

3. Administrative Recognition: an acknowledgement by the NPS of the probable existence of an RS 2477 right-of-way.
4. "When the RS 2477 grant was available": the period(s) of time between enactment and repeal of RS 2477 when subject lands were not reserved for public purposes.
5. State or local government: a non-federal government or non-federal governmental agency with legal authority over and responsibility for public highways.
6. Non-federal entity: a state or local government or any individual, group, or person acting in a non-federal capacity.

C. Background

Revised Statute 2477, Section 8 of the Act of July 26, 1866 (43 U.S.C. 932), repealed October 21, 1976, provided:

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

RS 2477 was a congressional grant of right-of-way. Although no action by a federal agency was required for a right to be obtained under RS 2477, no right was obtained unless the grant was "accepted." A state or local government or individual accepted an RS 2477 grant for the public by constructing a public highway across unreserved public lands. The validity of an accepted RS 2477 grant and the scope of the congressional offer is defined by federal, state, and common law.

Congress repealed RS 2477 on October 21, 1976, by enactment of §706 of the Federal Land Policy and Management Act (FLPMA). 90 Stat. 2793. Repeal was subject to valid existing rights. FLPMA §701. Therefore, rights-of-way for public highways accepted pursuant to RS 2477 prior to repeal may exist across subsequently established NPS lands.

D. Judicial Recognition

A determination by a State or Federal Court that all or a portion of the asserted right-of-way has been judicially determined to be a "road" is conclusive, and no additional administrative review is required. Such judicial determinations should be sent to the Regional Office so that records may be so noted.

E. Authority to Administratively Recognize

The Organic Act of the National Park Service, 16 U.S.C. §1, and specific park enabling legislation require the NPS to manage lands to conserve scenic, natural, historic, and wildlife resources for enjoyment by future generations. Although the NPS was not delegated adjudicative authority over RS 2477 assertions by that statute, the bureau must address RS 2477 assertions to rationally plan park management and fulfill legislative mandates.

The Secretary of the Interior issued a policy statement on RS 2477 rights-of-way on December 7, 1988. See Attachment E. This policy statement set the criteria that must be met for RS 2477 right-of-way assertions to be recognized by bureaus of the Department of the Interior. It also addressed several management issues and stated that:

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.

Under the Secretary's policy, NPS administrative recognition of an asserted RS 2477 right-of-way constitutes a finding that there exists sufficient evidence to support probable affirmative action on the assertion by a court of competent jurisdiction. NPS administrative recognition does not grant any interest in land; NPS administrative recognition merely acknowledges for land management purposes the probability of a pre-existing right-of-way.

The NPS has the authority and statutory obligation to manage RS 2477 rights-of-way in order to prevent derogation of park values. See Attachment C.

II. PRE-REVIEW PROCEDURES

The following requirements must be met by the asserting party and the following procedures shall be completed by the NPS before review of an asserted RS 2477 right-of-way may begin.

A. Assertion Requirements

1. Identification of Asserting Party - Assertions must be made by the state or local government with authority over and responsibility for public highways in the area of the asserted right-of-way.

If a potentially valid RS 2477 right-of-way exists but has not been asserted, the NPS may, at its discretion, independently initiate an action to determine the status of the subject land.

2. Identification of Asserted Right-of-way - Assertions must be accompanied by maps of sufficient detail to identify the asserted right-of-way. Asserted RS 2477 rights-of-way must be identified in such a manner that the asserted right-of-way may be accurately located on the ground by a competent engineer or land surveyor. The NPS may require:

- detailed maps;
- a legal description;
- survey records; or
- dated aerial photographs.

3. Submittal - An RS 2477 right-of-way must be asserted to the NPS by the appropriate state or local government to be administratively recognized. An assertion is a written claim that a public highway was constructed over unreserved public land before repeal of RS 2477. Assertions must be submitted to the superintendent(s) of the NPS unit(s) with jurisdiction over the lands affected by the asserted right-of-way.
4. Documentation - The asserting state or local government must provide the NPS with legal and historical documentation from appropriate competent authorities to document the construction and public nature of an asserted RS 2477 right-of-way with reasonable certainty pursuant to the review criteria in Part III.

