Gates of the Mountains Lakeshore Homes, 732 F.2d 1411 (9th Cir. 1984).

The Ninth Circuit held that R.S. 2477 did not provide for legal construction of the grant under State law and State law could not allow for power lines to be placed within an R.S. 2477 right-of-way without the permission of the U.S. Forest Service.

Humboldt County v. U.S., 684 F.2d 1276 (9th Cir. 1982).

The Ninth Circuit enforced the 12-year statute of limitations contained in the quiet title statute, 28 U.S.C. §2409a. The court also raised but did not resolve the issue of whether the Taylor Grazing Act of 1934 itself, or by withdrawals issued pursuant to it, withdrew the public lands from the operation of R.S. 2477.

Park County, Montana v. U.S., 626 F.2d 618 (9th Cir. 1980), cert. denied, 449 U.S. 1112 (1981).

The Ninth Circuit held that a county was precluded from asserting an R.S. 2477 within a National Forest because the road had been closed more than 12 years, and, therefore, the waiver of sovereign immunity in the quiet-title statute, 28 U.S.C. § 2409a, had expired.

Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973), cert. denied, 411 U.S. 917 (1973).

The D.C. Circuit held that the construction of a highway by a third party on the behalf of the state is sufficient to establish an R.S. 2477 right-of-way.

U.S. v. Dunn, 478 F.2d 443 (9th Cir. 1973).

The Ninth Circuit, citing as authority Central Pac. RR. v. Alameda, supra, reiterated that R.S. 2477 was passed to protect those who had previously encroached on the public domain but had been allowed to remain there with the knowledge and acquiescence of the United States. Accordingly, the statute was not intended to grant any future rights.

U.S. v. Jenks, 804 F. Supp 232 (D. N.M. 1992).

U.S. District Court Cases

The court found that the issue of whether an R.S. 2477 right-of-way has been established is a question of state law.

Wilkinson v. Department of the Interior, 634 F. Supp. 1265 (D. Colo. 1986).

This case involved a road that entered and then exited the Colorado National Monument. The Court held that the Park Service could not charge an entrance fee for those using the road through the Monument because this was an invalid restriction on the right-of-way, and the attempt to prohibit all commercial traffic was also contrary to the right-of-way. The court also held that reasonable regulation of commercial traffic was authorized by legislation enacted by Congress pursuant to the property clause of the U.S. Constitution.

U.S. v. 9,947.71 Acres of Land, 220 F. Supp 328 (D. Nev. 1963).

The court held that mining claimants acquired title to a right-of-way pursuant to R.S. 2477 to access a valid mining claim, even though the court recognized that the county involved had disclaimed the road and the court recognized that it was not a public highway.

U.S. v. Emery County, Utah, in the U.S. District for the District of Utah, Civil No. 92-C-106S. (D. Utah)

U.S. District Court Consent Decree

In 1990, Emery County filed applications for FLPMA rights-of-way and consulted with BLM for authorization to realign and improve the Buckhorn Road which has been administratively recognized as an R.S. 2477 highway. Rather than complete the process, Emery County proceeded with the realignments and improvements. In the process, an archaeological site was impacted, and other resource damage occurred. Emery County argued that it did not need permission to improve the road or deviate from the existing alignment. BLM issued three trespass notices and a cease and desist order.

The matter was ultimately resolved by a Consent Decree approved by the U.S. District Court which provided that the county was required to have approval from BLM for any improvement or realignment of any acknowledged R.S. 2477 highway. The county agreed they would notify BLM before it undertook any on-the-ground activity, other than routine maintenance. (Appendix IV, Exhibit A.)

Department of the Interior Position on R.S. 2477--Pre-FLPMA

Prior to the passage of FLPMA, BLM (and before it the General Land Office) had a very limited Congressional mandate to manage the public domain. Its primary purpose was disposition of these lands. Long-term retention and management of the public lands became more important over the years and led to the passage of FLPMA in 1976. Much greater attention was then given to multiple use management when land-use planning was Congressionally mandated for public lands.

Early Department of the Interior Guidance

After review of DOI records no indication has been found of any guidance or policy about R.S. 2477 rights from 1866 until 1898. In 1898, the Secretary of the Interior held that an attempt by a county to accept R.S. 2477 grants along all section lines in the county was ineffective (26 L.D. 446). (Appendix II, Exhibit B.)

In 1938, an early Interior regulation was published dealing with R.S. 2477 rights-of-way (43 CFR part 244.55). The guidance read as follows: "This grant becomes effective upon the construction or establishing of highways, in accordance with the state laws, over public lands not reserved for public uses. No application should be filed under the act, as no action on the part of the Federal Government is necessary." (56 I.D. 533, 551 (1938). Circular 1237a.) (Appendix II, Exhibit C.) This same position was maintained over the years. In 1955, (62 I.D. 158) a decision by the DOI shows that R.S. 2477 was considered an authority by which a highway could be established across public lands. (Appendix II, Exhibit D.)

Regulations in effect at the time of FLPMA's enactment had been published in 1970 and amended in 1974. (Appendix II, Exhibit E.) (43 CFR 2822.2-2 (FR 9646 June 13, 1970 as amended at FR 39440, November 7, 1974.)) They addressed the management of these rights in greater detail than previous guidance but maintained the same general position--that grants became effective upon construction or establishment of highways in accordance with state law across unreserved public land.

These same 1974 regulations also clarified that a right-of-way pursuant to R.S. 2477 was limited to highway purposes. Prior to these regulations, some holders of R.S. 2477 rights-of-way authorized third parties to ancillary uses within the right-of-way, such as power or telephone lines. This regulation stipulated that separate applications were required under other regulations to use lands within R.S. 2477 rights-of-way for other purposes.

Department of the Interior Position on R.S. 2477-- Post-FLPMA

Section 706(a) of FLPMA repealed the right-of-way authority for R.S. 2477. Section 509(a), however, preserved valid, existing rights-of-way acquired under former public land laws. This means that while rights-of-way established pursuant to R.S. 2477 prior to its repeal remain valid, no new rights-of-way could be acquired after its repeal.

Proposed Rulemaking to Sunset R.S. 2477

After the 1976 repeal of R.S. 2477, there was a growing awareness of the need to identify and recognize the rights that had been established prior to 1976. Proposed regulations published in 1979 (43 CFR 2802.3-6; 44 FR 58118, proposed October 9, 1979) would have required persons or state or local governments to file maps within three years with BLM showing the locations of public highways constructed under the authority of R.S. 2477. (Appendix II, Exhibit F.) The submission of this information was not intended to be conclusive evidence as to the existence of an R.S. 2477 right-of-way, but an opportunity for BLM to be able to note the public land records. However, when final regulations were published, they simply stated opportunity to file within three years. (43 CFR 2802.3-6; 45 FR 44518, 44531, July 1, 1980). (Appendix II, Exhibit G.)

In 1981, regulations were proposed to streamline the existing regulations. (43 CFR 2802.3; 46 FR 39968-69, proposed Aug. 5, 1981). (Appendix II, Exhibit H.) When final regulations to streamline were published on March 23, 1982 (43 CFR 2802.5; 47 FR 12568-70), the three-year window was removed. (Appendix II, Exhibit I.)

1980 Solicitor's Office Interpretation

Section 603 of FLPMA mandated that BLM review, for wilderness characteristics, roadless areas of 5,000 acres or more. Much discussion ensued at DOI over the definitions of road and roadless area.

The Solicitor's Office concluded in 1980 that the numerous and conflicting state and federal court rulings on R.S. 2477 were not helpful in clarifying these terms. Instead, it turned to the statutes, both R.S. 2477 and Section 603 of FLPMA, to define the terms "highway" and "road." Within the legislative history of FLPMA, a road must be more than a jeep track, requiring some evidence of mechanical improvement or maintenance through mechanical means.

In looking at R.S. 2477, a Solicitor's letter stated that the term "construction" also required the use of some modicum of mechanical means beyond the mere passage of vehicles. In a 1980 letter from Frederick Ferguson, Deputy Solicitor, to James Moorman, Assistant Attorney General, the DOI interpreted the reference to construction in R.S. 2477

to mean that a track across the public lands not subject to mechanical maintenance or improvement was only a "way" in the context of wilderness. This meant that a "way" could not be an R.S. 2477 highway, thus eliminating a potential conflict between R.S. 2477 and FLPMA with regard to roadless areas. (Appendix II, Exhibit J.).

Alaska Drives a New Policy

When Alaska became a state in 1959, approximately 98 percent of its land was in federal ownership, primarily (297 million acres) under BLM management.

Different types of transportation

This vast area contained few roads. Miners, trappers, and Natives traveled by foot, dogsled, or pack animal, using existing game trails or creating new trails. A few roads were constructed by the Bureau of Public Roads. In more recent years, access has also been gained by snowmobiles and tracked vehicles. Access by aircraft is common in many areas because of the cost-effectiveness of building airstrips compared to the cost of building roads.

In recent years, Congress specifically recognized Alaska's unique problems with the passage of Alaska legislation. In 1971, the Alaska Native Claims Settlement Act (ANCSA) mandated the reservation of access for public use across Native lands. This legislation and subsequent regulations established categories of easements, with different widths corresponding to different types of use, to apply to lands conveyed to Native corporations.

Alaska legislation

In 1980, the Alaska National Interest Lands Conservation Act (ANILCA) was passed, including Title XI, Transportation and Utility Systems In and Across and Access into, Conservation System Units. This legislation provided a process for acquiring rights-of-way for transportation and utility systems, recognizing that most of Alaska's transportation and utility network is undeveloped. Strict guidelines and timeframes are imposed upon applicants in this process. To date, nearly 13 years since enactment, only a few applications have been filed under this act, presumably because potential applicants fear the high costs and cumbersome process.

Because the state believes that access would play a critical role in the future development of Alaska's natural resources, there has been a major effort since the 1970s to identify existing roads and trails. Many Alaska interests voiced the concern that they need and should have the opportunity to use R.S. 2477 rights-of-way in much the same manner state and local governments in the Lower 48 States had during their own early developmental stages.

In 1985, an interagency task force was formed within the DOI to work with the state of Alaska on policy, process, and procedures for assertions of R.S. 2477 rights-of-way. This effort ultimately led to the development of the DOI policy for the administrative recognition of asserted R.S. 2477 rights-of-way, signed by then Secretary Hodel on December 7, 1988. The Hodel policy was based on and expanded the existing (1986) BLM Rights-of-Way Manual. The Hodel Policy was not published in the *Federal Register* for public comment.

1988 Policy

The 1988 Hodel policy, attempting to account for the perceived uniqueness of Alaska, put forward loose criteria for R.S. 2477 claims and applied these criteria to all federal lands under DOI jurisdiction in all 30 public land states.

The Hodel policy addresses the three statutory requirements that must be met for acceptance of an R.S. 2477 right-of-way. It also addresses ancillary uses, the width of highways, abandonment, and to some extent, the responsibilities of the agency and the right-of-way holder. (Appendix II, Exhibit K.)

The statutory requirements were interpreted by the Hodel policy as follows:

- Unreserved public lands means those federal lands open to the operation of the public land laws. That excludes lands reserved or dedicated by Act of Congress, Executive Order, Secretarial Order, and some classifications authorized by statute. Also excluded are public lands preempted or entered by settlers under the public land laws or located under the mining laws during the pendency of the entry or claim.

- Construction must have occurred while the lands were unreserved public land. Construction is defined in broad terms. It must involve a physical act of readying the highway for its intended method of transportation, which could include foot, horse, pack animal, or vehicle. Construction could be accomplished by such simple means as the removal of vegetation or rocks, road maintenance over several years, or the mere passage of vehicles. Survey, planning, or dedication alone do not constitute construction.

- The route must be a public highway that is freely open for its intended use but could potentially be a toll road or trail. The inclusion of a highway in a state, county, or municipal road

system or the expenditure of public funds for construction or maintenance constitutes adequate evidence of this criterion. A statement by an appropriate public body that the highway was and still is considered a public highway is acceptable, barring evidence to the contrary.

Other Provisions

The 1988 Hodel policy also provided guidance on several other aspects of R.S. 2477 rights-of-way. It confirmed that ancillary uses required separate authorizations under the 1974 BLM regulations.

Highway widths

Widths of highway rights-of-way were to be in accordance with state law wherever possible, or established based on the width of the disturbed area of the highway, including back slopes and drainage ditches.

Abandonment

Abandonment is to be accomplished within the procedures established by state, local, or common law or judicial precedent.

Reasonable activities allowed

The policy stated that under R.S. 2477, the DOI has no management control over proper uses of a highway right-of-way unless undue or unnecessary degradation of the servient estate can be demonstrated. The policy disavowed jurisdiction of reasonable activities of the right-of-way holder, while not precluding the applicability of other federal, state, or local laws that are relevant to the use of the right-of-way.

The Current Status

The first part of this section examines the recent BLM administrative determination process. The second part describes current R.S. 2477 claims, both those that have been recognized by administrative or judicial means and those that are pending. The third part addresses potential R.S. 2477 claims, including a discussion of factors that influence the likelihood of future claims being asserted to agencies.

Agencies Directed to Develop Administrative Procedures for R.S. 2477 Claims

No formal process for either asserting or recognizing R.S. 2477 rights-of-way currently is provided in law, regulations, or DOI policy. The 1988 Hodel policy directed all land management agencies within the DOI to develop appropriate procedures for administratively recognizing and to record this information on the land status records. Administrative recognitions are not intended to be binding, or a final agency action. Rather, they are recognitions of "claims" and are useful only for limited purposes. Courts must ultimately dertermine the validity of such claims.

Federal land management agencies, and even units within a particular agency, have been confronted with the R.S. 2477 issue to different degrees. As might be expected, the need to deal with this issue has influenced the pace and extent to which agencies have developed their own internal procedures for making administrative determinations on R.S. 2477 right-of-way claims.

The U.S. Forest Service, while not an agency of the DOI, has adopted the 1988 policy. (Forest Service Manual 2734.51)

Neither the Bureau of Indian Affairs, nor the Bureau of Reclamation, nor the U.S. Fish and Wildlife Service has developed administrative procedures.

Park Service interim guidance

The National Park Service, with pending claims in both Alaska and the Lower 48 States, has begun initial work to develop supplemental guidance. The Rocky Mountain Regional Office of the National Park Service has issued interim guidance (Appendix II, Exhibit L.).

BLM Manual guidance

The Bureau of Land Management, the recipient of the majority of R.S. 2477 claims so far, has developed the most detailed process for handling assertions. In 1989, the BLM published guidance on R.S. 2477 in its manual which established procedures to evaluate and process right-of-way claims. (Appendix II, Exhibit M.)

Acknowledgments are only an internal Administrative Determination

The manual elaborates on several points. It lists Acts of Congress, Executive Orders, and other federal activities which are recognized to remove public land from unreserved status. It reiterates that acknowledgments of R.S. 2477 claims are strictly administrative actions and not subject to administrative appeal. It describes the minimum information required to accompany an R.S. 2477 application to BLM. It also addresses BLM management responsibilities with regard to maintenance, realignment, and upgrading of existing R.S. 2477 highways.

Some BLM State Offices have also issued field-level guidance to assist the managers who typically make the administrative determination onsite. BLM Offices in Alaska and Utah have developed the most comprehensive guidance within the agency. (Appendix II, Exhibit N. and O.)

What is An Administrative Determination?

An administrative determination is an agency recognition that an R.S. 2477 right-of-way probably exists. The process used to make an administrative determination has been developed in response to claims filed and provides an administrative alternative to litigating each and every potential right-of-way. Its is not intended to be binding or final agency action, but simply a "recognition" of "claims" for land–use planning purposes.

An Overview of the Process

While procedures vary somewhat due to differing agency mandates, administrative determinations currently follow the general guidelines of the 1988 Hodel policy to determine the validity of an asserted right-of-way.

As an example, typical steps BLM takes to make a determination under the 1988 policy are as follows:

Evidence is submitted

- The process begins when a party presents a claim to the agency. Usually some form of supporting evidence, old maps, photographs, etc., accompanies the initial claim for highway recognition.

Cannot have been constructed by the Federal Government

- The first level of agency review includes a check into the status of the road being claimed. For example, the road in question is checked to determine if the road was constructed by or for the federal government. If so, it would not qualify as an R.S. 2477 highway. Public notification of the pending assertion is normally made at this initial stage. Information either to support or refute the asserted claim is solicited from the public.

Next, the agency checks to see if the statutory requirements to perfect a grant were met in a timely manner.

Unreserved Public Land?

- Historical records are examined to determine whether or not the highway was constructed on public lands which were not reserved at the time for other purposes.

Construction?

- It is determined whether some form of construction occurred. This question is reviewed both in accordance with state law and DOI policy. If state law does not require a higher standard of construction than set forth in the 1988 Hodel Policy, then this definition of construction applies.

Public highway?

- Was the asserted right-of-way considered a public highway? In general, a declaration by the asserter confirmed by a state or local government that the asserted road is and has been a public highway is sufficient to meet the test.

Was the right-of-way established prior to 1976?

All three of the above conditions must have been met prior to the repeal of R.S. 2477 by FLPMA in 1976.

Letter of acknowledgment

Where conditions exist on public lands to support recognition of an R.S. 2477 right-of-way Congressional grant, the Authorized Officer issues a letter of acknowledgment and treats the highway as a valid use of the public lands. When evidence does not support the assertion, the Authorized Officer will inform the asserter that the federal land management agency does not recognize a highway.

If the asserted right-of-way is acknowledged by the federal land management agency, the agency may then determine the scope of the right-of-way and the terms and conditions applicable to the acknowledgment, in accordance with agency guidance.

If the review process finds that the R.S. 2477 did not validate some or all of the asserted highway, an applicant has other options for securing access. Issuance of a right-of-way under more contemporary authorities such as Title V of FLPMA is one option typically considered by the BLM. The procedures and abilities to issue rights-of-way vary widely among land management agencies.

Controversy Over the Process

Like most aspects of R.S. 2477, the process outlined above has been quite controversial. Areas of contention among various members of the public include:

- Historic and record evidence required by the agency to substantiate a claim.
- Public notification procedures.
- Disagreement regarding the definitions of public highway, construction, and unreserved public lands.
- R.S. 2477 claims being determined valid over some but not all segments of the same highway.
- The lack of an administrative appeals process for administrative determinations.
- The issue of trying to assert R.S. 2477 claims over private property.

Current R.S. 2477 Claims

There are three different types of R.S. 2477 claims: recognized claims that have already been acknowledged through either an administrative or judicial process, pending claims that have been filed with an agency but not processed, and yet unfiled or asserted claims. The number of pending claims has increased by thousands since 1988 when awareness of this issue peaked.

Recognized Claims

As was mentioned earlier, thousands of highways have been established across the Western United States under the authority of R.S. 2477--most without any documentation on the public land record. The status of these rights-of-way has changed little over the years. After the repeal of the statute in 1976, the BLM attempted to identify and recognize grants that had been previously accepted. State and local governments that had constructed highways under the grant were encouraged to file maps with the BLM for notation on the public land records. The request stated that such information would neither be conclusive evidence as to the existence of an R.S. 2477 right-of-way nor would the failure to provide such information preclude a later finding as to its existence. Most jurisdictions failed to reply.

Existing public land records indicate that approximately 1,453 R.S. 2477 rights-of-way have been administratively recognized or judicially decreed to exist to date across BLM lands. At least two R.S. 2477 highways have been recognized in National Park Units--the Burr Trail located in both Capitol Reef National Park and Glen Canyon National Recreation Area in Utah and the Glade Park Road in the Colorado National Monument.

Information regarding other federal land management agencies was not available for this report. Few recognized claims are thought to exist across other agency lands.

Pending Claims

To date, no claims for R.S. 2477 rights-of-way have been asserted to either the Bureau of Indian Affairs or the Bureau of Reclamation. The National Park Service has six pending claims, three in Alaska and three in Utah.

Currently, there are approximately 5,600 pending claims on file with the BLM nationwide, mostly in Utah, with 5,000. Other states have very few claims pending. Many new assertions have been filed with various federal agencies since the initiation of this study. Few assertions are pending with federal land management agencies overall other than for Utah BLM.

Potential R.S. 2477 Claims

The number of R.S. 2477 rights-of-way that may have been in existence prior to 1976 but have not been confirmed is unknown and highly speculative.

Factors that Determine the Likelihood of Future R.S. 2477 Claims

Several factors have influenced where and how access routes developed across the Western United States prior to 1976. Historical development patterns and associated access needs surely influenced the potential number of qualifying highways. Topography, terrain, and climate have helped and hindered development of access. Travel across public lands in the arid Southwest and the Northern Tundra Region necessitated different methods of travel and different access needs.

Several other factors contribute to the number of potential R.S. 2477 highway assertions. Obviously, future DOI policy and judicial decisions are important factors. The willingness of a state or local government to assert rights-of-way routes is another obvious factor to potential routes.

A reference list of state statutes used to define what constitutes a state highway and a list of case law are contained in Appendix V, Exhibits A through Q.

In summation, there are many different factors that influence the likelihood of potential asserted claims. The potential for a great number of R.S. 2477 rights-of-way on lands managed by many federal agencies is minor, due to the fact the lands were withdrawn from the public domain before the establishment of highways. The significant exception to this generality is Alaska.

The Henry Mountains-- A Case Study

Currently, little hard, quantifiable information exists regarding potential R.S. 2477 highways. BLM in Utah, following its 1991 policy, (Appendix II Exhibit N) inventoried existing roads and trails on public land within its Henry Mountains Resource Area. Since the issuance of the 1988 Hodel policy, this is the first, and to date the only, BLM Resource Area where such an inventory has been completed and where counties have indicated which roads and trails they are asserting pursuant to R.S. 2477. This BLM unit provides an example of how various factors could influence the number of potential claims in a given area. Several commenters suggested other areas that could provide useful case studies, but information could not be gathered or verified in time for this report.

The following discussion of the Henry Mountain Resource Area may or may not be representative. Lack of information prevents any firm conclusions. It is offered in order to clarify the information previously discussed in this section on how different factors effect the potential for R.S. 2477 claims being asserted.

The BLM's Henry Mountain Resource Area encompasses 2.6 million acres of private, state, and BLM-administered lands within Garfield and Wayne counties in Southeastern Utah. It is bordered to the east by the Horseshoe Canyon Division of Canyonlands National Park and to the east and south by Glen Canyon National Recreation Area.

Inventory of R.S. 2477 Claims

In the Spring of 1991, the BLM began an inventory of potential R.S. 2477 highways in preparation for completing the transportation plan component to a new land-use plan for the Resource Area. Ascertaining the existence or lack of highway grants under R.S. 2477 was deemed necessary for preplanning purposes and in order to respond to the county assertions that they were the holder of valid existing rights-of-way on many routes that cross public lands. Claims for approximately 320 roads have been filed with the BLM by Garfield County. All of these claims are located on BLM-administered land except for a few that extend into

either Glen Canyon National Recreation Area or Capitol Reef National Park, administered by the National Park Service.