5. Deadline - Although Congress repealed RS 2477 on October 21, 1976, there is currently no deadline for asserting RS 2477 rights-of-way.
6. Fees - No fees shall be charged for reviewing and processing assertions of RS 2477 rights-of-way.

B. NPS Actions

1. Assignment of Review - Superintendents shall notify the appropriate regional director upon receiving an RS 2477 assertion. Regional offices shall assist assertion review as necessary to facilitate consistent and equitable determinations. Superintendents may request regional office review of an RS 2477 assertion if a park lacks necessary staff or training; assertion review will require staff with specialties in realty, historical analysis, and federal, state, local, and common law.

The authority to approve a determination against administrative recognition of an asserted RS 2477 right-of-way shall rest with regional directors, and the authority to approve determinations for administrative recognition shall rest with the Director of the NPS. However, regardless of the office conducting review of an assertion, superintendents shall be the primary initial and continuing contact for state or local governments submitting assertions.

The Office of the Regional Solicitor should be involved early in the review process, as appropriate.

2. Non-wilderness Threshold - The reviewing NPS office shall determine if an asserted RS 2477 right-of-way crosses any lands within the Wilderness Preservation System or any lands proposed for addition to the Wilderness Preservation System by the NPS. The reviewing NPS office shall draft a "Determination to Withhold Administrative Recognition" for any asserted RS 2477 rights-of-way across such lands and proceed pursuant to Part IV.A. without further review.

Rights-of-way and access procedures affecting wilderness areas in Alaska are governed by applicable provisions of ANILCA and regulations in 43 C.F.R. 36 and 36 C.F.R. 13 and apply in lieu of the above.

3. Public Notification - The NPS shall accept and review pertinent information on an RS 2477 assertion from all sources. After an assertion has passed the non-wilderness threshold, the NPS shall publish such public

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notice as is considered necessary that it is beginning review of an RS 2477 assertion.

4. Sufficiency of Documentation - The reviewing NPS office shall make a preliminary determination on the sufficiency of documentation accompanying an RS 2477 assertion. Each assertion must fulfill the requirements of Part II.A. above and include sufficient documentation to allow analysis of the assertion pursuant to Part III.

After making an initial determination of sufficiency, the superintendent shall make one of the following written notifications to the asserting party:

- a. insufficient documentation was provided to allow review. This notification shall indicate the nature of the deficiencies.
 - b. sufficient documentation was provided to initiate review. This notification shall also state that the NPS reserves the right to require additional information as necessary.
5. Coordination with Other Agencies - It is the asserting party's responsibility to file RS 2477 assertions with all affected land managers.

Determinations to administratively recognize or withhold recognition of asserted RS 2477 rights-of-way may affect such determinations by other land managers where RS 2477 rights-of-way cross lands under multiple administration. Therefore, the NPS shall coordinate review of RS 2477 assertions with appropriate adjacent land managers. Every effort should be made to reach a consensus decision with other agencies, however, the NPS shall make independent administrative determinations for those sections of asserted RS 2477 rights-of-way that cross NPS lands.

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III. REVIEW CRITERIA

The NPS shall accept pertinent information on an RS 2477 assertion from any source. Assertions shall be reviewed for compliance with the following criteria quoted from the Secretary of the Interior's policy statement on RS 2477 rights-of-way (12/07/88). See Attachment E. The NPS office reviewing an RS 2477 assertion shall evaluate the assertion as explained after each quote.

A. Unreserved Public Land

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

"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 pendency of the entry, claim, or other."

1. Unreserved Public Lands Defined - public lands were unreserved if such lands were not closed to the operation of any public land laws, and therefore:

- not withdrawn by federal legislation;
- not withdrawn by executive order;
- not withdrawn by departmental order (e.g., Public Land Order 4582, December 14, 1968 reserved all federal land in Alaska not previously reserved); or
- not pre-empted, entered, appropriated, reserved, located, or otherwise disposed of under the public land laws or mining laws.

2. Determination of Land Status - Between 1866 and 1976 it is possible that a single parcel of land was subject to and not subject to RS 2477 numerous times through various land status changes. Thus, a highway initiated while land was reserved might subsequently qualify under RS 2477 if the conditions were later met when the land returned to the status of unreserved public lands. The NPS shall determine and record the dates during which the subject lands were public lands, not reserved for public uses, by reviewing any or all of the following public land records:

- Bureau of Land Management (BLM) Master Title Plats (MTP) and Historical Indices (HI),
- NPS land status records,
- BLM and other agency land status records, and
- State and local recording office records.

NOTE: The reviewing NPS office must review any applicable withdrawals to determine the actual conditions of the withdrawals and whether a withdrawal effectively closed the subject lands to the operation of RS 2477. The Regional Solicitor should be consulted as to whether or not lands were actually closed.

B. Construction

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

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

"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."

1. Construction Defined - For the purpose of NPS review, any one of the following may have constituted construction if sanctioned by applicable federal, state, local, or common law in effect at a time when the RS 2477 grant was available.
 - a. actual physical modifications were made by non-federal entities to create a physically continuous and clearly defined and demarcated route for public highway purposes;
 - b. substantial maintenance was conducted by non-federal entities for public highway purposes on a definite route during a significant and uninterrupted period of time so as to effect actual physical modifications of the route and create a physically continuous and clearly defined and demarcated public highway.
 - c. a significant number of vehicles were driven by non-federal entities on a definite route during a significant and uninterrupted period of time so as to effect actual physical modifications of the route and create a physically continuous and clearly demarcated public highway.

For the purposes of NPS review, survey, planning, or pronouncement by public authorities does not constitute construction, and actual construction (as discussed above) initiated by such actions must have been effective at a time when the RS 2477 grant was available.

2. Documentation Required - For the purpose of NPS review, an RS 2477 assertion must be accompanied by sufficient evidence to document the construction of the asserted right-of-way. Documentation must clearly apply to the asserted right-of-way and clearly establish the act and effective date of construction. Examples of such documentation include but are not limited to:
 - dated expenditure records for actual construction;
 - dated expenditure records for maintenance;
 - dated photographic records of construction and maintenance;
 - dated aerial photography of accomplished construction;
 - dated media references to construction, maintenance, or the passage of vehicles;
 - affidavits by witnesses to the acts and dates of actual construction or maintenance;
 - affidavits by witnesses to the acts and dates of the passage of vehicles over time; and

- other dated records and documentation of actual construction, maintenance, or the passage of vehicles from local, state, and federal agencies, or other sources.
3. Determination of Construction - The NPS together with the Regional Solicitor if necessary, shall determine and record if an RS 2477 assertion sufficiently documents at least one of the definitions of construction provided above, and if so, the date by which such construction was in effect.

If an assertion states and convincingly documents construction of a highway, and the stated and documented construction was in effect at a date the subject lands were unreserved public lands as determined in III.A.2., the NPS shall find that construction occurred for the purpose of accepting the RS 2477 grant.

If an assertion fails to state and convincingly document the act of construction, or if the stated and documented construction was not in effect until a date the subject lands were reserved as determined in III.A.2., the NPS shall find that construction did not occur for the purpose of accepting the RS 2477 grant.

C. Public Highway

"The highway so constructed must be considered a 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."

1. Public Highway Defined - All of the following conditions must have been met for a route to qualify as a public highway. A route must have been:
 - a. physically continuous and clearly defined and demarcated;
 - b. equally open to use by all members of the public;
 - c. actually used as a public highway; and,
 - d. if state law provided that an RS 2477 right-of-way must be accepted by an official act of a state or local government, the record must show the right-of-way was either:
 - 1) officially included in a state or local government public highway system at a time when the RS 2477 grant was available;
 - 2) unofficially included in a state or local government public highway system by virtue of substantial construction or maintenance expenditures on the asserted right-of-way by a state or local government with authority over and responsibility for public highways in the area of the asserted right-of-way at a time when the RS 2477 grant was available; or
 - 3) incontestably proclaimed by the asserting state or local government at the time of the assertion to have been a public highway at a time when the RS 2477 grant was available and to have remained a public highway from that time forward.

Note: Vacation, including relinquishment by proper authority, occurs in accordance with State, local or common law or Judicial precedence. For highways held by local governments, most states have procedural statutes for vacation proposal, hearing, and final order by the appropriate governmental entity. For those highways held by the "public in general," local statutes may or may not exist. Vacation or relinquishment, if in accordance with state law of an asserted RS 2477 right-of-way by an appropriate state or local government at any time previous to the assertion, shall disqualify the asserted right-of-way from public highway status.