The development of access routes in the Henry Mountains

Several factors mentioned previously in this section have contributed to the development of access routes in the Henry Mountain Resource Area that may qualify for R.S. 2477 highways. Large blocks of unreserved public lands are found in the Resource Area. Both Capitol Reef and Glen Canyon are fairly recent additions to the National Park System, created from public domain that may have underlying R.S. 2477 rights-of-way. Past mining, ranching, and recreational use has led to development of a fairly extensive access system in many portions of the Resource Area. Topography has influenced the development of either well-established or very primitive access routes.

The Utah context

Utah state law is another factor. State law has established very broad criteria for the acceptance of a public highway. No formal acceptance of a highway is necessary, public use is accepted, and no specific road standards are necessary to establish a highway. A final factor is that Garfield and Wayne counties are two of several Southern Utah counties with a keen interest in establishing what they deem as valid R.S. 2477 highway rights.

Many types of potential R.S. 2477's claimed

The routes asserted range in character from well-established gravel or paved roads to the less distinct jeep trails maintained solely by the passage of motor vehicles. The approximately 320 routes currently asserted cover about 1,450 miles. About 120 roads, spanning 800 miles, are termed Class B roads under the Utah State highway system. All of these roads are periodically maintained by county highway departments. Another approximately 200 roads, covering about 650 miles, are termed Class D roads. These are the most primitive classifications within the State system. They are not in the county maintenance program. A rough estimate indicates that about half of these Class D roads were constructed by some type of mechanical means; the others, by mere passage of motor vehicles.

Mostly on BLM land, a few involve the Park Service

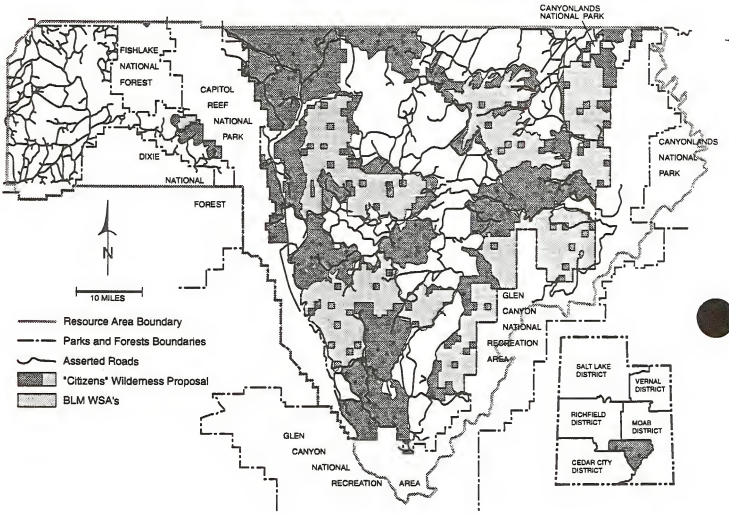
Except for the six roads that extend into National Park Service units (35 miles), all are on BLM land. Most do not traverse areas specially designated by the BLM. However, a citizen group's wilderness proposal is overlain by approximately 200 miles of asserted roads.

Some within wilderness study areas

Several roads, covering approximately 16 miles, within BLM WSAs have been asserted for agency acknowledgment. The BLM has informed Utah counties that all BLM WSAs have been previously inventoried and found to be roadless. It is the BLM's position that no R.S. 2477 public highways exist in WSAs in Utah.

ROADS ASSERTED TO THE BLM FOR ACKNOWLEDGMENT

Henry Mountain Resource Area Planning Unit



Impacts of Current and Potential R.S. 2477 Claims

Congress has instructed the DOI to address impacts of current and potential R.S. 2477 claims from three different perspectives in this Report. These are: (1) impacts on the management of federal lands, (2) impacts to multiple-use activities, and (3) impacts on access to federal, state, private, Indian, and Native lands. These will be addressed individually. Additionally, numerous comments were received that addressed impacts to state and local governments. These impacts will be considered in the last part of this section.

Broad perspective -- all agencies

The impacts on management discussed in this section are addressed from the broad standpoint of all federal land management agencies affected by the R.S. 2477 issue. No attempt has been made to split out the discussion among the various agencies, although reference to a particular agency or agencies will be made when appropriate.

This approach has been used for two reasons.

1. A lack of specific information and the difficulty in predicting the number of potential R.S. 2477 claims make the precise assessment of impacts on an agency or regional basis impossible.

2. An examination of impacts on management of federal lands as a whole is more appropriate to the scope of this nationwide study. Also, the identification and discussion of the central-management issues and concerns that may affect federal lands in the West due to R.S. 2477 are more in keeping with the information needs of Congress, federal land managers, and affected interests at this time.

Impacts on the Management of Federal Lands

Valid R.S. 2477 rights-of-way are recognized and important means of access to and across federal lands. In most instances they have not presented problems to land managers. However, the recent onslaught of assertions, so long after termination of the statute, the potential problems of proof, and the growing contentiousness of the issue do create problems for resource management. The uncertainty attending this issue makes planning and development difficult, compromises an agency's mission, and undermines the relationship between federal officials and the people they serve. The actual impact of use of current and potential

R.S. 2477 rights-of-way depends on the number of claims recognized, the type of resources affected, and how the right-of-way is used. Current and potential R.S. 2477 rights-of-way can pose significant adverse impacts to federal land management in many situations depending on the extent to which an agency is able to manage an R.S. 2477 grant.

Higher level of impacts than with other authorities

Recognized R.S. 2477 rights-of-way historically have been managed only to prevent unnecessary and undue degradation of resources, to the extent that the holder of the right-of-way is not denied reasonable use. R.S. 2477s are sought by many because they perceive R.S. 2477s as virtually unregulated. If this were the case, R.S. 2477 claims could permit a higher level of impact to resources than would occur with issuance of rights-of-way pursuant to other authorities. Under FLMPA, for example, federal managers have authority to review changes in use and to require appropriate mitigation of impacts. Therefore, indefinite recognition of R.S. 2477 rights-of-way could prevent the federal government from providing full protection to important geographic features and biological, cultural, and physical resources. This would pose a particularly significant threat to resource values in National Parks, Wildlife Refuges, Wilderness and WSAs, Wild and Scenic River corridors, Areas of Critical Environmental Concern, or other areas that require special-management practices to protect important resources. Some federal land managing bureaus have and do regulate R.S. 2477s The Department will explore the extent of its regulatory authority over these right-of-way.

Under this heading, impacts from R.S. 2477 highways on the manageability of federal lands are discussed first. This part addresses the topic of converting use along a right-of-way as a result of the holder's extending rights and concludes with a brief overview of agency concerns regarding costs associated with future R.S. 2477 highway claims. Possible impacts related to wilderness follow.

The Ability to Manage According to Agency Mission

The federal agencies that manage substantial acreages of federal land and are the most likely to be affected by recognition and use of R.S. 2477 rights-of-way are the BLM, National Park Service, U.S. Fish and Wildlife Service, and the Department of Agriculture's U.S. Forest Service.

The missions of these agencies are summarized briefly below.

National Park Service--preservation of natural values in National Parks, National Monuments, National Recreation Areas, Wild and Scenic Rivers, trails, etc., while providing for public use and enjoyment. No activity can be authorized which is in derogation of Park values and purposes.

U.S. Fish and Wildlife Service--management of National Wildlife Refuges for protection of migratory waterfowl and consultation under the Endangered Species Act and other protective legislation.

U.S. Forest Service--management of the National Forest System, including many National Recreation Areas and National Forest Monuments, according to the principles of multiple use and sustained yield. R.S. 2477 rights-of-way affect substantial National Forest areas. While some R.S. 2477 rights-of-way do limit the agency's management discretion, other such rights-of-way provide important public access to the National Forests. The Forest Service endeavors to retain historic public access.

BLM--management of the public lands, including National Conservation Areas and Areas of Critical Environmental Concern according to principles of multiple-use and sustained yield.

Common mandate for protection could be compromised

Every federal agency shares a common mandate for use and protection of federal lands and resources within a framework of long-term stewardship. Recognition and use of R.S. 2477 rights-of-way could interfere with and prevent effective management of the individual and common objectives of the affected agencies in some cases. The ability of federal managers to implement management plans and meet the requirements of federal laws, such as the Wilderness Act, Endangered Species Act, Clean Water Act, Archaeological Resources Protection Act, National Historic Preservation Act, etc., would be compromised if they are required to continue indefinitely recognizing R.S. 2477 rights-of-way.

Change of use could cause impacts

Changing the use or status of individual R.S. 2477 highways in conflict with federal purposes could cause localized impacts. For example, road-widening may directly impact natural resources contiguous to the right-of-way. Converting a rough, four-wheel-drive road into a paved thoroughfare could lead to direct impacts resulting from better access to, and increased use of, sensitive locations.

Resource management plans compromised

The recognition of additional R.S. 2477 rights-of-way within a federal unit could lead to more substantial problems. Without the ability to manage access, the ability of federal managers to implement short- and long-term resource management plans could be seriously compromised.

New claims continue to be filed

This potential problem of impact on management due to R.S. 2477 is aggravated due to the inchoate nature of the grant. New claims for rights may surface at any time, frustrating a manager's ability to plan. Related to this is the concern that as more time elapses between 1976 (the date the statute was repealed) and new R.S. 2477 claims, it will become harder to trace the evidence needed to make an accurate validation determination.

Impacts on wilderness designations

Federal agencies manage designated wilderness areas and proposed wilderness according to principles outlined in the Wilderness Act of 1964. It is argued that the assertion of R.S. 2477 rights-of-way in proposed wilderness areas could be used as a tool to defeat wilderness designation because by definition the area must be roadless.

Concern over the ability to manage according to agency mandate is also a particularly sensitive issue in National Parks, Wildlife Refuges, and other similar federal reservations. These areas have been set aside for preservation rather than multiple use purposes. R.S. 2477s within the boundaries of these areas could compromise the specific purposes and values these areas were established to protect.

These issues are of great interest in Alaska, where concerns over both access and the conservation of environmental values are intense. The large number of more recently established federal parks, refuges, etc., in Alaska create special access and management issues.

Degree of Impact Depends on Scope of Right-of-Way

Assessing the extent of impacts of R.S. 2477 claims on the management of federal lands is difficult. Confusion over the law and its application further clouds this evaluation. However, an important correlation can be made in many cases between the types of rights-of-way that may qualify as R.S. 2477 highways and the extent of impacts that could occur.

Significant roads normally a benefit rather than a problem

Generally, existing significant roads pose limited potential for conflict with federal management purposes. In many cases, these roads are major travel corridors providing access for commercial and recreational activities. As some members of the public have commented, these R.S. 2477 highways benefit both the federal managing agency and the public in a number of ways. This is particularly true in situations where state or local governments provide maintenance or other services to facilitate access.

Conversely, there is greater potential for adverse impacts to the management of federal lands if primitive roads--normally characterized as jeep trails, constructed through use only--are asserted and deemed valid R.S. 2477 highways.

Concern over primitive roads

If primitive roads are recognized as valid R.S. 2477 highways, there is greater opportunity for conflict because this type of access and associated use poses more potential for negative impacts to resources and sensitive locations. Without the option to regulate vehicle access, federal managers may not be able to mitigate adverse impacts or manage for nonmotorized types of experiences.

Conversion of Rights from Unimproved Road to Improved Road

The issue of impacts related to a change in use when a holder decides to develop or extend rights on an R.S. 2477 highway is addressed next under this heading.

Reduced ability to protect resources

Quite often, continued use of an R.S. 2477 highway has minimal impact on the management of federal lands as long as that use continues in the same manner and degree. However, should there be a change in use to recognized R.S. 2477 highways, the potential for adverse impacts increases. If recognized rights-of-way are substantially improved or if the scope and use are significantly changed, the ability of federal land managers to protect important resources is reduced.

For example, simple road maintenance may improve access and benefit all. But, road widening or realignment could potentially cause damage to adjacent resources that a federal manager may have difficulty controlling. Converting a jeep trail to accommodate heavy commercial traffic is another example of a situation that could impose various impacts on federal lands.

The extent of the ability to require mitigation is unclear

Under current policy, federal managers have no effective mechanism to review an R.S. 2477 highway holder's plans for maintenance or improvement to identify mitigation measures necessary to meet legislative mandates, including protection of cultural properties, management of habitat for sensitive plant and animal species, and management of federal land for wilderness values. Furthermore, due to conflicting interpretations of the statute and the lack of precise DOI procedures, federally imposed limitations or mitigation requirements have been challenged, making it difficult for land managers to meet legislative obligations. The DOI intends to further explore its legal authority and obligation to manage R.S. 2477 on federal land.

Agency Costs

Agency costs regarding R.S. 2477 can be broken down into two general categories--personnel costs relating to the administration of claims, and costs associated with litigation. Administrative costs include the cost of making administrative determinations and the cost of managing rights-of-way once they are recognized. Administrative determinations include costs of processing claims, reviewing historical records to determine unreserved status, and field examinations of claimed rights-of-way. Agency costs have been estimated to be between $1,000 and $5,000 per claim. The cost of managing recognized R.S. 2477 rights-of-way primarily involves working with the holder of the right-of-way when changes are planned. This cost is extremely variable based on a number of factors, and is not reflected in the figures above.

In addition, agency litigation costs are extremely difficult to estimate, but experience has shown that R.S. 2477 litigation can be protracted and expensive. Litigation costs are expected to remain high until administrative, legislative or judicial action clarifies the R.S. 2477 controversy.

Wilderness

Wilderness areas and Wilderness Study Areas (WSAs) are roadless by definition and preclude any recognition of R.S. 2477 rights-of-way. BLM has been informed by two Utah counties that they intend to pursue quiet-title actions on a road in an existing WSA.

The effect of recognition and use of R.S. 2477 rights-of-way on manageability of wilderness areas and WSAs is a special concern. It is this topic that elevated the R.S. 2477 issue to Congressional attention.

Wilderness manageability compromised

If Federal managers cannot prevent improvement and use of recognized R.S. 2477 rights-of-way, protection of wilderness values, such as naturalness and outstanding opportunities for solitude and primitive recreation in wilderness areas and WSAs, could not be ensured. The manageability of the area for protection of wilderness values would be compromised.

Wilderness proposals

If primitive access routes are recognized as R.S. 2477 highways, large areas of public land in some areas currently proposed for wilderness designation by various public-interest groups may be disqualified. Citizen wilderness proposals on BLM lands in Utah and in the California Desert Conservation Area are two examples of this situation.

Mechanically constructed vs. primitive roads

When assessing the extent of impacts of R.S. 2477 on wilderness management and potential designations, one can again make a distinction between well-established, significant roads and primitive roads. Well-established roads that have been constructed through some type of mechanical means pose no threat either to existing or potential wilderness. However, there is great concern over potential impacts to areas under consideration for future designations if primitive routes constructed by the mere passage of vehicles are deemed valid existing R.S. 2477 highways.

Responses from public scoping echoed the impacts addressed above in many instances and in some cases expressed very different perspectives on impacts of R.S. 2477 on management of Federal lands. The impacts identified by the public are listed below:

Constituency Concerns

- BLM has been informed that Millard County, Utah, intends to file suit for quiet-title to a road in the King Top WSA.
- Public lands cannot be managed by BLM as Congress intends when the lands are covered with a "spaghetti plate" of rights-of-way.
- It should be recognized by federal land managers that their activities on the land are made possible largely because counties have exercised their rights pursuant to R.S. 2477. An extensive network of roads has been built and maintained at the expense of local government and taxpayers and to the benefit of the nontaxpaying federal agency managing the land.
- Current and potential R.S. 2477 roads disrupt management of federal lands and threaten resources and public purposes and values of public land.
- Incomplete records and confusion over the law and its application make it difficult to inventory, thus assess, impacts of potential R.S. 2477 claims.
- It does not serve the public interest to allow abandoned rights-of-way to be converted to other purposes that may be incompatible with current purposes.
- Denial of R.S. 2477 rights-of-way does not mean that access has been eliminated; it merely leaves access under the management and jurisdiction of BLM or other federal agencies. This is precisely what Congress intended in the passage of FLPMA.
- There is the potential to misuse this law greatly in a way that would destroy so much important wildlife and recreational lands and corresponding local and regional economies.
- Congress did not designate National Parks, Refuges, and Forests in Alaska to protect wilderness and wildlife values with the notion that an ancient claim could be upgraded, reconstructed, or converted to uses that are incompatible with the conservation purposes established by law.
- Confirmation of pending or potential R.S. 2477 assertions would degrade or disqualify areas of public lands designated or proposed for designation as wilderness.

- The original intent of R.S. 2477 was to open the West. The BLM is abusing the original intent of the law by using it to increase their control over some roads.

Impacts on Multiple-Use Activities

General comments and information regarding impacts of R.S. 2477 claims on multiple-use activities will be discussed first under this general heading. Specific discussions relating to recreation, the mineral industry, grazing, and the forestry industry will follow.

The U.S. Forest Service and the BLM are the principal multiple-use land management agencies of the Nation. The public lands under the jurisdiction of these two agencies provide for a wide variety of consumptive and nonconsumptive uses, including mining, ranching, forestry, and recreation, to name a few.

Most of these activities have taken place on the public domain since the settlement days of the West. As these uses developed, so did an infrastructure of roads to support these activities. This historical network of roads, largely still in use today, was created in a number of different ways and by a number of different interests. Most roads were developed by users of the public lands; a few were developed by federal management agencies; and others were established by State and local governments. Access to federal lands that may be provided by these roads may be very important to multiple use activities.

A portion of this road system was developed under the authority of the R.S. 2477 grant. These R.S. 2477 highways continue to provide significant benefits not only to public land users but also to the managing federal agency as well. For example, the U.S. Forest Service encourages the use of R.S. 2477 to keep open historical public access to federal lands across lands now in private ownership. Many of these R.S. 2477 highways provide essential access, facilitating public land uses, protection, and management. This system has been developed at little or no cost to federal agencies or to taxpayers at large. The costs of acquiring access by other means can be high.

R.S. 2477 was neither the only, nor perhaps even the dominant, method by which citizens gained access to their public lands. A great deal of access has been and continues to be developed through casual use. The public lands and the roads across them are largely open and available to use without the need of a right-of-way or other formal authorization. Access for some multiple-use activities is allowed because of implicit authorities within related legislation. For example, the Taylor Grazing

Act and the Mining Act of 1872 have been interpreted as providing reasonable access for individuals engaged in those activities on the public land.

Access in support of multiple-use activities is an integral part of agency planning. Access related to grazing, mining, forestry, recreation, etc., is a key element of Forest Service and BLM management plans.

While R.S. 2477 played an important part in building the road infrastructure system on the public lands, its role should not be overstated, for at least two important reasons:

1. R.S. 2477 is only one of several different ways that access has been developed, and other viable alternatives continue to provide access to and across federal lands.

2. For numerous reasons detailed earlier in this draft report, it is not clear what percentage of the existing road infrastructure system on the public lands is attributable to the R.S. 2477 grant.

It is very clear, however, that the entire road system that developed across the public lands prior to 1976 was established and is in use today with very few R.S. 2477 right-of-way claims asserted or recognized by federal agencies or the court system.

Because of this, it is reasonable to assume that current and potential R.S. 2477 claims will continue to have little overall impact on multiple-use activities. Access for a wide variety of multiple-use activities has been available on the public lands and that situation will continue regardless of the recognition of R.S. 2477 rights-of-way. This is especially true for significant roads that were established by the grant. These well-established travel corridors will continue to support public land access and activities.

The potential effect of recognition and use of primitive roads as R.S. 2477 highways is greater than continued use of significant roads because of potential improvements to the primitive roads and increases in use. The nature of the related impacts is described below under individual activity headings.

Recreation Activities

Impacts to recreation vary depending on the type of recreational activity pursued. Some supporters of motorized recreation feel that current and potential R.S. 2477 claims could have a positive effect on their activities. This is because extending claims could maximize access options and perhaps provide an opportunity to maintain or even reopen areas currently closed by agencies.

Other recreationists feel that the proliferation of R.S. 2477 rights could adversely impact their enjoyment of wilderness and other uses of public lands that are not compatible with motor vehicle use.

Both types of impacts described above are more likely if primitive roads are recognized as R.S. 2477 highways.

Mineral Industry Activities

Overall impact to the mineral industry from recognition or use of R.S. 2477 rights-of-way would be minor. A number of public respondents did state that R.S. 2477 rights-of-way were essential because they help to maximize access options for exploration and development. Although this could be true in limited situations, particularly if primitive roads are deemed valid R.S. 2477 highways, the availability of access under casual use, provisions for access under the mining law, and alternative methods of obtaining a right-of-way under FLPMA and other laws combine to provide other means of ensuring continued access by miners.

Livestock Grazing

The overall impact of current and potential R.S. 2477 claims on grazing activities is also minimal. The availability of access under casual use, implicit provisions of the grazing regulations, and other alternative methods of obtaining access provide adequate means of ensuring continued access by livestock operators.

Forestry

The overall impact of current and potential R.S. 2477 claims on forestry uses of the public lands is minimal for the same general reasons stated above. Many National Forests are surrounded by private lands and securing access to them is more of a problem than controlling access across them. R.S. 2477, along with other access acquisition authorities, is valued by the U.S. Forest Service as a cost effective way of providing public access.

Constituency Concerns

Many respondents felt that multiple-use management objectives should be placed above the objectives of holders of R.S. 2477 rights-of-way. However, some felt that R.S. 2477 claims should mandate reconsideration of federal management objectives. Other concerns are listed as follows:

- BLM is violating the intent of both statutes by granting R.S. 2477 pro forma and by limiting the Secretary's ability to retain and manage public lands for multiple use and sustained yield with an emphasis on land-use planning, protection of the environment, and involvement of the public in decisionmaking.
- A conflict between management objectives and an R.S. 2477 claim is grounds for reconsidering the management objective.
- A functional R.S. 2477 will go a long way toward opening up our public lands for public use and enjoyment and curtailing exclusive use, commercialization for profit, and de facto management of public lands.
- The mineral industry depends on unimpeded access to remote areas of the public domain. Any attempt to restrict the scope of valid existing rights established under R.S. 2477 will directly hamper mineral exploration and development that is absolutely vital to this country's economy and national security.
- Access across public lands to private lands is of particular concern because of patented mining claims surrounded by public lands and the railroad checkerboard system of land ownership.
- Existing regulations pertaining to several multiple-use activities contain access provisions, such as the mining regulations under 43 CFR 3809, precluding the need for other authorizations such as FLPMA or R.S. 2477.

Impacts On Access

Impacts from current and potential R.S. 2477 claims on access to federal, private, state, Alaskan Native, and Indian lands will be discussed under this heading.

To Federal Lands

Access to significant areas of public lands is an important issue. As outlined in the Government Accounting Office report of April 1992 (Federal Lands--Reasons for and Effects of Inadequate Public Access), approximately 700 million acres are owned by the federal government.

This land contains many resources (both consumptive and nonconsumptive) of value to the American people. Intermingled with these lands are state, local government, tribal, corporate, private, and other lands. This fragmented pattern of ownership, especially in the West, makes it difficult in many instances for the public to access federal land easily or legally. Unless the federal, state, and local governments obtain additional access or identify and maintain existing legal public access routes, non-federal landowners can often control or deny public access to federal land.

In recent years, there has been more focus on and analysis of this situation by some federal agencies. What are now private and state lands may, in some cases, have included valid R.S. 2477 highways when they were conveyed out of federal ownership. When this historical access is closed by private land owners, the public may be deprived of access or may be charged a fee to access federal lands. Federal land managers have lacked adequate resources to gain legal access across these lands.

Recent actions to reopen or prevent closing of historical public highways pursuant to state law have been actively pursued by private citizens and by the federal government. The U.S. Forest Service and the BLM have entered into agreements with some private citizen groups to pursue reopening of closed historical access across private land where such routes may qualify as public highways under appropriate state law.

In addition, the BLM in Colorado, in conjunction with the DOI Regional Solicitor's Office, has been reviewing access needs across private lands. Where review finds that there is a valid public highway under Colorado state law, the private landowner is notified and BLM manages the public lands assuming there is legal public access. Other BLM State Offices are looking at this approach and are assessing its applicability to their access management.

To Private Lands

Inherent in private property ownership is a need for some sort of access to the property. Access also affects the value of private lands through the appraisal process. Many parcels of private land are reached by routes across federal lands. Management of motorized vehicle use over federal lands would directly affect use and enjoyment of the private lands, especially if the only access route is across federal lands. Some of those routes may be valid highways under appropriate state law.

When private landowners pursue formal authorization of access to their private property, the cost of access may be a prime consideration. There may be significant costs associated with formal authority to construct, operate, and maintain such access. If an access route exists that might be considered a public highway and thus not require a landowner to undertake these costs, this would probably be the preferred method of access. However, R.S. 2477 is clearly only a grant for a "public highway," and would not be applicable as authority for a strictly private road.

To State Lands

Many parcels of state land are reached by crossing federal land. Use of state lands by state leaseholders, other users, and the public can be significantly impacted by federal actions regarding management of access on federal land. State lands can consist of both trust and sovereign lands. Trust lands are generally managed by the respective states to maximize revenue generation in support of schools and other government services.

While a federal district court has addressed the right of access to state trust lands within WSAs in Utah and has stated that there is a right for such access, the question of the right of access to state lands in other states, as is reasonably necessary to the economic development of such lands, is not so clear.

R.S. 2477 highways are a valid method of securing historic access to State lands, but they are not available prospectively. The attractive feature for states and localities of R.S. 2477 is that, under current policy, no regulatory obligations are imposed, unlike other right-of-way authorities.

Access affects the value of state lands just as it does private land. The value of state lands may also be impacted based on the potential for R.S. 2477 rights-of-way across the land.

To Alaskan Native Lands

It was the intent of Congress to resolve aboriginal claim issues in Alaska with the Alaska Native Claims Settlement Act (ANCSA). Between this act and the Native Allotment Act of 1906, Native lands have taken on a unique and prominent aspect in Alaska. Native lands conveyed to Alaskan Natives have been not only used for the continuation of traditional culture, but also for the provision of economic development.

Access has been an important component of this issue. Access to and across Native lands is essential for the future economic development of Alaska, but there is a concern that uncontrolled access will impact the

traditional lifestyles of Alaskan Natives and lessen their ability to manage lands for their benefit. Important historical subsistence resources may exist on Native lands and on adjacent federal lands. Access to subsistence areas by contemporary access modes such as snowmobiles and all-terrain vehicles is considered by some Native peoples as critical to subsistence uses.

As discussed previously, the lack of development of a traditional access network in Alaska has resulted in unique access methods. Alaska Natives have depended on the use of traditional lands and access routes for subsistence. With the selection and conveyance of lands to for-profit corporations established by and for Alaskan Natives, the value of access has become an important issue.

Section 17(b) of ANCSA addressed the issue of reserving easements across Native lands conveyed to Native corporations. Physical access may exist to many Native lands, but formal authorizations over interspersed federal, state, and private lands generally do not exist. Costs associated with acquisition of other formal authorizations across federal and other lands may be a significant impact to Native landowners in Alaska or to the state of Alaska.

To Indian Lands

Most Indian Reservations in the Lower 48 States were established by Congress prior to the development of extensive infrastructure and road networks. Access to Indian lands is much the same as access to state and private lands, including Interstate, federal, state, and county roads. Access to Indian lands has not been identified as an issue through public comments, and little impact is anticipated to Indian lands as a result of existing or potential R.S. 2477 claims.

There could be impacts on access to Indian religious and cultural sites located outside Reservations. These sites have been determined by the courts in some cases to be Indian lands. Access to these areas could be impacted, but the extent of the impacts is not known. No comments were received that addressed this issue.

Many commenters on this study reiterated access concerns and suggested that Federal land managers take a more aggressive role, including the use of R.S. 2477, to lessen what they considered to be an access dilemma. These concerns include access to and across private lands.

Constituency Positions

Many comments stated that Alaska, for a variety of reasons, posed a special situation and that R.S. 2477 access is particularly critical to that state. Contributing factors include the state's large federal land base, coupled with the fact that much of the private, State, and local property has recently been established from federal lands.

Other typical comments included:

- R.S. 2477 maximizes access options.
- Federal, state, or private individuals should reestablish R.S. 2477 rights-of-way on roads currently blocked by private landowners in order to gain access to public lands.
- Maintaining R.S. 2477 rights-of-way across private lands ensures future access of the public to public lands.
- R.S. 2477 facilitates access to private lands. This is particularly important in the West, where land ownership patterns are often checkerboarded or where large areas of public lands surround private inholdings.
- R.S. 2477 may present an opportunity to gain access to areas currently closed, both public and private.
- Denial of R.S. 2477 does not eliminate access. It merely leaves access under the jurisdiction of the federal land manager.
- Access across public lands to private lands is of particular concern because of patented mining claims surrounded by public lands and railroad checkerboard.
- Average citizens will never see access with Title XI. There are too many loopholes; even major corporations won't use it.
- FLPMA and ANILCA are inadequate and do not provide the flexibility that R.S. 2477 provides to state and local government right-of-way needs.

Impacts to State and Local Governments

Some state and local governments view access pursuant to R.S. 2477 as a very significant issue. Their concern is not necessarily in maximizing public highways under their management, but preserving their ability to expand and upgrade their transportation systems to provide for road safety and future growth. Local interests fear that their economies and infrastructures may be limited or diminished if federal lands and resources are unavailable for development. Such limits will translate to lower tax bases for government services, loss of employment opportunities for present and future generations, and the potential loss of local control over their own destinies.

State and local governments also sometimes argue that R.S. 2477 is a blanket authority that was granted to local government to build access across the public domain for purposes of public convenience. They argue that the grant was without reservation, irrevocable, and that any taking of the right-of-way must involve compensation.

The following comments summarize many of the additional concerns expressed by or about state and local government entities.

Constituency Concerns

Because R.S. 2477 rights-of-way were historically available and stimulated road building, some state and local interests would like to retain its availability. Other right-of-way authorities are, of course, available, but are less desirable because they involve more federal control.

- R.S. 2477 has provided state and local governments greater flexibility in administering lands within their jurisdictions and provided access to neighboring public and private lands.
- Federal government is undoing policy that was made for the public.
- R.S. 2477 was a blanket authority granting the right to local government to build access across the public domain for the purposes of public conveyance and convenience. The right granted was total and without reservation.
- Once accepted, rights-of-way created under the R.S. 2477 grant are irrevocable. Any taking of the grant must involve some form of compensation to the affected state(s).
- The right granted by Congress in 1866 and the work and expense of local citizens pursuant to this right must not be treated casually by either federal managers or the U.S. Congress.

- The benefits accrue to all the people while the sacrifices made to create them were made by the few living in the local areas.

- Many counties in the Western States are not financed to fight the legal battles to get these rights-of-way reopened for use by public agencies and the general public.

- The ability to assert rights-of-way is an important land management component that allows county and local governments the flexibility to administer lands within their jurisdiction and ensure access to citizens as deemed necessary. To repeal, limit, or diminish this statute would cause undue hardship on local governments and small rural communities.

- Counties have expended large sums of money for construction and maintenance--money, or some portion thereof, that would otherwise have been shouldered by the federal government.

- R.S. 2477 rights-of-way must be recognized as inseparable from other essential rights vital to the interests and stability of local economies and cultures.

- Federal agencies should coordinate with local government and document existing standards in land-use and resource-management plans.

- A confirmation process should be established whereby all individuals and State and local governments with unresolved R.S. 2477 claims would be required to submit proof of the validity of their claims to the DOI for confirmation.

- An extensive network of roads has been built and maintained at the expense of local government and local taxpayers and to the benefit of the nontaxpaying federal agency managing the land.

- State and local governments view R.S. 2477 rights-of-way as property assets. Loss or reduction of use may constitute a taking necessitating compensation.

- States owning trust lands requiring that the lands be used for the support of the common schools and other specified institutions are concerned that federal actions not preempt or limit their

ability to fulfill their trust responsibilities to act for the sole benefit of their beneficiaries.

- Denial of R.S. 2477 claims may result in heavy legal costs to federal agencies and the federal treasury as affected parties seek compensation.

Currently Available Access Authorities

Although R.S. 2477 was repealed in 1976, it is perceived by many to be the only method of obtaining access to federal lands. This misperception has inflamed some users of public lands. Access is a key component of federal land management. Federal lands are currently managed to provide access in a variety of ways under several provisions of law.

Most access occurs without any special authorities or privileges extended. Refuge and park visitors or public land users travel under the terms of casual use or other implied rights that do not require a right-of-way or other authorization.

Additionally, there are current right-of-way authorities that provide access on federal lands other than R.S. 2477, such as Title V of FLPMA.

This section describes these access alternatives. First, alternative methods of obtaining access are discussed. Second, the legal authorities to grant rights-of-way on public land which are available to different agencies are described.

Alternatives to Rights-of-Way

The access methods described below are not a complete list of all available means of access. They indicate the types of access that exist.

Access for Casual Use

"Casual use" means activities that do not ordinarily cause any appreciable disturbance or damage to public lands, resources, or improvements; those types of activities do not require a right-of-way grant or temporary-use permit pursuant to regulations. Casual use of public lands is provided for under a number of different regulations, for mining, leases and permits, and rights-of-way and other activities. The regulations at 43 CFR 2800 define casual use on lands managed by BLM in terms of right-of-way uses. For the most part, this policy also applies to National Forest lands.

Casual use generally includes foot traffic and the use of horses or pack animals, although in a few instances, such traffic is prohibited to protect resources. Off-highway vehicle use is also recognized by BLM and the

Forest Service as casual use except where areas are designated as open only to the use of existing roads and trails, or closed to off-highway vehicle use. Casual use of NPS lands generally does not allow for off-highway vehicle use.

Implicit Authority

A right of reasonable access can be implied for those engaged in valid uses of the public lands. For mining claims, for mineral leasing, livestock grazing, and other uses, access is available across federal lands to reach the allotment or permit area. Courts have found that federal agencies must provide reasonable access to unpatented mining claims when requested.

Sections 1323(a) and 1323(b) of ANILCA provide for reasonable access to inholdings within National Forests and within blocks of public land managed by BLM.

Acquisition of Access Routes

There are several methods by which local, state, and federal agencies and other entities can acquire access to federal land across non-federal land by acquiring either easements or title to non-federal land. When this is accomplished, access can be managed as part of the adjacent federal lands by the managing federal agency.

Road and trail easements

Road or trail easements are acquired by federal agencies across private or state land when access is needed. This method involves negotiations with the landowner(s) and the compensation of fair market value for the easement acquired. This a commonly used method of acquiring needed access to federal lands.

Purchase of land

Acquisition of title to non-federal lands is very similar to the acquisition of easements by federal agencies. This method of acquisition differs in that federal agencies acquire (purchase at fair market value) title to property that has been identified as needed for federal-agency management and use. Acquisition of title to non-federal land that is contiguous to federal land allows the federal agency to provide access via existing routes that may cross the acquired land or to develop new access routes, if needed.

Land exchange

Acquisition of land or interest in land, including easements, can also be accomplished through the consummation of a land exchange with the non-federal party. Exchanges of land may be made if there is a finding that the public interest is well served and that the values of the non-federal lands or interests are greater than the values and objectives of the federal lands to be conveyed. Federal agencies may then manage the lands acquired through exchange in a manner that provides reasonable access to the agency, public land users, and the public.

Reciprocal Access Agreements

Access is sometimes obtained through reciprocal road agreements between a federal agency and parties seeking access across federal land. Reciprocal agreements can be developed that give each party the access desired. This authority is contained at 43 CFR 2801.1-2.1.

Alternative Right-of-Way Authorities

R.S. 2477 is not the only right-of-way authority available for roads, and because it was repealed in 1976, it cannot be used to establish rights-of-way that were not yet in existence at that time. However, land managing agencies are authorized to grant rights-of-way under other legal provisions. Resolution of the R.S. 2477 issue does not affect these other provisions. The following brief descriptions are offered as alternative right-of-way authorities. Any right-of-way sought that cannot be proven to have existed before 1976 and any future rights-of-way must use these authorities.

Title 23 of the Federal-Aid Highway Act

The U.S. Department of Transportation can appropriate highway rights-of-way under Title 23 of the Federal-Aid Highway Act. The appropriation is subject to conditions deemed necessary by the Secretary of the Interior and the Secretary of Agriculture to protect the federal land and public interest.

FLPMA Title V Right-of-Way

FLPMA Title V replaced R.S. 2477. It authorizes the granting of rights-of-way, to any qualified public land user. It incorporates the provisions of the National Environmental Policy Act and other applicable legislation into the right-of-way process. Impacts to public lands can be mitigated through terms and conditions of the right-of-way grant. Agency regulations and manuals clearly define the process. In some states, counties are relinquishing R.S. 2477 rights-of-way in favor of FLPMA rights-of-way.

Several federal agencies have specific authorities unique to the agency. A brief discussion follows.

Agency Authorities

U.S. Fish and Wildlife Service

The U.S. Fish and Wildlife Service has right-of-way authority (50 CFR 29) promulgated pursuant to the National Wildlife Refuge System Administration Act (16 U.S.C. 668 dd(d)). Under these regulations, a right-of-way must be certified to be compatible with the purposes for which the refuge was established or cannot granted without explicit authorization by Congress. Additionally, the U.S. Fish and Wildlife Service is authorized to issue special-use permits for uses that existed at the time of the creation of the Refuge. These permits contain stipulations and conditions to protect Refuge values.

U.S. Forest Service

The Enabling Act for the National Forest System was passed in 1891, thus creating a movement for separate forests and additions to forest reservations to be created by Acts of Congress and Presidential Proclamations. Except for entries under the mining laws and water right appropriations,

this closed the national forests to any more unilateral appropriation of public land for roads and trails. The method of creating rights-of-way for roads and trails on the national forest under state law stopped. Management of those existing public roads and trails on the national forests continued to be under the jurisdiction of the counties unless abandoned under state law provisions.

In addition, the U.S. Forest Service has authority to issue rights-of-way under FLPMA and the Forest Road and Trail Act (FRTA; 16 U.S.C. §533). The Forest Service may grant rights-of-way where parties show a need consistent with the planned uses of the forest.

NPS

The National Park Service lacks general authority to issue rights-of-way across units of the National Park System for roads, with certain exceptions on a unit-by-unit basis.

Special Alaskan Right-Of-Way Authorities

There are some unique legal authorities to issue rights-of-way in Alaska. These include easements reserved under the authority of Section 17(b) of the Alaska Native Claims Settlement Act (ANCSA) and the Transportation and Utility Corridor system process under Title XI of (ANILCA) (43 CFR Part 36).

17(b) Provision of ANCSA

Section 17(b) easements provide limited access over lands conveyed to native Alaskans. These easements are very limited in width and use. The regulations governing Section 17(b) easements are found at 43 CFR 2650.4-7. The following criteria must be met to permit a reservation of an easement: no other reasonable alternative route of transportation across publicly owned land can exist; they must be limited in number and not be duplicative; they must be limited in use and size; and must follow existing routes of travel unless otherwise justified.

Title XI of ANILCA

Title XI of ANILCA provides a process for establishing rights-of-way over, across, and through designated Conservation System Units and the National Conservation and National Recreation Areas. Title XI rights-of-way are available for new roads, pipelines, and other transportation and utility systems.

The process is perceived to be very burdensome, because it requires compliance with the National Environmental Policy Act and approval of each (possibly several) affected agencies. Several small scale single agency Title XI rights-of-ways have been processed by the U.S. Fish and Wildlife Service and the National Park Service in Alaska. Two major Title XI right-of-way applications have been filed by the state of Alaska with the Alaska Region of the National Park Service.

Recommendations--R.S. 2477

In the Fiscal Year 1993 House Appropriations Committee Conference Report, Congress directed the Department of the Interior to study the history, impacts, status, and alternatives to R.S. 2477 rights-of-way and to make sound recommendations for assessing claims. The Department understands that its recommendations must take into account the intent of R.S. 2477 and the Federal Land Policy and Management Act (FLPMA), and that any proposed changes in use of valid rights-of-way must be in accordance with applicable law.

The Department directed the Bureau of Land Management, Utah State office, to take the lead in investigating this issue and preparing a report to congress. Public participation was obtained in two stages. Preliminary "scoping" meetings were held in December 1992 and January 1993 in eight western cities. Over 6000 pages of public comments were received and reviewed. These comments were instrumental in preparing the March 1993 draft report, which was circulated to approximately 4000 interested parties. Seven additional public meetings were held on the draft report and attended by nearly 400 people. Approximately 1000 pages of further comments were provided to the Department. All comments received before May 7 were reviewed in preparation of the final report, even if received after the public comment period closed.

The Department's draft report outlined five general alternatives for addressing R.S. 2477. These alternatives were intended to generate comment and discussion that would aid the Department in making recommendations in the final report. The comments received were beneficial in development of the recommendations that follow.

Although R.S. 2477 was repealed in 1976 by FLPMA, a law that charted new directions for public land management, valid existing rights under R.S. 2477 at the time of repeal were protected. The final report contains extensive information about the history, status, impacts, and alternatives to R.S. 2477. It is intended to help congress and the public, as well as the Department, to understand this often misunderstood issue and put it in perspective.

To provide sound recommendations, the Department must move beyond description and discussion. It must grapple with unresolved conflicts and must help provide answers to several important questions, including: what are valid existing rights, what are the proper roles of holders of those rights and the managers of the land they traverse, and what is the

relationship between R.S. 2477 and the modern legislation that dictates current federal responsibilities.

Some of these answers must ultimately and finally be provided by the courts. But the Department of the Interior should be engaged in these questions, to bring its expertise to bear on them. To this end, the appropriate officials of the Department have been directed to begin work immediately on a formal rulemaking on R.S. 2477, and to publish proposed regulations promptly. The process of rulemaking will furnish a regularized process for exploring and resolving the many legal and policy questions inherent in this issue, providing ample opportunity for the public, affected states, other federal agencies, and congress to participate.

Questions including the following will be addressed in a future rulemaking:

- Appropriate definitions of the statutory terms construction, highways, and public lands not reserved for public purposes.
- The respective roles of, and relationships between, federal and state law in defining key terms and resolving other issues.
- The extent of the Department's authority and obligation to manage R.S. 2477 rights-of-way on federal lands, including whether some of the processes in FLPMA Title V might be used to channel the Department's management.
- Recordation requirements.
- The elements of proof for an R.S. 2477 claim.
- Public notification and administrative appeals processes.

The Secretary of the Interior has broad authority to regulate the management of the public lands, but the Department will consult with congress on whether, and the extent to which, further congressional action is needed.

Until final rules are effective, the Bureau of Land Management will defer any processing of R.S. 2477 assertions except in cases where there is a demonstrated, compelling, and immediate need to make such determinations.

The U.S.D.A. Forest Service suggests consideration of options that would preserve R.S. 2477 as a tool to maintain historic public access to federal lands across private lands. For example, congress could provide mechanisms for assuring that R.S. 2477 rights-of-way continue to provide important public access where such access is necessary and appropriate. Such mechanisms might include federal assumption of management under temporary leaseholds or cooperative agreements.

APPENDIX I

DIRECTIVE TO SUBMIT R.S 2477 REPORT

Exhibit

A . . . . . H.R. REP. NO. 901, 102d Cong., 2d Sess. 71 (1992)

102D CONGRESS
2d Session | HOUSE OF REPRESENTATIVES | REPORT
102-901

MAKING APPROPRIATIONS FOR THE DEPARTMENT OF THE INTERIOR AND RELATED AGENCIES, FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1993, AND FOR OTHER PURPOSES

SEPTEMBER 21, 1992.—Ordered to be printed

Mr. YATES, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 5503]

The Committee of Conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 5503) "making appropriations for the Department of the Interior and Related Agencies, for the fiscal year ending September 30, 1993, and for other purposes," having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its amendments numbered 7, 11, 20, 24, 25, 29, 30, 34, 35, 58, 60, 63, 64, 65, 66, 75, 79, 81, 82, 83, 88, 91, 98, 100, 105, 119, 123, 129, 134, 140, 142, 146, 147.

That the House recede from its disagreement to the amendments of the Senate numbered 4, 5, 6, 9, 13, 14, 15, 16, 17, 27, 32, 36, 40, 41, 42, 43, 45, 46, 49, 50, 51, 52, 53, 56, 59, 67, 68, 71, 76, 96, 106, 114, 115, 116, 117, 118, 121, 122, 125, 127, 130, 149, 151, 152, 153, 155, and agree to the same.

Amendment numbered 1:

That the House recede from its disagreement to the amendment of the Senate numbered 1, and agree to the same with an amendment, as follows:

In lieu of the matter stricken and inserted by said amendment insert the following: *$544,877,000*; and the Senate agree to the same.

Amendment numbered 2:

That the House recede from its disagreement to the amendment of the Senate numbered 2, and agree to the same with an amendment, as follows:

In lieu of the sum proposed by said amendment insert: *$544,877,000*; and the Senate agree to the same.

Amendment numbered 3:

Amendment No. 151: Deletes House language, as proposed by the Senate which would have prohibited the use of funds for the sale of timber on National Forest Lands in Texas which would be exported by the purchaser.

Amendment No. 152: Changes the section number as proposed by the Senate.

Amendment No. 153: Deletes House provision stricken by the Senate mandating reductions to various accounts in the bill as proposed by the Senate.

Amendment No. 154: Restores House proposed Buy American requirements stricken by the Senate and changes section number.

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 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.

Amendment No. 156: Inserts Senate finding regarding corporate responsibility and changes section number. The House had no similar provision and the managers on the part of the House take no position on the Senate finding.