Absent applicable federal, state, local, or common law to the contrary, the NPS shall consider RS 2477 rights-of-way to have been vacated, relinquished, or abandoned if there is demonstrable long-standing disuse of the right-of-way.

Questions of vacation, relinquishment or abandonment may be highly complex. The Regional Solicitor must be consulted early if such a claim is to be pursued.

2. Documentation Required - For the purpose of NPS review, an RS 2477 assertion must document the public nature of the asserted right-of-way including the past and current purposes, methods, and frequency of public use. Documentation must clearly apply to the asserted right-of-way and clearly establish the public nature and effective date of public use. Examples of such documentation include but are not limited to:
 - dated maps and survey records indicating a defined and demarcated public highway;
 - dated legislative or administrative proclamations adopting a right-of-way as part of a state or local government highway system;
 - dated expenditure records for construction or maintenance by an appropriate state or local government;
 - dated photographic records of public use;
 - dated media references to public use;
 - affidavits by witnesses to the public access to and use of the asserted RS 2477 right-of-way;
 - other records and documentation of public use from local, state, and federal agencies, or other sources; and
 - an incontestable statement by the asserting state or local government that the asserted right-of-way was and still is considered a public highway.

3. Determination of Public Nature of Highway - The NPS together with the Regional Solicitor if necessary, shall determine and record if an RS 2477 assertion sufficiently documents all of the conditions necessary for the asserted right-of-way to qualify as a public highway, and if so, the date by which the public nature of the asserted right-of-way was in effect.

If an assertion states and convincingly documents the public nature of an asserted right-of-way, the asserted right-of-way was never vacated, relinquished, or abandoned pursuant to applicable federal, state, local, or common law, and the stated and documented public nature of the asserted right-of-way was in effect and remained in effect during the dates the subject lands were unreserved public lands as determined in III.A.2., the NPS shall find that the asserted right-of-way was a public highway for the purpose of accepting the RS 2477 grant.

If an assertion fails to state and convincingly document the public nature of an asserted right-of-way, the asserted right-of-way was vacated, relinquished, or abandoned, or if the stated and documented public nature of the asserted right-of-way was not in effect or did not remain in effect until a date the subject lands were reserved as determined in III.A.2., the NPS shall find that the asserted right-of-way was not a public highway for the purpose of accepting the RS 2477 grant.

IV. REVIEW PROCEDURES

The NPS shall evaluate an RS 2477 assertion as outlined in Part III. and make a determination to either withhold or provide administrative recognition of the asserted RS 2477 right-of-way.

A. Determination to Withhold Administrative Recognition

1. Reviewing Office at Park or Regional Level - If an RS 2477 assertion does not include sufficient documentation to convincingly support the assertion and meet the above criteria, the reviewing NPS office shall draft a "Determination to Withhold Administrative Recognition." Such statements shall address the nature and extent of the assertion's deficiencies.
2. Regional Office Review - The reviewing NPS office shall submit each draft "Determination to Withhold Administrative Recognition" to the appropriate regional director for review.

If the regional director does not concur with the draft "Determination to Withhold Administrative Recognition" the draft shall be returned to the reviewing NPS office for either additional evaluation and revision or drafting of a "Statement of Administrative Recognition" as may be appropriate. See Part IV.B. and Attachment A.

If the regional director concurs with the draft "Determination to Withhold Administrative Recognition" the regional office shall sign the draft and return it to the superintendent.

3. Notifications - Following the return of a signed "Determination to Withhold Administrative Recognition" from the appropriate regional director, the superintendent shall make written notification to the asserting party and provide a copy of the signed "Determination to Withhold Administrative Recognition"

B. Determination to Provide Administrative Recognition

1. Reviewing Office at the Park or Regional Level - If an RS 2477 assertion includes sufficient documentation to convincingly support the assertion and meet the above criteria, the reviewing NPS office shall:
 - a. determine the scope of the asserted RS 2477 right-of-way. See Attachment B.
 - b. draft terms and conditions on the use of the asserted RS 2477 right-of-way as may be necessary to prevent degradation of the natural and cultural resources, associated values, and visitor use and enjoyment of lands under NPS jurisdiction, and comply with park planning documents. See Attachment C.
 - c. draft a recommendation for administrative recognition in the form of an unsigned "Statement of Administrative Recognition." Such statements shall incorporate the determination of scope and terms and conditions on the use of the RS 2477 right-of-way required above. See Attachment A.
2. Regional Office Review - The reviewing NPS office shall submit recommendations for administrative recognition, in the form of an unsigned "Statement of Administrative Recognition" to the appropriate regional director for review.