Amendment No. 157: Includes language proposed by the Senate which authorizes the Secretary of the Interior to remove restrictions applicable to the use of real property located in Halawa, Ewa, Island of Oahu, State of Hawaii as set forth in the quitclaim deed from the United States of America dated June 30, 1967. The managers have amended the provision so that the removal of the restrictions shall not be effective until the city and county of Honolulu have dedicated in perpetuity an equal amount of additional land for public park and public recreation uses.

Amendment No. 158: Includes language proposed by the Senate amended to change the section number, and to change the Senate language which was limited to Forest Service appeals, to provide an expanded Forest Service decision-making and appeals

APPENDIX II

DEPARTMENT OF INTERIOR GUIDANCE AND REGULATIONS

Exhibit

A . . . . . Instruction Memorandum No. 93-113, Bureau of Land Management, Dept. of Interior, January 22, 1993

B . . . . . Right-of-Way, Highway, R.S, 2477, 26 L.D. 446 (1898)

C . . . . . Rights-of-Way for Roads and Highways Over Public Lands, 56 I.D. 533, 551 (1938)(codified at C.F.R. pt. 244.255)

D . . . . . Limitation of Access to Through-Highways Crossing Public Lands, 62 I.D. 158 (1955)

E . . . . . 43 C.F.R. § 2822.0-3 to § 2822.2-2 (35 Fed. Reg. 9,646, June 13, 1970 as amended at 39 Fed. Reg. 39,440, Nov. 7, 1974)

F . . . . . 43 C.F.R. § 2802.3-6 (44 Fed. Reg. 58,106, 58,118, proposed October 7, 1979)

G . . . . . 43 C.F.R. § 2802.3-6 (45 Fed. Reg. 44,518, 44,530-31, July 1, 1980)

H . . . . . 43 C.F.R. § 2802.3 (46 Fed. Reg. 39,968-69, proposed August 5, 1981)

I . . . . . 43 C.F.R. § 2802.5 (47 Fed. Reg. 12,568-570, March 23, 1982)

J . . . . . Letter from Deputy Solicitor Ferguson to U.S. Attorney General's Office, April 28, 1980

K . . . . . Departmental Policy Statement on R.S. 2477, December 7, 1988

L . . . . . Interim Procedures for R.S. 2477, National Park Service, Rocky Mountain Region, August 28, 1992

M . . . . . Rights-of-Way Management, B.L.M. Manual 2801.48B (1989)

N . . . . . Instruction Memorandum No. UT 91-235, Change 1, Utah State Office, Bureau of Land Management, July 22, 1991

O . . . . . Instruction Memorandum No. AK 92-075, Alaska State Office, Bureau of Land Management, February 18, 1992

States Department of the Interior

BUREAU OF LAND MANAGEMENT

WASHINGTON, D.C. 20240

IN REPLY REFER TO

2800 (WO 260, 150)
Affects Manual 2801

January 22, 1993

EMS TRANSMISSION 1/25/93
Instruction Memorandum No. 93-113
Expires 9/30/94

To: All State Directors

From: Director

Subject: Washington Office (WO) Notification of RS 2477 Acknowledgements

Instruction Memorandum 93-32, dated October 27, 1992 informed all State Directors (SD) of the Bureau of Land Management's (BLM) assignment to report to the appropriate committees of Congress on several aspects of management of rights-of-way authorized by Revised Statue (RS) 2477.

Until such time as the report is completed, the BLM will acknowledge RS 2477 assertions in a most prudent manner. Assertions should only be examined when the State and/or local governmental entities have shown a compelling and immediate need to have a road acknowledged as a RS 2477 highway. When such an assertion is made, the WO Division of Lands, (WO-260) shall be notified, and will coordinate this information with the Division of Congressional Affairs. Using the information from the field, the appropriate Congressional committees will be notified of BLM's acknowledgement of the subject road as an RS 2477 highway.

When notifying WO-260 of an assertion, include a brief explanation of the relevant facts, and a map of the road and surrounding area. Telephone and/or fax the information to WO-260 as soon as possible, then follow-up with all the supporting documentation. When faxing information, please direct it to WO-260, Attention, Ron Montagna, at (202) 653-9117.

We consider RS 2477 issues to be of the highest priority. Therefore, the notification of the appropriate Congressional committees on the acknowledgement of RS 2477 assertions will be handled in a timely manner.

Your cooperation in this effort is greatly appreciated. Any questions regarding this assignment or RS 2477 questions in general, should be directed to Ron Montagna, WO-260 at (202) 653-9215.

Kemp Conn

Kemp Conn, Deputy Assistant Director,
Land and Renewable Resources

RIGHT OF WAY—HIGHWAY—SECTION 2477, R. S.

26 LD 446

DOUGLAS COUNTY, WASHINGTON.

It was not intended by section 2477 of the Revised Statutes to grant a right of way for highways over public lands in advance of an apparent necessity therefor.

Secretary Bliss to the Commissioner of the General Land Office, March 31, 1898.

With their letter of April 16, 1897, the local officers at Waterville, Washington, transmitted to your office a certified copy of an order of the board of county commissioners of Douglas County, Washington, purporting to be an acceptance of rights of way claimed to be granted by section 2477 of the Revised Statutes, and asking that the right of way so granted and accepted be made a matter of reservation in all subsequent patents issued for lands affected thereby.

Your office considered the matter, on April 23, 1897, and held that the statute does not authorize the exclusion of such right of way from patents issued for lands subject to such an easement. The county commissioners have appealed to the Department.

Section 2477 of the Revised Statutes is as follows:

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

Claiming to act under authority of the laws of the State of Washington, the board of county commissioners of Douglas county, in that State, passed the following order:

BE IT REMEMBERED: That, on the 6th day of April A. D. 1897, at a regular meeting of the board of county commissioners of Douglas county, State of Washington, said meeting being duly held and all members of said board being present, on motion, it was ordered that the right of way for the construction of highways over public lands, as granted by act of Congress (Section 2477 Revised Statutes), be accepted, and the same is hereby accepted, so far as said grant relates to said Douglas county, that is to say to the extent of thirty feet (30) on each side of all sections lines in said county; it is hereby declared that all sections lines in said county shall be, and the same are hereby declared to be, the center lines of highways and public roads in said county, wherever said section lines are bounded by public lands, and said highways are hereby declared to be sixty feet (60) in width; wherever any such section line shall be found to lie between public land on one side and private land on the other, such highway shall be sixty feet in width, and be wholly on such public land and bounded on one side by such section line.

It is further ordered that E. K. Pendergast, prosecuting attorney, for said county and state, file a certified copy of this order in the United States Land Office at Waterville, Washington, and take all necessary steps to have the Hon. Commissioner of the General Land Office exclude such easement and right of way from all patents issued for lands in said county, which shall be claimed or settled upon subsequent to the date hereof.

Dated this 6th day of April A. D., 1897.

It is urged on appeal that it is the duty of the land department of the government to execute this statute, that it authorizes the exclusion of the right of way thereby granted from patents issued for lands to which an easement may have attached by virtue thereof, and that the propriety of such action is manifest.

The declaration by the board of county commissioners, that highways shall be extended along all section lines designated by the public surveys in said county sixty feet in width, that where the section lines are bounded on both sides by public lands, such section lines shall be the center of the highway, and that where any such section line shall be found to lie between public land on one side and private land on the other, the highway shall be wholly on such public land and bounded on one side by such section line, embodies the manifestation of a marked and novel liberality on the part of the county authorities in dealing with the public land.

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

If public highways have been, or shall hereafter be, established across any part of the public domain, in pursuance of law, that fact will be shown by local public records of which all must take notice, and the subsequent sale or disposition by the United States of the lands over which such highways are established will not interfere with the authorized use thereof, because those acquiring such lands will take them subject to any easement existing by authority of law.

The decision appealed from is affirmed.

56 I D 533

REGULATIONS GOVERNING RIGHTS-OF-WAY FOR CANALS, DITCHES, RESERVOIRS, WATER PIPE LINES, TELEPHONE AND TELEGRAPH LINES, TRAMROADS, ROADS AND HIGHWAYS, OIL AND GAS PIPE LINES, ETC.

[Circular 1237a]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
May 23, 1938.

GENERAL REGULATIONS APPLICABLE TO ALL RIGHT-OF-WAY APPLICATIONS MADE UNDER THE REGULATIONS CONTAINED IN THIS CIRCULAR

1. *Application.*—No special form is required, but it should be filed at the land office for the district in which the land is located, should state the act invoked and the primary purpose for which the project is to be used. If there is no local land office, the application should be filed with the Commissioner of the General Land Office, Washington, D. C.

2. *Showing required of corporations.*—Application by a private corporation must be accompanied by a copy of its charter or articles of incorporation, duly certified to by the proper State official of the State where the corporation was organized; also an uncertified copy.

Agriculture for his determination that the lands are necessary for right-of-way for the highway or road-building material site purpose, as required by the act.

RIGHTS-OF-WAY FOR ROADS AND HIGHWAYS OVER PUBLIC LANDS

54. *Statutory authority.*—By section 2477, U. S. R. S., 43 U. S. C. 932, it is provided:

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

55. *When grant becomes effective.*—This grant becomes effective upon the construction or establishing of highways, in accordance with the State laws, over public lands not reserved for public uses. No application should be filed under the act, as no action on the part of the Federal Government is necessary.

RIGHTS-OF-WAY THROUGH PUBLIC LANDS AND RESERVATIONS FOR OIL AND NATURAL GAS PIPE LINES AND PUMPING PLANT SITES

552

FRED W. JOHNSON,
Commissioner.

I concur:

W. C. MENDENHALL,
Director of Geological Survey.

Approved: May 23, 1938.

OSCAR L. CHAPMAN,
Assistant Secretary.

an instruction in the Bureau of Reclamation manual which is an unpaired infralateral manual of instruction which has never received the approval of the Secretary of the Interior. The Board must conclude that the contracting officer was not authorized to extend the time for filing a notice of delay, and that, therefore, his consideration of the causes of delay on the merits did not cure the waiver the requirement of notice."

The contractor requests that if its delay in performance of the contract is found to be inexcusable under Article 9 thereof, the liquidated damages of $21,250 assessed against it be waived in accordance with the provision of section 10(a) of the act of September 5, 1950 (64 Stat. 578, 581; 41 U. S. C., 1952 ed., sec. 256a), which authorizes the Comptroller General, on the recommendation of an agency head to remit liquidated damages in whole or in part "as in his discretion may be just and equitable." [1] The Board is, however, not authorized to make such recommendations to the Comptroller General. This function is vested in the Solicitor of the Department by section 27 of Order No. 2509, Amendment No. 16.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 21, Order No. 2589, as amended; 19 F. R. 9129), the decision of the contracting officer denying the contractor's requests for additional extensions of time is affirmed, and the contractor's request that a recommendation be made to the Comptroller General that the liquidated damages be remitted is referred to the Solicitor for his consideration.

THEODORE H. HAAS, *Chairman.*
THOMAS C. BARTHOLOW, *Member.*
WILLIAM SEAGLE, *Member.*

LIMITATION OF ACCESS TO THROUGH-HIGHWAYS CROSSING PUBLIC LANDS

Rights-of-way: Revised Statutes sec. 2477

A throughway or limited-access type of highway may be established across the public lands, under Rev. Stat. sec. 2477 and the regulations (43 CFR 244.57

[1] It should be noted that this question cannot arise under Paragraph 5 Act of Standard Form 23A (March 1953), which permits the contracting officer to extend the time for filing notices of delay without the concurrence of the head of the Department. The Board either notices of delay without the concurrence of the head of the Department. The Board has considered the question although not essential to its decision because its decision on this same question in Campbell Construction & Equipment Co., IBCA 2 (January 11, 1954) the same question in Campbell Construction & Equipment Co., IBCA 2 (January 11, 1954) 62 I. D. 61, has been attacked as incorrect, and the same question may arise in another appeal.

[2] Officials of this Department do not have any authority to waive the imposition of liquidated damages on equitable grounds. *See Equal Indemnity Co. v. United States*, 313 U. S. 289, 291 (1941). *Ocean Construction Co.*, 61 I. D. 372 (1954).

244.58). The United States as grantor does not have any special right of access to such highways, other or different from that accorded other abutting owners under State law. Persons subsequently acquiring the abutting lands from the United States likewise do not have any special right of access which the State need consider for the purpose of eliminating by purchase or otherwise.

Rights-of-way: Act of November 9, 1921

A throughway or limited-access highway may be established on public lands under sec. 17 of the Federal Aid Highway Act, and the regulations (43 CFR 244.51-244.54). The Secretary of the Interior probably could reserve a special right of access to such highway if necessary to his administration of the public lands as a condition of his certification of the land for disposition to the State for highway purposes. In the absence of a special reservation, the United States as owner of the abutting lands, is subject to the same limitations on access to the highways as other adjoining owners under State law; and persons subsequently deriving title from the United States are subject to the same limitations. The Secretary of the Interior may surrender to the State a reserved right of access prior to disposing of the abutting lands.

M-36274 APRIL 15, 1955.

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT.

You have informally referred to me the correspondence from Mr. E. H. Brunner, Right-of-Way Engineer of the Idaho Highway Department, together with your proposed reply thereto and a proposed memorandum for the information of Bureau officials on the above subject.

Mr. Brunner writes that the State of Idaho in acquiring rights-of-way for the Interstate Highway System, so far as it crosses Federal lands in Idaho, would also like to acquire rights from the abutting Government land in order to provide for a safer highway. For this purpose Mr. Brunner asked the Manager of the Land and Survey Office at Boise to add the following clause to a certification of right-of-way withdrawal of Government land:

In the event Federal statutes are amended, giving the right to grant access rights along with rights-of-way, this withdrawal shall be considered as also granting all access rights, present and future, across the above listed subdivisions.

The manager properly indicated his lack of authority to sign the certification as requested and the matter has been referred to you. By "withdrawal" Mr. Brunner obviously means an appropriation and transfer of Federal land under section 17 of the Federal Aid Highway Act (see 43 CFR 244.51 (a) (2)).

The questions and problems posed by Mr. Brunner's letter and enclosures are common to the highway departments of other Western States where highways must cross large stretches of public land. The problem is that in constructing a limited access highway whether

as part of the inter-state highway system or otherwise, the highway departments desire to acquire from the Government the right of way for such highway over and across the public land; and to acquire also the right of access to such highway from the abutting Government land while it is in Government ownership so as to preclude the unrestricted exercise of such rights when title to the abutting lands has passed into private ownership thus avoiding the necessity of the States' purchasing such rights from the Government's successors in interest. Mr. Brunner's suggested access clause is intended as a stop-gap measure pending the enactment of legislation authorizing the grant of access rights. The questions involved may be simply stated as follows:

1. May a freeway or limited access type of highway be constructed over the public lands?

2. Does the United States (and its successors in interest) as owner of lands abutting such highway have special rights of access thereto?

3. If it does, is legislation necessary to authorize the Government to surrender to the States its access rights to such highway?

This memorandum will touch only briefly upon the Government's right of access to the ordinary, conventional or "land service" highway running across public lands. I will not discuss the situation where a conventional highway is converted under State authority into a limited access highway, but my answer will be restricted to new freeways constructed on public lands administered by the Bureau of Land Management where no highway previously existed. My answers follow:

1. A limited access highway may be constructed over public lands either under Rev. Stat., sec. 2477, or under section 17 of the Federal Aid Highway Act of 1921, *infra*.

2. Except as hereinafter indicated with respect to Federal Aid Highways, the United States does not have any special right of access to such freeways other or different from that accorded to other abutting owners under State Law.

3. As to such limited access highways no special legislation is necessary to authorize the surrender to the States of the Government's right of access, if any. Nor is the special access clause suggested by Mr. Brunner necessary pending enactment of such legislation.

An easement of access is defined as the right which an abutting owner has of ingress and egress to and from his premises other than the public easement in the street or roadway. *Chicago, St. P., M. & O. Ry. Co. v. Wheaton, Ex. rel. K. Electric Ry. Co.*, 50 N. W. 678 (Wis., 1891).

Thus owners of land abutting upon a highway have the right to use and enjoy the highway in common with other members of the public; and in addition they have an easement of access to their lands abutting upon the highway arising from ownership of such land contiguous to the highway which "easement of access" does not belong to the public generally. *State Highway Board v. Baxter*, 111 S. E. 796 (Ga. 1928). These rights usually arise in connection with the ordinary, conventional or "land service" highway as distinguished from the "traffic service" or limited-access highway.

The limited access highway has been developed in recent years by highway authorities to provide rapid transit for through traffic, uninterrupted and unendangered by vehicles or pedestrians from private roads and intersecting streets and highways, thereby providing a maximum of economy, efficiency and safety. Limited access highways, also designated as freeways, throughways, expressways, controlled access highways, etc., are so constructed or regulated that an abutting owner cannot directly enter the highway from his property or enter his property from the highway. Users of such highways gain access thereto at specified controlled access points which they may reach by a circuitous route or by a service road paralleling the main highway.

There are two statutes of concern to us in the administration of the public lands under which highway rights-of-way may be acquired. They are Rev. Stat., sec. 2477 (43 U. S. C. sec. 932; 43 CFR 244.57 244.59), and section 17 of the Federal Aid Highway Act of 1921 (23 U. S. C. sec. 18; 43 CFR 244.54–244.56).

Section 2477 is an unequivocal grant of the right-of-way for highways over the public lands without any limitation as to the manner of their establishment. *Smith v. Mitchell*, 58 Pac. 867 (Wash., 1899). The grant becomes fixed when a public highway is definitely established in one of the ways authorized by the laws of the State where the land is located. *State v. Nolan*, 190 Pac. 150 (Mont., 1920); *Moulton v. Irish*, 218 Pac. 1053 (Mont., 1923). The act did not specify nor define the extent of the grant contemplated over the public lands, the width of the right-of-way nor the nature and extent of the right thus conferred, both as against the Government and subsequent patentees (24 L. D. 354 (1895)). Whatever may be construed as a highway under State law is a highway under Rev. Stat., sec. 2477, and the rights thereunder are interpreted by the courts in accordance with the State law. The lands over which the right of way is located may be patented to others subject to the easements and to whatever rights may flow to the State and to the public therefrom. *Emma McCarthy*, 11 L. D. 105 (1890).

a does not create rights of direct access in favor of abutting property which prior to the new construction had no such right of access. *Schaden et ux. v. State*, 244 P. 2d 1 (Calif., 1952).

The precise question of the nature and extent of the Government's right of access to a new limited access highway on public lands has not previously been raised before this Department, nor has it been considered by the Courts so far as I know. As already stated, neither Rev. Stat., sec. 2477 nor the Federal Aid Highway Act contains any qualification as to the nature of the grant and of the rights thereunder. In the absence of express reservation in the right of-way grant (or in the conditional certification of a section 17 highway), it would appear that the United States would retain no right of access unless such right was granted by State law since its position would be that of a land owner only. Such right after conveyance by the United States would be governed by the rule in *Packer* v. *Bird*, 137 U. S. 661, 669 (1891), that whatever incidents or rights attach to property conveyed by the Government will be determined by the laws of the States in which situated, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee. It was held in the cited case that where a State law denies riparian rights to private land owners a grantee of the United States would acquire none with the grant. The right of access here involved would seem to be in like case.

In the circumstances therefore the State courts would undoubtedly consider the United States as a landowner in the same position as any other adjoining landowner, and the same rules of construction would be applied to it. It would follow that if under State law a private landowner has no right of access to a limited-access highway except as specifically provided, the United States likewise has no such easement from its lands. If the United States has no right of access, clearly persons subsequently deriving or claiming from or through the United States would have no such property rights in the highway which the State need consider or pay compensation for its elimination. The latter question, however, is one for the State courts when and if presented in a proper case. Suffice it to say that, in my view, the Government has no special rights of access to limited-access highways newly established under either of the two cited statutes on public lands under the administration of the Bureau of Land Management.

A complication could arise, however, in the situation where the Secretary of Commerce determines that public lands are necessary for a limited access highway and the Secretary of the Interior as a condition to his certification of such lands wishes to reserve the right of access to or across the highway. If the Secretary of the Interior as a necessary incident to the management of the adjacent public

lands found it necessary to retain the Government's right of access to or across the proposed highway it may be that he could make it a condition for his certification of the land for appropriation and transfer. The complication could arise when the abutting land is disposed of, if the Secretary did not voluntarily surrender such right of access to the State, prior to the patenting of the land or the establishment of valid rights to the land. In the absence of such conditions, the Government and its successors would have no right of access to the highway except at the control points or as otherwise provided by State law.

Another problem in public land administration will undoubtedly arise from the practical effect which a limited access highway has of cutting a legal subdivision upon which it is located into two separate parcels because of the restriction upon the settler's or applicant's right to enter and cross the highway without difficulty to reach and utilize a parcel on the other side of the road.

I do not think it necessary to comment on the proposed legislation prepared by a special commission of State highway officials particularly section 6 relating to granting of access rights which Mr. Brunner submitted merely for your information. Further, in view of the conclusion I have reached on the basic questions, I do not believe it is necessary to discuss the discretionary authority of the Secretary under section 7 of the Taylor Grazing Act and other laws to insert access limiting stipulations in patents or other disposals whose allowance is discretionary, as indicated in your proposed reply. Your reply should be drafted consistent with the views herein expressed.

C. R. BRAMSHAW,
Acting Assistant Solicitor,
Branch of Land Management.

Approved:
JAMES D. PARKER, Jr.,
Associate Solicitor,
Division of Public Lands.

APPEAL OF A. G. McKINNON, D B A McKINNON CONSTRUCTION CO

IBCA-4 *Decided April 25, 1955*

Contracts: Additional Compensation—Contracts: Specifications

Where a contract provided for the excavation on a particular section of a channel in accordance with specifications and drawings, and the requirements of the work were reasonably ascertainable from the drawings relating to that section of the canal and a related drawing which showed that there was much more material on one side of the centerline of the channel than on the other side and that the embankments were designed to be approximately [illegible] and the contractor's schedule of [illegible] which would require the embankments to be a minimum height of 18 feet above the bottom grade of

the channel if allowance was also to be made for a freeboard, the contractor is not entitled to additional compensation for equalizing the embankments to the necessary minimum height, notwithstanding the omission of the 18 foot dimension on one of the drawings, and its revision by the contracting officer to show the omitted dimension, at a time when the contractor had virtually completed the excavation work on that section of the canal.

Contracts: Contracting Officer

The findings of a contracting officer will be presumed to be correct in the absence of contrary proof by the contractor.

Contracts: Additional Compensation—Contracts: Specifications

A contractor who was required to lengthen and reconstruct a bridge in accordance with unit prices stipulated in a schedule for erecting salvaged timber in structures, removing timber in existing structures, and salvaging timber, was not entitled to additional compensation for removing the center span of the existing bridge prior to the construction of the center pile bent for the lengthened bridge, and replacing the center span in its original position, when the removal of the center span was a necessary operation in reconstructing the bridge, and no provision for payment for this work was contemplated by the contract.

BOARD OF CONTRACT APPEALS

A. G. McKinnon, d/b/a McKinnon Construction Company, Sandy, Oregon, appealed on May 25, 1953, from the findings of fact and decision of the contracting officer denying two separate claims arising out of construction work under Contract No. 12r 49806 with the Bureau of Reclamation. The contract is identified as "Earthwork and Structures, West River Channel Improvements, West Canal Enlargement, W-4 Lateral, Langell Valley, Specifications No. DC-3689, Modoc Unit, Tule Lake Division, Klamath Project, Oregon-California."

The two claims, which will be considered separately in this decision, are for (*1*) $42,115 alleged to be due for extra work in depositing excavated material in embankment construction between Stations 370 + and 325 +, and (*2*) $1,330 for the removal and replacement of the center span of a bridge structure.

Following the issuance of the contracting officer's findings of fact and decision on April 9, 1953, the contractor in his notice of appeal requested a hearing before the Solicitor of the Department of the Interior. The Solicitor designated a hearing examiner, and a hearing was held in Portland, Oregon, on June 21 and 22, 1954. Subsequent to the hearing the examiner filed a recommendation that the claim of the contractor be denied. This recommendation, the transcript of the hearing which runs to 681 pages, as well as exhibits and briefs by both the Government and the contractor, have been studied by the Board

propriation and release to the State or its nominee of all rights of the United States, as owner of underlying and abutting lands, to cross over or gain access to the highway from its lands crossed by or abutting the right-of-way, subject to such terms and conditions and for such duration as the authorized officer of the Bureau of Land Management deems appropriate.

§ 2821.6 Additional rights-of-way within highway rights-of-way.

A right-of-way granted under this subpart confers upon the grantee the right to use the lands within the right-of-way for highway purposes only. Separate application must be made under pertinent statutes and regulations in order to obtain authorization to use the lands within such rights-of-way for other purposes. Additional rights-of-way will be subject to the highway right-of-way. Future relocation or change of the additional right-of-way made necessary by the highway use will be accomplished at the expense of the additional right-of-way grantee. Prior to the granting of an additional right-of-way the applicant therefor will submit to the Authorized Officer a written statement from the highway right-of-way grantee indicating any objections it may have thereto, and such stipulations as it considers desirable for the additional right-of-way.

[39 FR 39440, Nov. 7, 1974]

§ 2821.6-1 General.

No application under the regulations of this part is required for a right-of-way within the limits of a highway right-of-way granted pursuant to Title 23, United States Code, for facilities usual to a highway, except (a) where terms of the grant or a provision of law specifically requires the filing of an application for a right-of-way, (b) where the right-of-way is for electric transmission facilities which are designed for operation at a nominal voltage of 33 KV or above or for conversion to such operation, or (c) where the right-of-way is for oil or gas pipelines which are part of a pipeline crossing other public lands, or if not part of such a pipeline, which are more than two miles long. When an application is not required under the provisions of this subparagraph, qualified persons may appropriate rights-of-way for such usual highway facilities with the consent of the holder of the highway right-of-way, which holder will be responsible for compliance with § 2801.1-5, in connection with the construction and maintenance of such facilities.

§ 2821.6-2 Terms of grant.

Except as modified by § 2821.6-1 of this subpart, rights-of-way within the limits of a highway right-of-way granted pursuant to Title 23, United States Code, and applications for such rights-of-way, are subject to all the regulations of this part pertaining to such rights-of-way.

(43 U.S.C. 1371)

Subpart 2822—Roads Over Public Lands Under R.S. 2477

SOURCE: 35 FR 9646, June 13, 1970, unless otherwise noted.

§ 2822.0-3 Authority.

R.S. 2477 (43 U.S.C. 932), grants rights-of-way for the construction of highways over public lands, not reserved for public uses.

§ 2822.1 Applications.

§ 2822.1-1 For unreserved public lands.

No application should be filed under R.S. 2477, as no action on the part of the Government is necessary.

§ 2822.1-2 Procedure when reserved land is involved; rights-of-way over revested and reconveyed lands.

(a) *Showing Required.* When a right-of-way is desired for the construction of a highway under R.S. 2477 over public land reserved for public uses, and such reserved land is under the jurisdiction of the Department of the Interior, and when a right-of-way is desired for the construction of a highway under R.S. 2477 over the Revested and Reconveyed Lands, an application should be made in accordance with § 2802.1. Such application should be accompanied by a map, drawn on trac-

ing linen, with two print copies thereof, showing the location of the proposed highway with relation to the smallest legal subdivisions of the lands affected

(b) *Revocation or modification of withdrawal.* Where reserved lands are involved, no rights to establish or construct the highway may be acquired before the reservation is revoked or modified to permit construction of the highway, subject to terms and conditions, if any, as may be deemed reasonable and necessary for the adequate protection and utilization of the reserve and for the protection of the natural resources and the environment.

(c) *Revested and Reconveyed Lands.* Where Revested and Reconveyed Lands are involved, no rights to establish or construct the highway will be acquired by reason of the filing of such application unless and until the authorized officer of the Bureau of Land Management shall grant permission to construct the highway, subject to such terms and conditions as he deems necessary for the adequate protection and utilization of the lands, and for the maintenance of the objectives of the act of August 28, 1937 (50 Stat. 874, 43 U.S.C. 1181a).

[35 FR 9646, June 13, 1970, as amended at 39 FR 39440, Nov. 7, 1974]

§ 2822.2 Nature of interest.

[39 FR 39440, Nov. 7, 1974]

§ 2822.2-1 Effective date of grant.

Grants of rights-of-way under R.S. 2477 are effective upon construction or establishment of highways in accordance with the State laws over public lands that are not reserved for public uses.

[39 FR 39440, Nov. 7, 1974]

§ 2822.2-2 Extent of grant.

A right-of-way granted pursuant to R.S. 2477 confers upon the grantee the right to use the lands within the right-of-way for highway purposes only. Separate application must be made under pertinent statutes and regulations in order to obtain authorization to use the lands within such rights-of-way for other purposes. Additional rights-of-way will be subject to the highway right-of-way. Future relocation or change of the additional right-of-way made necessary by the highway use will be accomplished at the expense of the additional right-of-way grantee. Prior to the granting of an additional right-of-way the applicant therefor will submit to the Authorized Officer a written statement from the highway right-of-way grantee indicating any objections it may have thereto, and such stipulations as it considers desirable for the additional right-of-way. Grants under R.S. 2477 are made subject to the provisions of § 2801.1-5 (b), (c), (d), (e), (i), and (k) of this chapter.

[39 FR 39440, Nov. 7, 1974]

PART 2840—RAILROADS, STATION GROUNDS, WAGON ROADS

Subpart 2841—Railroads, Wagon Roads and Tramways in Alaska

Sec.
2841.0-3 Authority.
2841.0-7 Cross reference.
2841.1 Nature of interest.
2841.2 Procedures.
2841.2-1 Applications.
2841.2-2 Survey.
2841.3 Evidence of construction.
2841.3-1 Statement and certificates required when road is constructed.
2841.3-2 Action where required evidence is not filed.
2841.4 Charges for transportation of passengers and freight.
2841.4-1 Required showings, consent.
2841.4-2 Schedules to be filed with Interstate Commerce Commission.

Subpart 2842—Railroads and Station Grounds Outside of Alaska

2842.0-3 Authority.
2842.1 Nature of grant.
2842.2 Procedures.
2842.2-1 Applications.
2842.2-2 Evidence of construction.

Subpart 2841—Railroads, Wagon Roads and Tramways in Alaska

SOURCE: 35 FR 9647, June 13, 1970, unless otherwise noted.

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 2800

Federal Land Policy and Mangement Act; Management of Rights-of-Way and Related Facilities on Public Lands and Reimbursement of Costs

AGENCY: Bureau of Land Management, Interior.

ACTION: Proposed rulemaking.

SUMMARY: This proposed rulemaking establishes procedures for the management of all rights-of-way on public lands except for: oil, natural gas and petroleum product pipelines; Federal Aid Highways; cost-share roads; and access to mining claims. Title V of the Federal Land Policy and Management Act of 1976 gives the management responsibility for these rights-of-way to the Secretary of the Interior.

DATE: Comments by January 7, 1980.

ADDRESS: Send comments to: Director (650), Bureau of Land Management, 1800 C Street, N.W., Washington, D.C. 20240. Comments will be available for public review in Room 5555 at the above address during regular business hours (7:45 a.m. to 4:15 p.m.), Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Robert C. Bruce, 202–343–8735, or Bob Mollohan, 202–343–5537.

SUPPLEMENTARY INFORMATION: The principal author of this rulemaking is Robert E. Mollohan, Division of Rights-of-way and Project Review of the Bureau of Land Management, assisted by the Division of Legislation and Regulatory Management, Bureau of Land Management, and the Office of the Solicitor, Department of the Interior.

The Bureau of Land Management, in a coordinated joint effort with the Forest Service, invited public participation in developing regulations under title V of the Federal Land Policy and Management Act of 1976 by issuing a preproposed outline of procedures for granting rights-of-way on November 14, 1977, which invited written comments. Four public meetings were also held to obtain public input.

Title V of the Federal Land Policy and Management Act replaces most of the Bureau of Land Management's previous authority for granting rights-of-way, and provides broad discretionary power to the agency in developing current policies and procedures for carrying out that authority. This proposed rulemaking varies significantly from the previous regulations in that title V of the Federal Land Policy and Management Act combined and condensed various separate Acts dealing with specific types of rights-of-way. This combining promotes uniform right-of-way provisions for the majority of public and private users. In addition, title V of the Federal Land Policy and Management Act made its statutory provisions applicable to both the Bureau of Land Management and the Forest Service, encouraging the two agencies to jointly develop a common system for granting rights-of-way.

Joint agency staff teams developed an outline of suggested common right-of-way grant procedures. The outline was distributed on November 14, 1977, to user groups, States and other involved governmental agencies, and interested public and private groups. The Bureau of Land Management and the Forest Service recognize the efforts and appreciate the thoughtful comments of the many participants in this joint rulemaking process. This proposed rulemaking is addressed only to public lands administered by the Bureau of Land Management. The Forest Service has developed a separate, but similar set of regulations that apply to lands in the National Forest System.

The Bureau of Land Management, in addressing these comments, found it impractical to respond to each separate comment and instead, has addressed the more repetitive and significant comments as follows:

Comment: Several industry groups urged the development of separate regulations designed specifically for their particular needs.

Response: The Federal Land Policy and Management Act mandates that right-of-way grants be authorized on the basis of the needs and circumstances peculiar to each right-of-way, including location, ground to be occupied, duration and terms and conditions. If separate regulations were developed for different industry groups, the specific needs of each grant might not be compiled with, but narrowly limited. To be fully satisfactory, the right-of-way granted would have to be adequate for the most demanding circumstance that might occur, and specialized regulations would defeat this purpose.

Separate regulations for classes of industries, rights-of-way or uses according to size are infeasible and would be arbitrary in terms of application requirements. The initial Outline of Proposed Procedures illustrated this problem. It mentioned all of the possible disclosure requirements that might be necessary under any circumstance. The comments requested less stringent requirements be implemented in the regulations.

In the past, Bureau of Land Management right-of-way regulations were highly detailed and contained much procedural guidance, mandatory terms, widths and durations. This was necessary to accommodate the many specific authorities that the Federal Land Policy and Management Act repealed. Because the Act is a broad, general authority, we have been able to substantially shorten and simplify the regulations. Where necessary, additional guidance will be provided to the field in the Bureau Manual. Manuals are written in relatively broad terms for systemwide guidance but are frequently supplemented at the State Offices to achieve consistency along with appropriate adaptation to local conditions.

The rulemaking also encourages applicants to contact local Bureau of Land Management Offices prior to applying for instructions and guidance.

Comment: Several States and the Federal Highway Administration pointed out that the Federal Land Policy and Management Act did not preclude grants for highway purposes under sections 107 and 317 of title 23 of the United States Code. They added that the grants made by the Department of Transportation under title 23 have satisfied their needs on national forest lands.

Response: The Forest Service plans to continue its current practice of consenting to appropriation of highway rights-of-way by the Federal Highway Administration. The Bureau of Land Management will continue to use its existing regulations (43 CFR 2821) at this time and will review the Forest Service approach for Federal Aid Highways.

Comment: Owners of private lands intermingled with public lands wanted a perpetual easement across public lands appurtenant to the private lands served.

Several cited situations where local statutes require permanent access prior to allowing subdivisions of private land. Others cited the need for permanent access to obtain mortgage loans.

Response: Access rights-of-way across public land to reach intermingled private lands posed a substantial problem for the authors of the regulations. While several objectives can be stated, specific details will have to be developed in the cost-share and reciprocal right-of-way regulations that will follow. The cost-share and reciprocal right-of-way programs are in effect where intermingled private lands are managed for long-term timber production primarily in the Pacific Northwest. However, intermingled

§ 2802.3-2 Technical and financial capability.

The applicant shall furnish evidence satisfactory to the authorized officer that the applicant has, or prior to commencement of construction shall have, the technical and financial capability to construct, operate, maintain and terminate the project for which authorization is requested.

§ 2802.3-3 Project description.

(a) The applicant shall furnish an explanation of how the project will interrelate with existing and future projects and other developments on the public lands.

(b) The project descripton shall be in sufficient detail to enable the authorized officer to determine:

(1) The technical and economic feasibility of the project:

(2) Its impact on the environment:

(3) Any benefits provided to the public:

(4) The safety of the proposal: and

(5) The specific public lands proposed to be occupied or used.

When required by the authorized officer, applicant shall also submit the following:

(i) A description of the proposed facility;

(ii) An estimated schedule for construction of all facilities together with anticipated manpower requirements for each stage of construction;

(iii) A description of the construction techniques to be used;

(iv) Total estimated construction costs; and

(v) A description of the applicant's alternative route considerations.

§ 2802.3-4 Environmental protection plan.

If the authorized officer determines that the issuance of the right-of-way authorization requires the preparation of an environmental statement, the applicant shall submit a plan for the protection and rehabilitation of the environment during construction, operation, maintenance and termination of the project.

§ 2802.3-5 Additional information.

The applicant shall furnish any other information and data required by the authorized officer to enable him/her to make a decision on the application.

§ 2802.3-6 Maps.

(a) The authorized officer may at his/her discretion require the applicant to file a map with the application. When the authorized officer determines not to require the filing of a map with the application, the application may be filed and processing may proceed. Where the application is accepted without a map, the applicant shall be notified that a map shall be required prior to the issuance of the grant or permit, or within 60 days of completion of construction, as determined by the authorized officer. When the authorization is for use of an existing road controlled by the United States, any map showing said road shall suffice. The requirements of paragraph (b) of this section shall not apply in this situation.

(b) Maps portraying linear rights-of-way, as a minimum, shall show the following data:

(1) The bearing and distance of the traverse line or the true centerline of the facility as constructed;

(2) At least one tie to a public land survey monument to either the beginning or ending point of the right-of-way. If a public land survey monument is not within a reasonable distance as determined by the authorized officer, the survey shall be tied to either a relatively permanent man-made structure or monument or some prominent natural feature. However, when the right-of-way crosses both public lands and lands other than public lands, each parcel of public land crossed by said right-of-way must be tied to a public land survey monument, or if the map shows a continuous survey from the beginning point to the ending point of the project regardless of land ownership, then only one corner tie at either the initial or terminal point is required;

(3) The exterior limits of the right-of-way and the width thereof;

(4) A north arrow;

(5) All subdivisions of each section or portion thereof crossed by the right-of-way, with the subdivisions, sections, townships, and ranges clearly and properly noted; and

(6) Scale of the map. The map scale shall be such that all of the required information shown thereon is legible.

(c) Maps portraying non-linear or site-type rights-of-way shall include the requirements of paragraph (b)(4), (5), and (6) of this section. In addition, the map shall show, as a minimum, the following data:

(1) The bearing and distance of each exterior sideline of the site; and

(2) At least one angle point of the survey shall be tied to a public land survey monument, as provided for in paragraph (b)(2) of this section.

(d) Any person, State or local government which has constructed public highways under authority of R.S. 2477 (43 U.S.C. 932, repealed October 12, 1976), shall file within 3 years of the effective date of these regulations a map showing the location of all such public highways constructed under R.S. 2477. Maps required pursuant to this paragraph shall, as a minimum, be a county highway map showing all county roads located on the public lands, a State highway map showing State highways located on public land, and in the case of a municipality, a street or road map showing the location of city streets or roads. An individual who has constructed a public road pursuant to R.S. 2477 shall, as a minimum, submit a United States Geological Survey Quadrangle showing the location of said road on public land.

§ 2802.4 Application processing.

(a) The authorized officer shall acknowledge, in writing, receipt of the application and initial cost reimbursement payment required by § 2803.1-1 of this title. An application may be denied if the authorized officer determines that:

(1) The proposed right-of-way or permit would be inconsistent with the purpose for which the public lands are managed;

(2) That the proposed right-of-way or permit would not be in the public interest;

(3) The applicant is not qualified;

(4) The right-of-way or permit would otherwise be inconsistent with the act or other applicable laws; or

(5) The applicant does not or cannot demonstrate that he/she has the technical or financial capacity.

(b) Upon receipt of the acknowledgement, the applicant may continue his or her occupancy of the public land pursuant to § 2802.1(d) of this title to continue to gather data necessary to perfect the application. However, if the applicant finds or the authorized officer determines that surface disturbing activities will occur in gathering the necessary data to perfect the application, the applicant shall file an application for a temporary use permit prior to entering into such activities on the public land.

(c) The authorized officer may require the applicant for a right-of-way grant to submit such additional information as he deems necessary for review of the application. Where the authorized officer determines that the information supplied by the applicant is incomplete or does not conform to the act or these regulations, the authorized officer shall either reject the application or notify the applicant of the continuing deficiency and afford the applicant an opportunity to file a correction. Where a deficiency notice has not been adequately complied with, the authorized officer may reject the application or notify the applicant of the continuing deficiency

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 2800

[Circular No. 2468]

Rights-of-Way, Principals and Procedures; Federal Land Policy and Management Act; Management of Rights-of-Way and Related Facilities on Public Lands and Reimbursement of Costs

AGENCY: Bureau of land Management. Interior.

ACTION: Final rulemaking.

SUMMARY: This final rulemaking establishes procedures for the management of all rights-of-way on public lands except pipelines for oil, natural gas and petroleum products; Federal Aid Highways; cost-share roads; and access to mining claims. Title V of the Federal Land Policy and Management Act of 1976 gives the management responsibility for these rights-of-way to the Secretary of the Interior.

EFFECTIVE DATE: July 31, 1980.

ADDRESS: Any recommendations or suggestions should be addressed to: Director (330), Bureau of Land Management, 1800 C Street, N.W., Washington, D.C. 20240.

FOR FURTHER INFORMATION CONTACT: Bob Mollohan (202) 343–5537.

SUPPLEMENTARY INFORMATION: The proposed rulemaking on Management of Rights-of-Way and Related Facilities on Public Lands and Reimbursement of Costs under the provisions of title V of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1761), was published in the Federal Register on October 9, 1979 (44 FR 58106). The proposed rulemaking invited comments for 90 days ending on January 7, 1980. During the comment period and several days thereafter, a total of 73 comments were received. Thirty-two of the comments came from business sources, mostly utilities, fifteen from State and local governments, twelve from Federal agencies, six from local rural electric associations and two from individuals.

General Comments

Many of the comments wanted to know what action had been taken on the suggestions made on the notice of intent to propose rulemaking. The preamble to the proposed rulemaking contained a detailed discussion of the comments received on the notice of intent to propose rulemaking and the action taken on these comments. It would serve little purpose to discuss the comments again in this document.

Generally, the comments on the proposed rulemaking expressed the opinion that the Bureau of Land Management had made a real effort to adopt the points raised by those commenting on the procedures for granting rights-of-way outlined in the notice of intent. Several of the comments stated that they thought the proposed rulemaking was a good effort to meet users needs. Other comments were of the opinion that the proposed rulemaking needed extensive revision in order to provide users with an effective procedure for obtaining right-of-way on public lands. The proposed rulemaking represented a conscious effort by the Bureau of Land Management to incorporate the changes recommended in the many comments received both in writing and during public hearings to provide a procedure that would be an effective tool both for users and for bureau personnel who issue the rights-of-way. Some of the suggested changes could not be accepted and every effort was made to adopt changes to the extent consistent with the law and regulations to provide the least burdensome rules possible.

One comment commended the efforts made in the proposed rulemaking to remove sexist terms, but recommended further efforts. While appreciating this comment, no further changes have been made in this regard.

In addition to the general comments, comments were received covering specific areas of the proposed rulemaking. The following segment of this preamble addresses those specific comments, setting forth only those sections on which comments were received.

Specific Comments

Objectives

A comment requested that section 102(a)(2) of the Federal Land Policy and Management Act of 1976 be repeated in the Objectives section of the final rulemaking. Even though this suggestion has not been adopted, the Objectives section makes reference to land use plans, which requires compliance with the provisions of 43 CFR Part 1601, the Bureau of Land Management's land use planning regulations. Further, the rulemaking requires compliance with existing Federal and State law, including the requirement to comply with the provisions of the Federal Land Policy and Management Act of 1976, the basic authority for the issuance of this rulemaking.

Another comment recommended that the Objectives section include a listing of the types of grants that could be made under this rulemaking. This suggestion has not been adopted because the type of grant that will be made as a result of an application for a right-of-way will be determined at the time of granting and the granting document will provide the terms of the grant.

A final comment on this section wanted a specific reference to the environmental analysis process to be included in the rulemaking. This general section of the final rulemaking has not been amended to include a specific reference to the environmental analysis process. Other sections of the rulemaking, § 2802.3–4, make specific provision for carrying out the environmental analysis process.

Authority

A comment requested that additional authority be listed for the issuance of rights-of-way. This rulemaking is concerned with the right-of-way authority granted by title V of the Federal Land Policy and Management Act. Other authority used for the granting of rights-of-way is covered in other parts of Title 43 of the Code of Federal Regulations. Therefore, no change has been made in the authority section of the final rulemaking.

Definitions

Several comments were directed at the various paragraphs of this section. A couple of comments recommended that the definition of the term "authorized officer" be changed. The comments argued that the definition was not specific enough and should list the qualifications of the authorized officer. The term "authorized officer" has not been changed. The term "authorized officer", as used in this section, refers in most cases to the District Manager who has management responsibility over the lands covered by a right-of-way application. These individuals are land managers with varied backgrounds. They do not work alone, but have in their district offices trained personnel who can give them the advice they need to use as the basis of their decision on a right-of-way application.

A few comments suggested amending the term "right-of-way grant" to include the type of right or interest in the lands that would be granted by the grant. The comments specifically wanted to include in the definition such terms as "easement", "lease", "permit", etc., and to define these terms in the definition section. As discussed above, the

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privileges to United States citizens. Its application shall be denied. A right-of-way or temporary use permit shall not be granted to a minor, but either may be granted to legal guardians or trustees of minors in their behalf.

(b) An application by a private corporation shall be accompanied by a copy of its charter or articles of incorporation, duly certified by the proper State official where the corporation was organized, and a copy of its bylaws, duly certified by the secretary of the corporation.