If the regional director does not concur with the recommendation, the recommendation shall be returned to the reviewing office for either a determination to withhold recognition, as described in IV.A., or additional evaluation as may be appropriate.

If the regional director concurs with the recommendation, the regional director shall submit the recommendation for administrative recognition to the office of the appropriate regional solicitor for final approval of legal sufficiency.

3. Washington Office Review - Following final approval of legal sufficiency, the appropriate regional director shall submit four (4) copies of the recommendation for administrative recognition to the Director of the NPS. The Director of the NPS shall review all recommendations for administrative recognition.

If the Director of the NPS does not concur with the recommendation for administrative recognition, the recommendation shall be returned to the reviewing NPS office for either a determination to withhold recognition, as described in Part IV.A., or additional evaluation as may be appropriate.

If the Director of the NPS concurs with the recommendation for administrative recognition, the Director shall sign all four (4) copies of the "Statement of Administrative Recognition" and return three (3) signed copies to the reviewing NPS office.

4. Notifications - Following the return of three (3) signed copies of the "Statement of Administrative Recognition" from the Director of the NPS, the reviewing NPS office shall:
 - a. submit two (2) signed copies to the superintendent. The superintendent shall transmit one copy to the asserting state or local government and retain one copy in park files.
 - b. submit one (1) signed copy to the appropriate regional rights-of-way coordinator for regional office files.
 - c. publish legal public notice of NPS administrative recognition of the asserted RS 2477 right-of-way.
 - d. arrange for the recording of the administratively recognized RS 2477 right-of-way on the land status maps, including NPS land ownership maps, for each affected NPS unit.
 - e. notify the appropriate office of the Bureau of Land Management.

C. Additional Review

The NPS reserves authority to accept and review additional documentation pertinent to RS 2477 determinations and, if warranted, change administrative determinations. A party may submit additional information to the superintendent only if such information could be reasonably expected to substantively alter the record and previous findings.

D. APPEAL

Acknowledgement or non-acknowledgement of the existence of an RS 2477 right-of-way is an administrative, not an adjudicative action, and is not subject to appeal.

A party wishing to contest an RS 2477 determination may file suit in a court of competent jurisdiction.

ATTACHMENT A

STATEMENT OF ADMINISTRATIVE RECOGNITION

A "Statement of Administrative Recognition" by the NPS for RS 2477 rights-of-way across NPS lands shall include:

- A. identification of the asserting party, including all information required at Part II.A.1. above;
- B. identification of the asserted right-of-way, including all information required at Part II.A.2. above;
- C. findings pursuant to the criteria in Part III. above;
- D. a determination of the scope of the asserted RS 2477 right-of-way pursuant to Attachment B.
- E. terms and conditions for management of the asserted RS 2477 right-of-way pursuant to Attachment C.
- F. a signature page for the Director of the NPS, including the following disclaimers:

Administrative recognition of RS 2477 rights-of-way across National Park Service lands by the National Park Service does not grant any interest in land; such administrative recognition is an acknowledgment of the probable validity of a right-of-way established under RS 2477.

The National Park Service reserves management authority over administratively recognized RS 2477 rights-of-way across National Park Service lands pursuant to applicable federal, state, local, and common law.

ATTACHMENT B

DETERMINATION OF SCOPE

I. BACKGROUND

Property rights may include the right to possess, use, dispose, transfer, encumber, exclude, or any other right of ownership. The scope of a right-of-way is that collection of property rights that have been granted to allow one party to cross the lands of another party. The U.S. Court of Appeals, Tenth Circuit, stated in footnote 9 of Sierra Club v. Hodel (Burr Trail), that,

The "scope" of a right-of-way refers to the bundle of property rights possessed by the holder of the right-of-way. This bundle is defined by the physical boundaries of the right-of-way as well as the uses to which it has been put. 848 F.2d 1068 (10th Cir. 1988).