(c) A corporation, other than a private corporation, shall file a copy of the law under which it was formed and provide proof of organization under the same, and a copy of its bylaws, duly certified by the secretary of the corporation.

(d) When a corporation is doing business in a State other than that in which it is incorporated, it shall submit a certificate from the Secretary of State or other proper official of that State indicating that it has complied with the laws of the State governing foreign corporations to the extent required to entitle the company to operate in such State, and that the corporation is in good standing under the laws of that State.

(e) A copy of the resolution by the board of directors of the corporation or other documents authorizing the filing of the application shall also be filed.

(f) If the corporation has previously filed with the Department the papers required by this subpart, and there have not been any amendments or revisions of the corporation's charter, articles of incorporation or bylaws, the requirements of this subpart may be met in subsequent applications, by specific reference to the previous filing by date, place and case number.

(g) If the applicant is a partnership, association or other unincorporated entity, the application shall be accompanied by a certified copy of the articles of association, partnership agreement, or other similar document creating the entity, if any. The application shall be signed by each partner or member of the entity, unless the entity shows evidence in the form of a resolution or similar document that one member has been authorized to sign in behalf of the others. In the absence of such resolution each partner shall furnish the evidence of qualification which would be required if the partner or member were applying separately.

(h) If the applicant is a State or local government, or agency or instrumentality thereof, the application shall be accompanied by a statement to that effect and a copy of the law, resolution, order, or other authorization under which the application is made.

(i) Each application by a partnership, corporation, association or other business entity shall, upon the request of the authorized officer, disclose the identity of the participants in the entity and shall include where applicable:

(1) The name, address and citizenship of each participant (partner, associate or other);

(2) Where the applicant is a corporation: the name, address, and citizenship of each shareholder owning 3 percent or more of each class of shares, together with the number and percentage of any class of voting shares of the entity which each shareholder is authorized to vote; and

(3) The name, address, and citizenship of each affiliate of the entity. Where an affiliate is controlled by the entity, the application shall disclose the number of shares and the percentage of each class of voting stock of that affiliate owned, directly or indirectly, by the entity. If an affiliate controls the entity, the number of shares and the percentage of each class of voting stock of the entity owned, directly or indirectly, by the affiliate shall be included.

§ 2802.3-2 Technical and financial capability.

The applicant shall furnish evidence satisfactory to the authorized officer that the applicant has, or prior to commencement of construction shall have, the technical and financial capability to construct, operate, maintain and terminate the project for which authorization is requested.

§ 2802.3-3 Project description.

(a) The applicant shall furnish an explanation of how the project will interrelate with existing and future projects and other developments on the public lands.

(b) The project description shall be in sufficient detail to enable the authorized officer to determine:

(1) Its impact on the environment;

(2) Any benefits provided to the public;

(3) The safety of the proposal; and

(4) The specific public lands proposed to be occupied or used.

(c) When required by the authorized officer, the applicant shall also submit the following:

(1) A description of the proposed facility;

(2) An estimated schedule for construction of all facilities together with anticipated manpower requirements for each stage of construction;

(3) A description of the construction techniques to be used; and

(4) A description of the applicant's alternative route considerations.

§ 2802.3-4 Environmental protection plan.

If the authorized officer determines that the issuance of the right-of-way authorization requires the preparation of an environmental statement, the applicant shall submit a plan for the protection and rehabilitation of the environment during construction, operation, maintenance and termination of the project.

§ 2802.3-5 Additional information.

The applicant shall furnish any other information and data required by the authorized officer to enable him/her to make a decision on the application.

§ 2802.3-6 Maps.

(a) The authorized officer may at his/her discretion require the applicant to file a map with the application. When the authorized officer determines not to require a detailed map prepared in accordance with paragraph (b) of this section, the applicant shall attach to the application a map such as a United States Geological Survey Quadrangle map or aerial photograph showing the approximate location of the facility and processing may proceed. Where the application is accepted without a detailed survey map, the applicant shall be notified that a map pursuant to paragraph (b) of this section shall be required prior to the issuance of the grant or permit, or within 60 days of completion of construction, as determined by the authorized officer, except that the authorized officer may waive all or part of the requirements of paragraph (b) of this section for maps for temporary use permits. When the authorization is for use of an existing road controlled by the United States, any map showing said road shall suffice and the requirements of paragraph (b) of this section shall not apply in this situation.

(b) Maps or aerial photographs portraying linear rights-of-way, as a minimum, shall show the following data:

(1) The bearing and distance of the traverse line or the true centerline of the facility as constructed;

(2) At least one tie to a public land survey monument to either the beginning or ending point of the right-of-way. If a public land survey monument is not within a reasonable distance as determined by the authorized officer, the survey shall be tied to either a relatively permanent man-made structure or monument or some prominent natural feature. However, when the right-of-way crosses both public lands and lands other than public lands, each parcel of

public land crossed by said right-of-way must be tied to a public land survey monument, or if the map shows a continuous survey from the beginning point to the ending point of the project regardless of land ownership, then only one corner tie at either the initial or terminal point is required;

(3) The exterior limits of the right-of-way and the width thereof;

(4) A north arrow;

(5) All subdivisions of each section or portion thereof crossed by the right-of-way, with the subdivisions, sections, townships, and ranges clearly and properly noted; and

(6) Scale of the map. The map scale shall be such that all of the required information shown thereon is legible.

(c) Maps portraying non-linear or site-type rights-of-way shall include the requirements of paragraphs (b)(4), (5), and (6) of this section. In addition, the map shall show, as a minimum, the following data:

(1) The bearing and distance of each exterior sideline of the site; and

(2) At least one angle point of the survey shall be tied to a public land survey monument, as provided for in paragraph (b)(2) of this section.

(d) In order to facilitate proper management of the public lands and to assist the authorized officer in developing a sound transportation plan, any person or State or local government which has constructed public highways under the authority of R.S. 2477 (43 U.S.C. 932, repealed October 21, 1976), is provided the opportunity to file within 3 years of the effective date of these regulations a map showing the location of all such public highways constructed under R.S. 2477. Maps filed pursuant to this paragraph should, as a minimum, be a county highway map showing all county roads located on the public lands, a State highway map showing State highways located on public land, and in the case of a municipality, a street or road map showing the location of city streets or roads. An individual who has constructed a public road pursuant to R.S. 2477 should, as a minimum, submit a United States Geological Survey Quadrangle showing the location of said road on public land. The submission of such maps depicting the location of alleged R.S. 2477 highways shall not be conclusive evidence of their existence. Similarly, failure to depict such roads shall not preclude a later finding as to their existence.

§ 2802.4 Application processing.

(a) The authorized officer shall acknowledge, in writing, receipt of the application and initial cost reimbursement payment required by § 2803.1-1 of this title. An application may be denied if the authorized officer determines that:

(1) The proposed right-of-way or permit would be inconsistent with the purpose for which the public lands are managed;

(2) That the proposed right-of-way or permit would not be in the public interest;

(3) The applicant is not qualified;

(4) The right-of-way or permit would otherwise be inconsistent with the act or other applicable laws; or

(5) The applicant does not or cannot demonstrate that he/she has the technical or financial capacity.

(b) Upon receipt of the acknowledgement, the applicant may continue his or her occupancy of the public land pursuant to § 2802.1(d) of this title to continue to gather data necessary to perfect the application. However, if the applicant finds or the authorized officer determines that surface disturbing activities will occur in gathering the necessary data to perfect the application, the applicant shall file an application for a temporary use permit prior to entering into such activities on the public land.

(c) The authorized officer may require the applicant for a right-of-way grant to submit such additional information as he deems necessary for review of the application. All requests for additional information shall be in writing. Where the authorized officer determines that the information supplied by the applicant is incomplete or does not conform to the act or these regulations, the authorized officer shall notify the applicant of these deficiencies and afford the applicant an opportunity to file a correction. Where a deficiency notice has not been adequately complied with, the authorized officer may reject the application or notify the applicant of the continuing deficiency and afford the applicant an opportunity to file a correction.

(d) Prior to issuing a right-of-way grant or temporary use permit, the authorized officer shall:

(1) Complete an environmental analysis in accordance with the National Environmental Policy Act of 1969;

(2) Determine compliance of the applicant's proposed plans with applicable Federal and State laws;

(3) Consult with all other Federal, State, and local agencies having an interest, as appropriate; and

(4) Take any other action necessary to fully evaluate and make a decision to approve or deny the application and prescribe suitable terms and conditions for the grant or permit.

(e) The authorized officer may hold public meetings on an application for a right-of-way grant or temporary use permit if he determines that such meetings are appropriate and that sufficient public interest exists to warrant the time and expense of such meetings. Notice of public meetings shall be published in the Federal Register or in local newspapers or in both.

(f) A right-of-way grant or temporary use permit need not conform to the applicant's proposal, but may contain such modifications, terms, stipulations or conditions, including changes in route or site location on public lands, as the authorized officer determines to be appropriate.

(g) No right-of-way grant or temporary use permit shall be in effect until the applicant has accepted, in writing, the terms and conditions of the grant or permit. Written acceptance shall constitute an agreement between the applicant and the United States that, in consideration of the right to use public lands, the applicant shall comply with all terms and conditions contained in the authorization and the provisions of applicable laws and regulations.

(h) The authorized officer may place a provision in a right-of-way grant requiring that no construction on or use of the right-of-way shall occur until detailed construction or use plans have been submitted to the authorized officer for approval and one or more notices to proceed with that construction or use have been issued by the authorized officer. This requirement may be imposed for all or any part of the right-of-way.

§ 2802.5 Special application procedures.

An applicant filing for a right-of-way within 4 years from the effective date of this subpart for an unauthorized right-of-way that existed on public land prior to October 21, 1976, is not:

(a) Required to reimburse the United States for costs incurred for processing an application and for the preparation of reports and statements pursuant to the National Environmental Policy Act of 1969 [see § 2803.1-1(a)(1)] which are above the schedule shown in § 2803.1-1(a)(3)(i) of this title.

(b) Required to reimburse the United States for costs incurred incident to a right-of-way for monitoring (the construction, operation, maintenance and termination) of authorized facilities as required in § 2803.1-1(b) of this title.

(c) Required to pay rental fees for the period of unauthorized land use.

DEPARTMENT OF THE INTERIOR

43 CFR Part 2800

Rights-of-Way, Principles and Procedures; Amendment to Rights-of-Way Regulations

AGENCY: Bureau of Land Management, Interior.

ACTION: Proposed rulemaking.

SUMMARY: This proposed rulemaking would eliminate burdensome, outdated and unneeded provisions in the existing rights-of-way regulations for right-of-way grants issued under the provisions of title V of the Federal Land Policy and Management Act of 1976.

DATE: Comments by September 21, 1981.

ADDRESS: Comments should be sent to: Director (650), Bureau of Land Management, 1800 C Street, NW., Washington, D.C. 20240. Comments will be available for public review in Room 5555 of the above address during regular working hours (7:45 a.m. to 4:15 p.m.) on regular working days.

FOR FURTHER INFORMATION CONTACT: John Hafterson (202) 343-5537; or Robert C. Bruce (202) 343-8735

SUPPLEMENTARY INFORMATION: The operation of the rights-of-way regulations since they became effective some 15 months ago has revealed several provisions that could be eliminated, thereby making the regulations easier to understand and fulfill by both the public and Bureau personnel. These changes will also reduce the burden placed on the public by the regulations.

The first change in the regulations is a complete revision of the section on application content, § 2802.3. The information that an applicant must furnish the Bureau of Land Management in order to obtain a right-of-way grant has been reduced. The amendment would allow the use of a consolidated Federal right-of-way application form that is under development. The new consolidated form is being developed by the Department of the Interior, the Department of Transportation and the Department of Agriculture with input from other interested agencies. This new consolidated form should help the affected public by giving them one form for use in connection with any right-of-way grant from any agency of the Federal government. Further, the consolidated form will reduce the requirements for information to a minimum. The public was requested to comment on the proposed form by publication in the Federal Register of March 12, 1981 (46 FR 16342). The public comments are being reviewed and a revised form will be submitted to the Office of Management and Budget as required by the Paperwork Reduction Act of 1980 (Pub. L. 96-511). The use of this form will not be required until it has been approved by the Office of Management and Budget.

Other changes in § 2802.3 include the elimination of the citizenship requirement, permitting applicants other than individuals to attest to their qualifications to do business rather than having to prove it with documentation, and a general reduction in the amount of information that an applicant must furnish with an application.

Sections 2802.3-2, 2802.3-3 and 2802.3-6 of the existing regulations would be revised to delete the present requirements and to reduce requirements for the furnishing of technical and financial capability and a description of the projects and needed maps.

Section 2802.3-4 has been deleted from the regulations as being no longer needed. The requirement for an environmental plan is not an appropriate part of the application system. If an environmental plan is needed from an applicant, it would be called for much later in the process and the need for the plan would be worked out with the applicant.

Section 2802.3-5 would be eliminated because it is redundant and the authority to request additional information appears in § 2802.4.

Subpart 2805 would be deleted in its entirety and would be replaced by a new § 2802.5-2 which requires an applicant to work with the Department of Energy on any required wheeling agreement. In order to reduce any possible delay in the issuance of a right-of-way grant because of difficulties in arriving at a wheeling agreement, the amendment would permit the right-of-way grant to be issued and would allow a year for completion of the wheeling agreement.

The principal author of this proposed rulemaking is John Hafterson, Division of Rights-of-Way and Project Review, assisted by the staff of the Office of Legislation and Regulatory Management, Bureau of Land Management.

It is hereby determined that the publication of this document is not a major Federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)).

The Department of the Interior has determined that this document is not a major rule under Executive Order 12291 and will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (Pub. L. 96-354).

PART 2800—RIGHTS-OF-WAY, PRINCIPLES AND PROCEDURES

Under the authority of title V of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1716-1771), it is proposed to amend Part 2800, Group 2800, Subchapter B, Chapter II, Title 43 of the Code of Federal Regulations as set forth below:

§§ 2802.3-1-2802.3-6 [Removed]

1. Sections 2801.3-1, 2802.3-2, 2802.3-3, 2802.3-4, 2802.3-5 and 2802.3-6 are removed in their entirety and § 2802.3 is revised as follows:

§ 2802.3 Application content.

Applications for right-of-way grants or temporary use permits shall be filed on a form approved by the Director. The application form shall contain instructions for the completion of the form and shall require the following information:

(a) The name and address of the applicant and the applicant's authorized agent, if appropriate;

(b) A description of the applicant's proposal;

(c) A map and description of the location of the applicant's proposal;

(d) A statement of the applicant's compliance with the requirements of State and local governments;

(e) A statement of the applicant's technical and financial capability to construct, operate, maintain and terminate the proposal;

(f) A description of the alternative routes and modes considered when developing the proposal;

(g) A listing of other similar applications or grants the applicant has submitted or holds;

(h) A statement of need and economic feasibility of the proposal;

(i) A statement of the environmental, social and economic effects of the proposal; and

(j) For applicants other than individuals, a statement attesting to their authorization to conduct business in the area where the proposal is located.

2. Add a new § 2802.5 as follows:

§ 2802.5 Special requirement for applicants for electric power transmission lines of 66 KV or above.

The applicant for a right-of-way grant for a power project having a voltage of 66 kilovolts or more shall execute an

eement with the Department of Energy agreeing to the wheeling of power from any facility having a voltage of 66 kilovolts or more unless the Department of Energy determines that a wheeling agreement is not necessary. The agreement shall be excluded within 1 year of the issuance of the right-of-way grant. Failure to execute a required wheeling agreement may result in the suspension or termination of the right-of-way grant.

Subpart 2805—Applicants for Electric Power Transmission Lines of 66 KV or Above [Removed]

3. Subpart 2805—Applications for Electric Power Transmission Lines of 66 KV or Above—is removed in its entirety.

David G. Russell,

Deputy Assistant Secretary of the Interior.

April 29, 1981.

[FR Doc. 81-22838 Filed 8-4-81; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 2800

[Circular No. 2500]

Rights-of-Way, Principles and Procedures; Amendment

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rulemaking.

SUMMARY: This final rulemaking will eliminate burdensome, outdated and unneeded provisions in the existing right-of-way regulations for right-of-way grant issued under the provisions of title V of the Federal Land Policy and Management Act of 1976. This amendment came about as a result of the efforts of the Administration and the Secretary of the Interior to streamline existing regulations.

EFFECTIVE DATE: April 22, 1982.

ADDRESS: Any inquiries or suggestions should be sent to: Director (330), Bureau of Land Management, 1800 C Street, N.W., Washington, D.C. 20240.

FOR FURTHER INFORMATION CONTACT: John Hafterson, (202) 653–8842 or Robert C. Bruce, (202) 343–8735.

SUPPLEMENTARY INFORMATION: The proposed rulemaking amending the regulations on Rights-of-Way, Principles and Procedures, was published in the Federal Register on August 5, 1981 (46 FR 39968), with a 45-day comment period ending on September 21, 1981. Forty-two comments were received on this proposed rulemaking and the proposed rulemaking on Rights-of-Way under the Mineral Leasing Act which was published the same day. Most of those making comments combined their comments and for the purposes of these two rulemakings, we have combined all of the comments and considered them as applying to both rulemakings. The comments came from the following sources: 22 from industry, 9 from Federal agencies, 8 from industry associations, 1 from an association of State governments and 1 from an individual.

The comments were unanimous in their praise of the effort of the Department of the Interior in reducing the impact of the right-of-way regulations on the using public. As one comment pointed out, the Department of the Interior deserves praise for its efforts to reduce the paperwork burden imposed on the public by its regulations. The comments noted that the rights-of-way regulations were developed in close consultation with the affected public, but that these changes were an improvement to that effort. In addition to these general comments, comments were made on specific sections of the proposed rulemaking and will be discussed in connection with each of the sections.

Nearly all of the comments pointed out the numbering area contained in section 1 of the proposed rulemaking. The number "2801.3–1" has been corrected in the final rulemaking to "2802.3–1" as the title to that change clearly shows what was intended.

Nearly all of the comments praised the decision to remove the citizenship requirement that had been made a part of the regulations by the Secretary of the Interior in the exercise of his discretionary authority. One comment did object to its removal, stating that removal of the provisions will operate to encourage foreign competition for limited domestic resources. The citizenship requirement is deleted from the existing regulations by the final rulemaking.

The other deletions relating to applicant qualifications and disclosure were also favored by the majority of those commenting. One comment noted that the stockholder disclosure requirement was required by section 501 of the Federal Land Policy and Management Act and recommended that the requirement for stockholder disclosure not be removed from the regulations. The final rulemaking removes the stockholder and other disclosure requirements from the regulations, but these requirements are continued in the new application form. In administering these requirements, the Bureau of Land Management will, as a practical matter, require disclosure of the information only when it is needed to carry out its responsibility to manage the public lands and preserve them for the use of the public.

One comment objected strongly to the three percent stockholder requirement in the regulations and suggested that it be dropped entirely. Since this requirement is imposed by the Federal Land Policy and Management Act, the Bureau of Land Management has the authority to require a corporate entity to reveal the information if it is needed to make a determination as to whether a right-of-way should be granted, issued or renewed. Any change in this authority would have to be made by the Congress.

One comment favored the deletion of the requirement on technical and financial capability of a right-of-way applicant and recommended that it be deleted from the new application requirement section. The view was expressed that this requirement was not needed because the bonds required of an applicant protected the United States from the failure of an applicant to fulfill the requirements of the right-of-way grant. The final rulemaking deletes the technical and financial capability requirement from § 2803.3–2 but places a similar requirement in the § 2803.2–3, the new application content section. Section 504(j) of the Federal Land Policy and Management Act requires a finding that the applicant is financially and technically qualified to construct the project as a prerequisite to granting the right-of-way. The Bureau of Land Management, in administering this requirement, will accept a statement by the applicant that it is financially and technically qualified to go forward with the project, except in those instances where previous experience has shown the applicant lacks adequate financial or technical capacity to carry out its obligations under a grant. Further, the bonds required of an applicant are for the purpose of protecting the public lands from damage that might occur as a result of the actions of an applicant, not for the purpose of assuring the applicant's financial and technical qualifications.

The comments favored the change made by the proposed rulemaking and carried out in the final rulemaking that removes the section on project description and replaces it with a short requirement in the § 2802.3. The new requirement is greatly streamlined and imposes a less burdensome requirement on the public.

A number of comments expressed their views on the deletion of the environmental protection plan requirements contained in § 3802.3–4 of the existing regulations and which is deleted by the proposed rulemaking. Most of the comments favored the change, but one of the comments expressed the view that a decision on a right-of-way should not be made without the benefit of an environmental assessment. We concur in the need for analyzing the impact of a right-of-way before the right-of-way grant is issued. However, we do not believe that the plan required by section 504(d) of the Federal Land Policy and Management Act should be submitted with the application for a right-of-way. To require an applicant to prepare a protection plan prior to completion of the environmental evaluation is both unfair and wasteful. After the environmental assessment has been completed and a decision has been made that the right-of-way can be granted, then the applicant can be requested to submit the protection plan.

if the decision is made that the right-of-way should not be granted, the applicant has not borne the cost of preparing a protection plan. The final rulemaking has not made any change in the amendment made by the proposed rulemaking on this subject, but does add a new paragraph (h) to § 2802.4 that authorizes the authorized officer to place a provision concerning a protection plan in the right-of-way grant to provide the public lands adequate protection and fulfill the requirements of the Federal Land Policy and Management Act.

All of the comments supported the deletion of § 2802.3–5, the authority for the authorized officer to obtain additional information for use in making a decision on the application. If additional information is needed by the authorized officer to allow a decision on the application, it can be obtained under § 2802.4. The final rulemaking makes no change in the provisions of the proposed rulemaking on this point.

The comments on maps made by the proposed rulemaking raised a number of issues. Most of the comments supported the deletion of the detailed map requirements in § 2802.3–6 of the existing regulations, with a few questioning the need for information required by the new map provision that the proposed rulemaking adds to § 2802.3. The final rulemaking contains in § 2802.3(e)(3) a new, simplified, minimum map requirement that will furnish sufficient information to allow the authorized officer to determine the general location of the project and make a general evaluation of it. If more detailed maps are needed, they can be requested under other provisions of the existing regulations. As a result of a couple of comments that objected to the deletion of the mapping requirement relating to roads established under the provisions of section 2477 of the Revised Statutes contained in § 2802.3–6(d), the final rulemaking has added a new paragraph (b) to § 2802.5 of the regulations that contains the requirement relating to R.S. 2477 roads. This was done because the section on R.S. 2477 roads provides a convenient, but optional means, to resolve road status questions. The furnishing of the maps on the public roads remains at the option of the road owner.

A number of the comments on the application content requirements contained in the proposed rulemaking were concerned about the use of the consolidated application form that was developed primarily for use in Alaska. We are aware of these concerns and are designing instructions to accompany the consolidated form that will not require the completion of application items in excess of those needed to complete action on the application under consideration. Therefore, the Bureau of Land Management will be able to use the consolidated form that was published in the Federal Register on March 12, 1981 (46 FR 16342), for all rights-of-way.

All of the comments expressed agreement with the proposed reduction in the requirements for information to be included in applications. Most of the comments, however, recommended further changes in the requirements of the proposed rulemaking. After careful review of the comments and a thorough study of the requirements contained in the proposed rulemaking, the final rulemaking has been changed further. The requirements have been divided into two categories in the final rulemaking. The items that are required to be submitted with the application have been reduced to five, with the additional items that were part of the proposed rulemaking being listed as information that the applicant may submit to be of assistance to the authorized officer. There is no requirement that any of the information in paragraph (b) be submitted with the application.

There was considerable concern expressed in the comments about the provision requiring a statement of compliance with the standards of State governments. This requirement has been removed by the final rulemaking because it is not needed at the time the application is filed. However, in compliance with the provisions of section 505 of the Federal Land Policy and Management Act, § 2802.4 requires the authorized officer to require compliance with applicable State standards when granting the right-of-way. Section 2802.4 remains in the regulations and will be followed in the processing of a right-of-way grant.

Virtually all of the comments supported the change in the wheeling provisions made by the proposed rulemaking, but went on to suggest further changes or elimination of any reference to wheeling in the final rulemaking. After careful review of the wheeling provision and the comments, the final rulemaking deletes § 2802.6 in its entirety, along with Subpart 2805 which the proposed rulemaking deleted. The wheeling requirements are left to the Department of Energy, where the responsibility lies, as provided in Title II the Public Utility and Regulatory Policies Act of 1978 (16 U.S.C. 824[j].

The principal author of this final rulemaking is John Hafterson, Division of Rights-of-Way and Project Review, assisted by the staff of the Office of Legislation and Regulatory Management, Bureau of Land Management.

The Department of Interior has determined that this document is not a major rule under Executive Order 12291 and will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (Pub. L. 96–354).

The information collection requirements contained in 43 CFR Part 2800 have been approved by the Office of Management and Budget under 44 U.S.C. 3507 and assigned clearance numbers 1004–0060 and 1004–0107.

Under the authority of title V of the Federal Land Policy and Management Act of 1975 (43 U.S.C. 1761–1771), Part 2800, Group 2800, Subchapter B, Chapter II of Title 43 of the Code of Federal Regulations is amended as set forth below.

Garrey E. Carruthers,
Assistant Secretary of the Interior
December 4, 1981.

PART 2800—RIGHTS-OF-WAYS, PRINCIPLES AND PROCEDURES

1. Group 2800 is amended by adding the following note to the beginning of the Table of Contents:

Group 2800—Use; Rights-of-Way

Note.—The information collection requirements contained in Parts 2800 and 2880 of Group 2800 have been approved by the Office of Management and Budget under 44 U.S.C. 3507 and assigned clearance numbers 1004–0060 and 1004–0107. The information is being collected to allow the authorized officer to determine if the applicant is qualified to hold a right-of-way grant, to determine if the issuance of a grant is in the public interest and to make other land management decisions. This information will be used in making those determinations. The obligation to respond is required to obtain a benefit.

§§ 2802.3–1—2802.3–6 [Removed]

2. Sections 2802.3–1, 2802.3–2, 2802.3–3, 2802.3–4, 2802.3–5 and 2802.3–6 are removed in their entirety and § 2802.3 is revised as follows:

§ 2802.3 Application content.

(a) Applications for right-of-way grants or temporary use permits shall be filed on a form approved by the Director. The application form shall contain instructions for the completion of the form and shall require the following information:

(1) The name and address of the applicant and the applicant's authorized agent, if appropriate;

(2) A description of the applicant's proposal;

(3) A map, USGS quadrangle, aerial photo or equivalent, showing the approximate location of the proposed right-of-way and facilities on public lands and existing improvements adjacent to the proposal, shall be attached to the application. Only the existing adjacent improvements which the proposal may directly affect need be shown on the map;

(4) A statement of the applicant's technical and financial capability to construct, operate, maintain and terminate the proposal;

(5) Certification by the applicant that he/she is of legal age, authorized to do business in the State and that the information submitted is correct to the best of the applicant's knowledge.

(b) The applicant may submit additional information to assist the authorized officer in processing the application. Such information may include, but is not limited to, the following:

(1) Federal or State approvals required for the proposal;

(2) A description of the alternative route(s) and mode(s) considered by the applicant when developing the proposal;

(3) Copies of or reference to similiar applications or grants the applicant has submitted or holds;

(4) A statement of need and economic feasibility or the proposal;

(5) A statement of the environmental, social and economic effects of the proposal.

§ 2802.4 [Amended]

3. Section 2802.4 is amended by revising paragraph (h) to read:

* * * * *

(h) The authorized officer may include in his/her decision to issue a grant a provision that all be included in a right-of-way grant requiring that no construction on or use of the right-of-way shall occur until a detailed construction, operation, rehabilitation and environmental protection plan has been submitted to and approved by the authorized officer. This requirement may be imposed for all or any part of the right-of-way.

§ 2802.5 [Amended]

4. Section 2802.5 is amended by:

(a) Inserting at the beginning of the first paragraph of the section the figure "(a)";

(b) Redesignating existing paragraphs (a), (b) and (c) as subparagraphs (1), (2) and (3); and

(c) Adding a new paragraph (b) to read:

* * * * *

(b) In order to facilitate management of the public lands, any person or State or local government which has constructed public highways under the authority of R.S. 2477 (43 U.S.C. 932, repealed October 21, 1976) may file a map showing the location of such public highways with the authorized officer. Maps filed under this paragraph shall be in sufficient detail to show the location of the R.S. 2477 highway(s) on public lands in relation to State or county highway(s) or road(s) in the vicinity. The submission of such maps showing the location of R.S. 2477 highway(s) on public lands shall not be conclusive evidence as to their existence. Similiarly, a failure to show the location of R.S. 2477 highway(s) on any map shall not preclude a later finding as to their existence.

* * * * *

Subpart 2805—Applicants for Electric Power Transmission Lines of 66 KV or Above [Removed]

5. Subpart 2805—Applications for Electric Power Transmission Lines of 66 KV or Above—is removed in its entirety.

[FR Doc. 82-7803 Filed 3-22-82; 8:45 am]

BILLING CODE 4310-84-M

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43 CFR Part 2880

[Circular No. 2501]

Amendment to the Rights-of-Way Under the Mineral Leasing Act Regulations

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rulemaking.

SUMMARY: This final rulemaking will eliminate burdensome, outdated and unneeded provisions in the existing regulations for oil and gas right-of-way grants under the Mineral Leasing Act.

EFFECTIVE DATE: April 22, 1982.

ADDRESS: Inquiries or suggestions should be addressed to: Director (330), Bureau of Land Management, 1800 C Street, NW., Washington, D.C. 20240.

FOR FURTHER INFORMATION CONTACT: John Hafterson, (202) 653-8842 or Robert C. Bruce, (202) 343-6735.

SUPPLEMENTARY INFORMATION: The proposed rulemaking amending the regulations on Rights-of-Way Under the Mineral Leasing Act was published in the Federal Register on August 5, 1981 (46 FR 39964), with a 45-day comment period ending on September 21, 1981. Forty-two comments were received on this proposed rulemaking and the proposed rulemaking on Rights-of-Way Procedures and Principles, which was published the same date. Most of those making comments combined their comments and for the purposes of these two rulemakings, we have combined all of the comments and considered them as applying to both rulemakings. The comments came from the following sources: 22 from industry, 9 from Federal agencies, 8 from industry associations, 2 from an association of State governments and 1 from an individual.

The comments were unanimous in their praise of the effort of the Department of the Interior in reducing the impact of the right-of-way regulations on the affected public. As one comment pointed out, the Department of the Interior deserves praise for its efforts to reduce the paperwork burden imposed on the public by its regulations. The comments noted that the right-of-way regulations had been developed in close consultation with the affected public, but that these changes were an improvement to that effort. In addition to these general comments, comments were made on specific sections of the proposed rulemaking and will be discussed in connection with each of the sections.

The comments supported the change in the proposed rulemaking that is continued in the final rulemaking that allows the filing of a right-of-way application in any office of the Bureau of Land Management having jurisdiction over the lands and not just at a State Office, as is now required. This change will save time for the using public.

The comments praised the Department of the Interior for the streamlining of the application process and the reduction in the amount of information required of an applicant to an absolute minimum. The comments did make some suggestions for further reductions in the information required of an applicant and these have resulted in a further change in the final rulemaking that has reduced still further the required information, with the applicant being given the opportunity to submit additional information, if it is desired, that might be helpful to the authorized officer in reaching a decision on the right-of-way application. One significant change in the required information is a more specific paragraph on the maps that are to be submitted with the application. The information called for is a bare minimum and should be easily available to all applicants.

FILE COPY
Surname

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

APR 28 1980

Honorable James W. Moorman
Assistant Attorney General
Land and Natural Resources Division
Department of Justice
Washington, D.C. 20530

Re: Standards to be applied in determining whether highways have been established across public lands under the repealed statute R.S. 2477 (43 U.S.C. § 932).

Dear Mr. Moorman:

I. Introduction

This is in response to your letter of March 12, 1980. The statute in question, R.S. 2477 (43 U.S.C. § 932), was originally section 8 of the Act of July 26, 1866 (14 Stat. 253). It was repealed in 1976 by section 706(a) of the Federal Land Policy and Management Act. Prior to its repeal, it provided in its entirety as follows:

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

Because of the repeal, we are only concerned with grants of rights-of-ways perfected prior to October 21, 1976, the date of the enactment of FLPMA.1/

As you are probably aware, R.S. 2477 has been the subject of inconsistent state statutes and state court decisions, and a handful of inconsistent federal court decisions, during its 110-year existence.2/ Even if the state interpretations were fully consistent with each other, they would not necessarily control, especially where, as here, almost all of the reported state court decisions involved competing rights of third parties and the United States was not a party to them. The analysis in the various federal

1/ A valid R.S. 2477 highway right-of-way is a valid existing right which is protected by FLPMA's sections 701(a) (43 U.S.C. § 1701 note), and 509(a) (43 U.S.C. § 1769(a)).

2/ The legislative history is silent as to the meaning of this section of the 1866 statute. See generally The Congressional Globe, Vol. 36, 39th Cong., 1st Sess. (1866).

DER/Genl.

cases involving R.S. 2477 also are not only inconsistent with each other, but none of them definitively come to grips with the precise issue we now face: Exactly what was offered and to whom by Congress in its enactment of R.S. 2477, and how were such rights-of-way to be perfected?

In the face of this tangled history,3/ we outline below what we believe to be the proper interpretation of R.S. 2477. Our interpretation comports closely with its language which, because of the absence of legislative history, is especially appropriate. Our view is also consistent with many of the reported decisions. It has the added virtue of avoiding what would otherwise be a serious conflict between highway rights-of-way established under R.S. 2477 and the meaning of the term "roadless" in section 603 of FLPMA, which deals with the Bureau of Land Management (BLM) wilderness review responsibilities.

3/ A similar situation existed in the dispute over the ownership of the submerged land off the coast of California. In United States v. California 332 U.S. 19 (1947), the state argued that the United States was barred from asserting its title to the area because of the prior inconsistent positions taken by its agents over the years. The Supreme Court refuted this contention, stating in part (332 U.S. at 39-40):

> 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 has 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. (Citations omitted, emphasis added.)

II. Does R.S. 2477 Apply to Highways Constructed After 1866?

A threshold issue here is whether the statute sought only to validate highways previously constructed in trespass, or to apply prospectively as well. This Department has always regarded R.S. 2477 as applying prospectively to highways constructed after 1866. In United States v. Dunn, 478 F.2d 443, 445, note 2 (9th Cir. 1973), however, the court of appeals held that the Act was designed only to cure the trespass of those persons who had already (prior to 1866) "encroached on the public domain without authorization." The court said R.S. 2477 was "not intended to grant rights, but instead to give legitimacy to an existing status otherwise indefinable." The Ninth Circuit relied on Supreme Court decisions in Jennison v. Kirk, 98 U.S. 453, 459-61 (1878), and Central Pacific Ry. Co. v. Alameda County, 28 U.S. 463 (1931).

Jennison concerned section 9 of the 1866 Act, R.S. 2339, which — besides confirming and protecting the water rights of those who had perfected or accrued water rights on the public domain under local custom and laws — held liable for damages any person who, in constructing a ditch or canal, impaired the possession of any settler on the public domain. This section immediately followed section 8 of that Act (R.S. 2477) with which we are here concerned. The dispute in that case concerned two competing miners, the second of which (the plaintiff) had constructed a ditch for hydraulic mining which had crossed, and interfered with the first miner's working of, his mining claim. The first miner (defendant) had cut away the second miner's ditch in order to work his claim as before, and the Court held this did not give rise to the second miner's claim for damages under section 8. In dictum, the Court acknowledged that the broad purpose of the 1866 Act was to cure prior trespasses on the public domain, but made no specific comments on R.S. 2477.

The Central Pacific Ry. case did involve R.S. 2477, but only the validity of roads constructed prior to 1866. The Court said that, like section 9 construed in Jennison, section 8 (R.S. 2477) 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." 284 U.S. at 473 (emphasis added). The underlined clause is ambiguous, but might be read as suggesting that R.S. 2477 could apply to highways constructed after 1866, and indeed this is how the Department applied it both before and after the Dunn case.

We find implicit support for the Department's view in Wilderness Society v. Morton, 479 F.2d 842, 882-83 (D.C. Cir. 1973), cert. denied, 411 U.S. 917 (1973), which upheld the validity of an R.S. 2477 grant of a right-of-way for a highway constructed in 1970 along the Trans-Alaska Pipeline. Dunn's holding to the contrary, therefore, does not find unambiguous support in the cases it cites as support for its holding, and most reported decisions assume to the contrary; as a result, it has not been followed by the Department, in the Ninth Circuit, or elsewhere.

While the Ninth Circuit is correct in finding that one major purpose of the 1866 Act, taken as a whole, was to validate various prior trespasses on the public lands, it does not follow a fortiori that R.S. 2477 applies only retroactively. The statutory language, fairly read, looks forward as well as backward in time, and the great bulk of case law also supports the Department's consistent administrative interpretation.

III. Determining whether an R.S. 2477 highway has been validly established is a question of federal law.

The common law doctrine of adverse possession does not operate against the federal government. 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. 986 (1973); Drew v. Valentine, 16 F. 712 (5th Cir. 1883). The necessary corollary of this rule is that in order for a state or individual to gain an interest in land owned by the United States, there must be compliance with a federal statute which grants such interests.

The operative rule of construction applicable to such statutes is that grants by the federal government "must be construed favorably to the government and . . . nothing passes but what is conveyed in clear and explicit language -- inferences being resolved not against but for the government." Caldwell v. United States, 250 U.S. 14, 20 (1916); Wisconsin Central R.R. Co. v. United States, 164 U.S. 190, 202 (1896); Great Northern Ry. Co. v. United States, 315 U.S. 262, 272 (1942); Andrus v. Charlestone Stone Products Co., 436 U.S. 604, 617 (1978); cf. Leo Sheep v. United States, 440 U.S. 668 (1979). This doctrine applies to grants to states as well as grants to private parties. Lessee v. Pacific Ry. Co., 64 U.S. 66, 68 (1859). Thus, in accordance with these rules, any ambiguities which exist in the statutory language must be resolved in favor of the federal government.

The question of whether a particular highway has been legally established under R.S. 2477 remains a question of federal law. It is a settled rule of statutory construction that all words in a statute are to be given effect. It must be assumed that Congress meant every word of a statute and that, therefore, every word must be given force and effect. United States v. Menasche, 348 U.S. 528, 538-39 (1955); Williams v. Sisseton-Wahpeton Sioux Tribal Council, 367 F. Supp. 1194, 1200 (D. South Dakota 1973); See also Zeigler Coal Co. v. Kleppe, 536 F. 2d 398, 406 (D.C. Cir. 1976); Wilderness Society v. Morton, 479 F. 2d 842, 886 (D.C. Cir. 1973),

cert. denied, 411 U.S. 917 (1973); United States v. Wong Kim Bo, 472 F. 2d 720, 722 (5th Cir., 1972); Consolidated Flower Ship. Inc.-Bay Area v. C.A.B., 205 F.2d 449 (9th Cir. 1953). This is especially so when, as here, there is no legislative history to suggest otherwise.4/

Thus in order to determine whether a valid R.S. 2477 highway exists on the federal lands, the several elements of the offer provided by the terms of the statute must be met. First, was the land reserved for a public use? Second, was there actual construction? Third, was what was constructed a highway?

A. Land reserved for public use

R.S. 2477 only grants rights of way over public lands "not reserved for public uses." Therefore, Indian reservations, Wildlife Refuges, National Parks, National Forests, Military Reservations, and other areas not under the jurisdiction of BLM are clearly not open to construction of highways. The extent to which withdrawals of public lands constitute "reservations for public uses" is potentially complicated — See, e.g., Executive Order 6910 (54 I.D. 539) (1934); Wilderness Society v. Morton, 479 F.2d 842, 882, n.90 (D.C. Cir. 1973) — but for present purposes it is sufficient to observe that R.S. 2477 was an offer of rights-of-way only across public lands "not reserved for public uses."

B. Construction

Consistent with the rules of statutory interpretation previously discussed, the choice of the term "construction" in R.S. 2477 necessitates that it be considered an essential element of the offer made by Congress. "Construction" is defined in Webster's New International Dictionary, (2d Ed. 1935) (unabridged) at 572, as: "act of building; erection; act of devising and forming." Construction ordinarily means more than mere use, such as the creation of a track across public lands by the passage of vehicles. Accordingly, we believe that the plain meaning of the term "construction," as used in R.S. 2477, is that in order for a valid right-of-way to come into existence, there must have been the actual building of a highway; i.e., the grant could not be perfected without some actual construction.

4/ An analogy can be drawn from the law of contracts. It is a basic tenet of contract law that no more than is offered is susceptible of a valid acceptance. Maddox v. Northern Natural Gas Co., 259 F. Supp. 781, 783 (D.C. Okla. 1966). Thus, in order for rights-of-way to have been validly accepted under the instant statute, such acceptance must have been performed in accordance with the terms and conditions of the offer. Minneapolis & St. Lr. Co. v. Columbus Rolling Mill Co., 119 U.S. 149, 151 (1886); Tilley v. County of Cook, 103 U.S. 155, 161 (1880); National Bank v. Hall, 101 U.S. 43, 47 (1879).

We believe the correct interpretation on this point is that adopted by the New Jersey Supreme Court in Paterson R.R. Co. v. City of Paterson, 86 A. 68 (N.J. 1912) construing the nearly identical phrase "construction of a highway" which appeared in a 1911 state statute. The court noted (86 A. at 69-70, emphasis added):

> [T]he first question that arises is what is meant by the "construction of a highway." Does it mean simply to lay out the highway on paper and file a map thereof in some public office, or does it contemplate such grading, curbing, flagging, planking, or other physical alteration or addition as may be necessary to prepare the crossing for use by horses, wagons and other vehicles, [and] foot passengers. . . . The plain words of the statute indicate to my mind that the latter is the intention.
>
> To survey a piece of lands and make a map of it, to designate it as a public street, and to file the map cannot in any sense be said to be the construction of a highway. To construct a building it is not sufficient to make a drawing of it and file it: it is necessary to make a physical erection which can be used as buildings ordinarily are used, and so I think that a highway cannot be said to be "constructed" until it shall have been made ready for actual use as a highway. The word "construction" implies the performance of work; it implies also the fitting of an object for use or occupation in the usual way, and for some distinct purpose; it means to put together the constituent parts, to build, to fabricate, to form and to make. The use of the word in connection with a highway manifestly means the preparation of the highway for actual ordinary use, and not the mere delineation thereof, or the taking of land for the purpose of a street.

The federal court decisions are not helpful in interpreting "construction." For example, both Dunn and Wilderness Society involved roads actually constructed. One might find a faint suggestion in the Central Pacific Ry. case that an R.S. 2477 highway may be created solely by actual use,5/ but the Court never addressed the question whether some "construction" in the ordinary, dictionary sense of the word was necessary.

5/ See 284 U.S. at 467, where the Court noted in passing that the original road in question "was formed by the passage of wagons, etc., over the natural soil . . . ." Earlier the Court noted that the highway had been "laid out and declared by the county in 1859, and ever since has been maintained." 284 U.S. at 465.

the administrative difficulty of applying a standard other than actual construction would be potentially unmanageable. If actual use were the only criterion, innumerable jeep trails, wagon roads and other access ways — some of them ancient, and some traversed only very infrequently (but whose susceptibility to use has not deteriorated significantly because of natural aridity in much of the west) -- might qualify as public highways under R.S. 2477.6/ Requiring highways to be constructed will prove, we believe, much more workable in determining whether an R.S. 2477 right-of-way existed prior to October 21, 1976.7/

6/ For example, the State of Utah, which argues that R.S. 2477 highways can be perfected merely by public use without construction, is by state law in the process of mapping such "roads" which it considers were in existence as of October 21, 1976, the date of the repeal of R.S. 2477. (Section 27-15-3, Utah Code Annotated (1976).) Our initial review of these maps indicates that the State of Utah considers all of the numerous trails across federal lands to be R.S. 2477 highways, regardless of extent of construction, maintenance or use.

7/ In the debates leading up to the repeal of R.S. 2477 in FLPMA, there occurred a colloquy between Senators Stevens (Alaska) and Haskell (Colorado) which mirrors the confusion in the reported decisions about the meaning of R.S. 2477. See generally 120 Cong. Rec. 22263-64 (July 8, 1974). For example, Senator Stevens refers at one point to "de facto public roads" which are created from trails that "have been graded and then graveled and then are suddenly maintained by the state. He was concerned that repeal of R.S. 2477 might eliminate rights-of-way for such highways if there had been no formal declaration of a highway under R.S. 2477, even if the state "did, in fact, build public highways across federal land." Senator Haskell assured him that such formal perfection of the grant was not necessary; i.e., that actual existing use as a public highway under state law at the time FLPMA becomes law is sufficient to protect the highway right-of-way as a valid existing right not affected by the repeal of R.S. 2477. Senator Haskell referred to a North Dakota state court decision which recognized both formal and informal acceptance of the R.S. 2477 grant, the latter being done by "uses sufficient to establish a highway under the laws of the State." Whether either Senator thought use without construction was sufficient is doubtful. Senator Stevens raised the point in the context of highways which had been graded, graveled and otherwise built. Finally, of course, this debate, occurring nearly 110 years after enactment of R.S. 2477, sheds no light on Congress' intent in 1866.

This is not to say that if a road was originally created merely by the passage of vehicles, it can never qualify for a right-of-way grant under R.S. 2477. To the contrary, we think such a road can become a highway within the meaning of R.S. 2477 if state or local government improves and maintains it by taking measures which qualify as "construction"; i.e., grading, paving, placing culverts, etc. If the highway has been "constructed" in this sense prior to October 21, 1976, it can qualify for an R.S. 2477 right-of-way whether or not constructed ab initio.8/

C. Highway

A highway is a road freely open to everyone; a public road. See, e.g., Webster's New World Dictionary, (College Ed. 1951) at 686; Harris v. Hanson, 75 F. Supp. 481 (D. Idaho 1948); Karb v. City of Bellingham, 377 P.2d 984 (Wash. 1963). Because a private road is not a highway, no right-of-way for a private road could have been established under R.S. 2477. Insofar as the dicta in United States v. 9,947.71 Acres of Land, 220 F. Supp. 328 (D. Nev. 1963) concludes otherwise, we believe the court was clearly wrong. The court's error in that case was in confusing the standards of R.S. 2477 with other law of access across public lands; i.e., the road at issue in that case was a road to a mining claim, and the Department had previously distinguished such roads from public highways such as might be constructed pursuant to R.S. 2477. See Rights of Mining Claimants to Access Over the Public Lands to Their Claims, 66 I.D. 361, 365 (1959). The court in 9,947.71 Acres of Land specifically found that the road in question was not a public road or highway, 220 F. Supp. at 336-37, and it therefore follows that it could not have been an R.S. 2477 road.9/ Rather, it was an access road under the Mining Law of 1872, and even assuming the court correctly concluded that its taking by the government was compensable, the court's discussion of R.S. 2477 was not pertinent to the legal question presented.

In summary, it is our view that R.S. 2477 was an offer by Congress that could only be perfected by actual construction, whether by the state or local government or by an authorized private individual, of a highway open to public use, prior to October 21, 1976, on public lands not reserved

8/ It is not necessary to deal herein with whether and how an R.S. 2477 right-of-way can be terminated. Because only a right-of-way rather than title is conveyed, however, it seems clear that such a right-of-way can be terminated by abandonment or failure to maintain conditions suitable for use as a public highway. Cf. United States v. 9,947.1 Acres of Land, 220 F. Supp. 328, 334 (D. Nev. 1963).

9/ In fact, the State of Nevada had officially taken the position that the road in question was not considered a public road or highway. See 220 F. Supp. at 337.

for public uses. Insofar as highways were actually constructed over unreserved public land by state or local governments or by private individuals under state or local government imprimatur prior to October 21, 1976, we do not question their validity.

D. State law construing R.S. 2477

As noted above, state court decisions and state statutes are in conflict with each other on the issue of how a right-of-way under R.S. 2477 is perfected. Generally, the approach of the states appears to fall into three general categories. First, some (Kansas, South Dakota and Alaska) have held that state statutes which purport to establish such rights-of-way along all section lines are sufficient to perfect the grant upon enactment of the state statute, even if no highway had either been constructed or created by use. Tholl v. Koles, 70 P. 881 (Kan. 1902); Pederson v. Canton Twp., 34 N.W. 2d 172 (S.D. 1948); Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Alas. 1975), contra Warren v. Chouteau County, 265 P. 670 (Mont. 1928). Second, states such as Colorado, Oregon, Wyoming, New Mexico, and Utah have held that R.S. 2477 rights-of-ways can be perfected solely by public use, without any construction or maintenance. Nicolas v. Grassie, 267 P. 196 (Colo. 1928); Montgomery v. Somers, 90 P. 674 (Ore. 1907); Hatch Bros Co. v. Black, 165 P. 514 (Wyo. 1917); Wilson v. Williams, 67 P. 2d 883 (N.M. 1939); Lindsay Land & Livestock Co. v. Charnock, 265 P. 646 (Utah 1930). Third, Arizona courts have held that such rights-of-way can be established only by a formal resolution of local government, after the highway has been constructed. Perfection by mere use is not recognized. Tucson Consol. Copper Co. v. Reese, 100 P. 777 (Ariz. 1909).

The above analysis of the plain meaning of R.S. 2477 shows that the Arizona interpretation is the only correct one, and that the positions taken by other states do not meet the express requirements of the statute. For example, the Kansas, South Dakota and Alaska approach based on section lines does not even require that there be a highway or access route, much less that it be constructed. The approach taken by states such as Colorado, Utah, New Mexico, Oregon and Wyoming, that R.S. 2477 rights-of-way may be perfected by across ways created by use alone, without any construction, also fails to meet the plain requirement of R.S. 2477 that such highways be "constructed."

The term "construction" must be construed as an essential element of the grant offered by Congress; otherwise, Congress' use of the term is meaningless and superfluous. The states could accept only that which was offered by Congress and not more. Thus, rights-of-way which states purported to accept but on which highways were not actually constructed prior to October 21, 1976, do not meet the requirements of R.S. 2477 and therefore no perfected right-of-way grant exists.

IV. The regulation at 43 C.F.R. § 2822 (1979) did not make the question of whether a highway has been established under R.S. 2477 a question of state law.

The language of this regulation first appeared in a Circular dated May 25, 1938 (Circ. 1237 a, ¶ 54). At pertinent part, the regulation provides (43 C.F.R. § 2822.1-1):

> No application should be filed under R.S. 2477, as no action on the part of the Government is necessary.

This is a correct statement, but it does not mean that the grant may be perfected on whatever terms a state deems appropriate, without regard to the conditions on which the grant is offered.

Rather, a state claim of an R.S. 2477 right-of-way is like a miner's location of a claim under the Mining Law of 1872, for which no application is required either. Like a mining claim, however, a claim to an R.S. 2477 right-of-way does not necessarily mean that a valid right exists. The United States has often successfully challenged the validity of mining claims because of the failure of the claimant to establish rights under that law. See, e.g., Cameron v. United States, 252 U.S. 450 (1920); United States v. Coleman, 390 U.S. 599 (1968); Hickel v. Oil Shale Corp., 400 U.S. 48 (1970). The Department has not previously determined the validity of claimed rights under R.S. 2477, because it has had no land or resource management reason to do so; i.e., conflicts generally did not arise between the existence of claimed rights-of-way under R.S. 2477 and the management of the public lands affected by such claims. If there is a resource management reason to do so, such as the review of public lands for wilderness values, claimed rights-of-way may be reviewed to determine their validity under R.S. 2477.

43 C.F.R. § 2822.2-1 further provides:

> Grants of rights-of-way under R.S. 2477 are effective upon construction or establishment of highways in accordance with the State laws over public lands that are not reserved for public uses.

In the context of the above analysis, the question presented by this sentence is whether "establishment" can mean less than "construction." We think lawfully it could not because the explicit language of R.S. 2477 required "construction." If "establishment" as used in the Circular and subsequent regulations meant less than "construction," it was an unauthorized exercise of power by the Secretary of the Interior. Congress has plenary power over the public lands and the Secretary can only do those things authorized by Congress. See, e.g., Kleppe v. New Mexico, 426 U.S. 529 (1976).

Given the statutory requirement of construction, the phrase "or establishment in accordance with the State laws" must mean that a state could lawfully require more than mere construction of the highway in order to perfect the R.S. 2477 grant; i.e., "construction" is the minimum requirement of federal law but the State could impose on itself additional requirements in order to perfect a grant under R.S. 2477. This in fact is what Arizona has apparently done; i.e., construction of the highway is sufficient as a matter of federal law to qualify for a right-of-way under R.S. 2477, but Arizona has imposed upon itself the additional requirement of formal approval of the grant by local government. Highways thus might be "constructed" under R.S. 2477, but the right-of-way won't be accepted as far as Arizona is concerned, or "established" in terms of 43 C.F.R. § 2822.2-1, until local government resolves to accept or designate them.

V. Relationship between "roadless" as used in section 603 of FLPMA and "highway" as used in R.S. 2477.

Section 603 of FLPMA (43 U.S.C. § 1782) mandates an inventory of all public lands initially to determine which lands contain wilderness characteristics as defined in the Wilderness Act (16 U.S.C. § 1131 et seq.), contain 5,000 acres or more and are roadless. Areas which meet these standards must be managed to protect their suitability for wilderness preservation until Congress determines whether or not they should be placed in the Wilderness System. Critical to this process is the meaning of the term "roadless."

As discussed in a Solicitor's Opinion interpreting section 603 of FLPMA (86 I.D. 85, 95 (1979)), the definition used by the BLM in administering section 603 comes from the House Report on FLPMA and provides as follows:

> 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.

H.R. Rep. No. 1163, 94th Cong., 2d Sess. 17 (1976).

The above analysis shows that an area containing a highway validly constructed under the offer of R.S. 2477 is of necessity not roadless under section 603 of FLPMA, because an area containing a valid R.S. 2477 highway can never meet the definition of "roadless" in the House Report. That is, a valid R.S. 2477 right-of-way must be a public highway constructed (or, as the House Report on section 603 indicates, "improved and maintained by mechanical means") over unreserved public lands, and can, therefore, never be a way established merely by the passage of vehicles. Read in

this way, the two statutes are consistent with each other,10/ and with the settled rules of statutory construction that Congress is presumed to be cognizant of prior existing law,11/ and that statutes should be construed consistent with each other where reasonably possible.

Finally, it should be noted that in states such as Alaska, which have enacted statutes designating all section lines as highways, purporting to constitute the perfection of the R.S. 2477 grant, see Girves v. Kenai Penensula Borough, 536 P. 2d 1221, 1225 (Alas. 1975), no public lands in the entire state would qualify for wilderness study because there would be no "roadless" areas over 640 acres, and section 603 of FLPMA requires a roadless area of 5000 acres as a minimum in order to be considered for wilderness area designation. There is absolutely no indication in the legislative history of FLPMA that Congress thought such a bizarre result would be possible. On the contrary, all indications are that Congress thought that all areas of public lands without constructed and maintained roads would be considered for possible preservation as wilderness.

I trust you will find this explanation of our position useful. I look forward to our meeting on May 2 to discuss this further.

Sincerely,

FREDERICK N. FERGUSON

DEPUTY SOLICITOR

10/ It is significant that in formulating its definition of "roadless" that the House Committee identified no conflict between that definition and R.S. 2477. See H.R. Rep. No. 1163, 94th Cong., 2d Sess. 17 (1976). The transcript of the House Committee markup session reveals that Congressman Steiger of Arizona suggested the definition of "road" which appears 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 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. See Transcript of Proceedings, Subcommittee on Public Lands of House Committee on Interior and Insular Affairs, Sept. 22, 1975, at 329-33.

11/ See, e.g., United States v. Robinson, 359 F. Supp. 52 (D. Fla. 1973); In re Vinarsky, 267 F. Supp. 446 (D. N.Y. 1968).

cc: Dep. Asst. Atty. Gen. S. Sagalkin, DOJ
L.Schiffer, DOJ
P.Coppelman, DOJ
R.Fowler, Ofc. of Gen. Counsel, DOA
Assoc. Sol., EAL
Assoc. Sol., C&W
Regional Sol., Southwest Region
Regional Sol., Pacific Southwest Region
Regional Sol., Alaska Region
Regional Sol., Utah Region
Regional Sol., Rocky Mt. Region
Asst. Sol., Land Use, DLR
Asst. Sol., Realty, DLR
[illegible], DLR
[illegible], DLR

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[illegible]:SOL:DLR:JDLesh[illegible]:4/28/86:X5757 #6

THE SECRETARY OF THE INTERIOR
WASHINGTON

Memorandum

To: Secretary

From: Acting Assistant Secretary for Fish and Wildlife and Parks
Assistant Secretary for Land and Minerals Management

Subject: Departmental Policy on Section 8 of the Act of July 26, 1866, Revised Statute 2477 (Repealed), Grant of Right-of-Way for Public Highways (RS 2477)

Although RS 2477 was repealed nearly 12 years ago, controversies periodically arise regarding whether a public highway was established pursuant to the congressional grant under RS 2477 and the extent of rights obtained under that grant. Under RS 2477, the United States had (has) no duty or authority to adjudicate an assertion or application. However, it is necessary in the proper management of Federal lands to be able to recognize with some certainty the existence, or lack thereof, of public highway grants obtained under RS 2477.

With the passage of the Federal Land Policy and Management Act, the Bureau of Land Management (BLM) developed procedures, policy, and criteria for recognition, in cooperation with local governments, of the existence of such public highways and notation to the BLM's land records. This has allowed the BLM to develop land use plans and to make appropriate management decisions that consider the existence of these highway rights.

Issues have recently been raised by the State of Alaska and others which question not only the BLM policy but also the management actions by other bureaus within the Department. We have had the BLM review and report on the various issues and concerns (Attachment 2) and consulted with the State of Alaska, the BLM, the Fish and Wildlife Service, and the National Park Service.

We believe that the land management objectives of the Department will be improved with adoption of a Departmental policy and recommend that the attached policy (Attachment 1) be adopted for Departmentwide use.

Approve: Donald Paul Hodel Disapprove: _____

Date: DEC 07 1988 Date: _____

Attachments: 1-RS 2477 Policy
2-BLM Report

Celebrating the United States Constitution

RS 2477
Section 8 of the Act of July 26, 1866
Revised Statute 2477 (43 U.S.C. 932)
Repealed October 21, 1976

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

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

Although this statute, 43 U.S.C. 932 (RS 2477), was repealed by Title VII of the Federal Land Policy and Management Act of October 21, 1976, 90 Stat. 2793, many rights-of-way (R/W) for public highways obtained under the statute exist or may exist on lands administered by the Department and other Federal agencies. The existence or lack of existence of such highway R/Ws has material bearing on the development and implementation of management plans for conservation system units and other areas of Federal lands. Land managing Bureaus of the Department should develop, as appropriate, internal procedures for administratively recognizing those highways meeting the following criteria and recording such recognized highways on the land status records for the area managed by that Bureau.

Acceptance:

To constitute acceptance, all three conditions must have been met:

1. The lands involved must have been public lands, not reserved for public uses, at the time of acceptance.

2. Some form of construction of the highway must have occurred.

3. The highway so constructed must be considered a public highway.

Public lands, not reserved for public uses:

Public lands were those lands of the United States that were open to the operation of the various public land laws enacted by Congress.

Public lands, not reserved for public uses, do not include public lands reserved or dedicated by Act of Congress, Executive Order, Secretarial Order, or, in some cases, classification actions authorized by statute, during the existence of that reservation or dedication.

Public lands, not reserved for public uses, do not include public lands pre-empted or entered by settlers under the public land laws or located under the mining laws which ceased to be public lands during the pendancy of the entry, claim, or other.

Construction:

Construction must have occurred while the lands were public lands, not reserved for public uses.

2801 - RIGHTS-OF-WAY MANAGEMENT

Departmental Policy Statement, RS 2477

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

Survey, planning, or pronouncement by public authorities may initiate construction, but does not by itself, constitute construction. Construction must have been initiated prior to the repeal of RS 2477 and actual construction must have followed within a reasonable time.

Road maintenance over several years may equal actual construction.

The passage of vehicles by users over time may equal actual construction.

Public Highway:

A public highway is a definitive route or way that is freely open for all to use. It need not necessarily be open to vehicular traffic for a pedestrian or pack animal trail may qualify. A toll road or trail is still a public highway if the only limitation is the payment of the toll by all users. Multiple ways through a general area may not qualify as a definite route, however, evidence may show that one or another of the ways may qualify.

The inclusion of a highway in a State, county, or municipal road system constitutes being a public highway.

Expenditure of construction or maintenance money by an appropriate public body is evidence of the highway being a public highway.

Absent evidence to the contrary, a statement by an appropriate public body that the highway was and still is considered a public highway will be accepted.

Ancillary uses or facilities usual to public highways:

Facilities such as road drainage ditches, back and front slopes, turnouts, rest areas, and the like, that facilitate use of the highway by the public are considered part of the public highway R/W grant.

Other facilities such as telephone lines, electric lines, etc., that were often placed along highways do not facilitate use of the highway and are not considered part of the public highway R/W grant. An exception is the placement of such facilities along such R/W grants on lands administered by the Bureau of Land Management prior to November 7, 1974. Prior to this date, the requirement of filing an application for such facilities was waived. Any new facility, addition, modification of route, etc., after that date requires the filing of an application/permit for such facility. Facilities that were constructed, with permission of the R/W holder, between November 7, 1974, and the effective date of this policy, should, except in rare and unusual circumstances, be accommodated by issuance of a R/W or permit authorizing the continuance of such facility.

Width:

For those highway R/Ws in the State, county, or municipal road system, i.e., the R/W is held and maintained by the appropriate government body, the width of the R/W is as specified for the type of highway under State law, if any, in force at the time the grant could be accepted.

In some cases, the specific R?W may have been given a lesser or greater width at the time of creation of the public highway than that provided in State law.

Where State law does not exist or is not applicable to the specific highway R/W, the width will be determined in the same manner as below for non-governmentally controlled highways.

Where the highway R/W is not held by a local government or State law does not apply, the width is determined from the area, including appropriate back slopes, drainage ditches, etc., actually in use for the highway at the later of (1) acceptance of the grant or (2) loss of grant authority under RS 2477, e.g., repeal of RS 2477 on October 21, 1979, or an earlier removal of the land from the status of public lands not reserved for public uses.

Abandonment:

Abandonment, including relinquishment by proper authority, occurs in accordance with State, local or common law or judicial precedence.

Responsibilities of Agency and Right-of-Way Holder:

This policy addresses the creation and abandonment of property interests under RS 2477 and the respective property rights of the holder of a R/W and the owner of the servient estate.

Under the grant offered by RS 2477 and validly accepted, the interests of the Department are that of owner of the servient estate and adjacent lands/resources. In this context, the Department has no management control under RS 2477 over proper uses of the highway and highway R/W unless we can demonstrate unnecessary degradation of the servient estate. It should be noted, however, that this poli , does not deal with the applicability, if any, of other federal, state, and/or local laws on the management or regulation of R/Ws reserved pursuant to RS 2477.

Reasonable activities within the highway R/W are within the jurisdiction of the holder. As such, the Department has no authority under RS 2477 to review and/or approve such reasonable activities. However, review and approval may or may not occur, depending upon the applicability, if any, of other federal, state, or local laws or general relevance to the use of a R/W.

L1425 (RMR-PA)
RS 2477

SEP 1 1992

Memorandum

To: Superintendents, Arches, Bryce Canyon, Canyonlands, Capitol Reef and Zion National Parks, Dinosaur National Monument and Glen Canyon National Recreational Area

From: Regional Director, Rocky Mountain Region, Denver Colorado

Subject: Interim Procedures for Processing RS 2477 Right-of-Way Assertions

The Rocky Mountain Region has been working closely with the Alaska Region to develop a uniform set of procedures for handling assertions of rights-of-way under Section 8 of the Act of July 26, 1866, commonly known as Revised Statute (RS) 2477. A copy of the latest version of these procedures is enclosed.

These procedures are to be utilized in this region in the handling of any RS 2477 assertions on an interim basis pending the finalization and adoption of service-wide procedures.

Any comments should be directed to Dick Young of our Land Resources Division at (303) 969-2610.

(Signed) Boyd Evison

Enclosure

bcc:

RD, ARO w/enc.
Davis, WASO 500 w/enc.
Kriz, WASO 660 w/enc.
Regional Solicitor, Denver w/enc.
Regional Solicitor, Salt Lake City w/enc.
Turk, RMR-PP w/enc.
Chaney, RMR-RN w/enc.
RMR-D
Ott w/enc
RAYoung:sed:969-2610:8-31-92
A:\RS2477.I

NATIONAL PARK SERVICE PROCEDURES FOR ASSERTION, REVIEW, AND DETERMINATIONS OF REVISED STATUTE 2477 RIGHTS-OF-WAY

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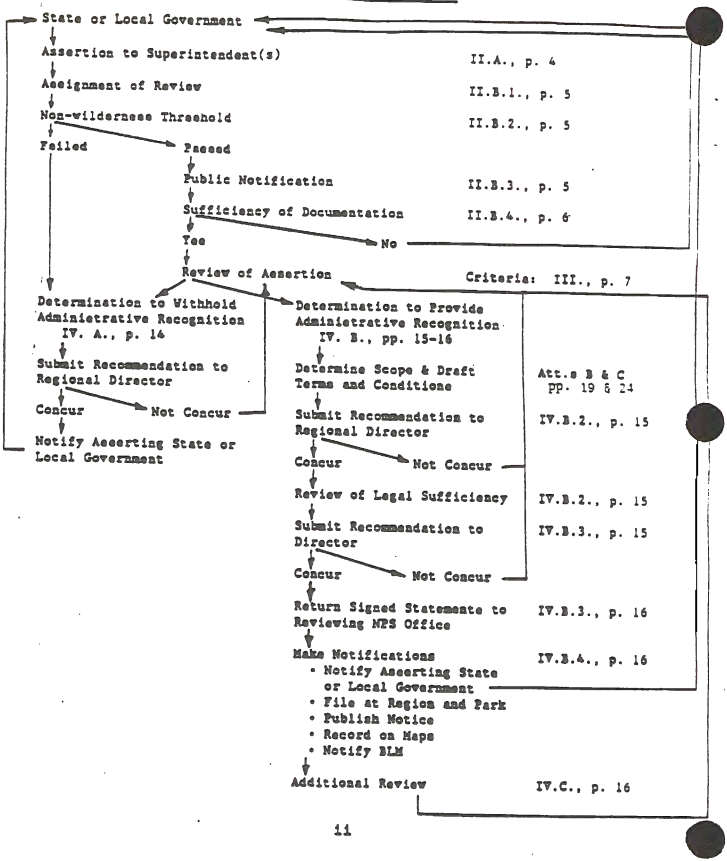

NATIONAL PARK SERVICE PROCEDURES FOR
ASSERTION, REVIEW, AND DETERMINATIONS OF
REVISED STATUTE 2477 RIGHTS-OF-WAY

I. PREAMBLE

Consistent with the Organic Act of the National Park Service, 16 U.S.C. 1, and other applicable federal law and regulation, this document sets forth National Park Service (NPS) procedures for accepting assertions, reviewing assertions, and making administrative determinations on assertions of Revised Statute 2477 (RS 2477) rights-of-way. These procedures shall guide NPS administrative actions in the absence of applicable determinations by a court of competent jurisdiction.

These procedures represent the initial step in NPS management of RS 2477 rights-of-way. After determining that an asserted RS 2477 right-of-way qualifies for administrative recognition, the NPS shall determine the scope of the right-of-way and draft terms and conditions on the use of the right-of-way as necessary to prevent derogation of park values.

A. Purpose

These procedures:

1. implement Department of the Interior policy on RS 2477 (see Part I.C.);

2. describe the documentation and steps necessary to assert an RS 2477 right-of-way on NPS lands (see Part II.A.);

3. provide a process and standards for NPS review of RS 2477 assertions (see Parts II.B., III., and IV.); and

4. provide a standardized process for NPS administrative recognition of RS 2477 rights-of-way (see Part IV.).

B. Definitions

1. Acceptance of the RS 2477 grant: the act of construction of a public highway across unreserved public lands by a non-federal entity before repeal of RS 2477.

2. Assertion: a written statement by a state or local government submitted to a superintendent to declare and document the existence of an RS 2477 right-of-way.