The scope of an RS 2477 right-of-way administratively recognized by the NPS is the set of property rights the NPS acknowledges were accepted by construction of a public highway across unreserved public lands before repeal of RS 2477. Only those property rights that could be lawfully accepted under applicable federal, state, local, and common law in effect at the latest time when the RS 2477 grant was available shall be administratively recognized by the NPS.

II. DETERMINATION

The reviewing NPS office shall determine the scope of asserted RS 2477 rights-of-way that will be recommended for administrative recognition by the NPS. Such determinations shall be included as part of any unsigned "Statement of Administrative Recognition" submitted as a recommendation for administrative recognition.

Determinations of scope shall address at least three elements from the bundle of property rights that constitute the scope of RS 2477 rights-of-way, including: width, use, and development.

A. Width

According to the Secretary of the Interior's policy statement on RS 2477, the width of an RS 2477 right-of-way administratively recognized by the NPS is to be determined in the following manner:

"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 provide 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 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, 1976, or an earlier removal of the land from the status of public lands not reserved for public uses."

Therefore, the reviewing NPS office shall determine the width of an asserted RS 2477 right-of-way that will be recommended for administrative recognition by one of the following methods, as appropriate:

5. if an asserted RS 2477 right-of-way that will be recommended for administrative recognition was either:
 - a. officially included in a state or local government public highway system at the latest time when the RS 2477 grant was available, or
 - b. unofficially included in a state or local government public highway system by virtue of substantial construction or maintenance expenditures on the asserted right-of-way by a state or local government with authority over and responsibility for public highways in the area of the asserted right-of-way at a time when the RS 2477 grant was available,

then the width of the RS 2477 right-of-way would be that width, if any, that attached to the right-of-way pursuant to the applicable state law, if any, in effect at the latest time when the RS 2477 grant was available.

NOTE: When applicable state law states that the width of an RS 2477 right-of-way is that width reasonable and necessary for the needs of the particular right-of-way, or terms to that effect, "reasonable and necessary" shall be defined by the circumstances and uses in effect, and width actually utilized for public highway purposes, including appropriate back slopes, drainage ditches, etc., at the latest time when the RS 2477 grant was available.

6. If an asserted RS 2477 right-of-way that will be recommended for administrative recognition was either:
 - a. officially or unofficially included in a state or local public highway system, but no applicable state law was in effect at the latest time when the RS 2477 grant was available, or
 - b. not included in a state or local public highway system at the latest time when the RS 2477 grant was available,

then the width of the RS 2477 right-of-way is that width actually utilized for public highway purposes, including appropriate back slopes, drainage ditches, etc., at the latest time when the RS 2477 grant was available.

B. Use

Authorized use of a right-of-way typically extends to construction, operation, maintenance, and termination of facilities in support of the purpose of the right-of-way. RS 2477 was a grant of right-of-way for public highway purposes. Acceptance of the grant required construction of a public highway. According to the Secretary of the Interior's policy statement on RS 2477,

"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...."

NOTE: BLM rules in effect prior to November 7, 1974, may have permitted such ancillary uses. Consult the Regional Solicitor. Proposals for new ancillary uses on recognized RS 2477 rights-of-way are handled under normal National Park Service procedures.

Therefore, the reviewing NPS office shall evaluate assertion documentation, other historical documentation identified during assertion review, and applicable federal, state, local, and common law to determine what uses properly attached to the right-of-way for public highway purposes at the latest time when the RS 2477 grant was available. Such determinations shall identify, as appropriate:

1. those uses facilitating public highway purposes that were supported by the asserted RS 2477 right-of-way as constructed at the latest time when the RS 2477 grant was available;
2. the intended, available, and actual modes of transportation supported by the asserted RS 2477 right-of-way as constructed at the latest time when the RS 2477 grant was available;
7. the seasonal patterns of public use supported by the asserted RS 2477 right-of-way as constructed at the latest time when the RS 2477 grant was available.

C. Development

The holder of a right-of-way may have a property right to modify, upgrade, or improve the facilities associated with the right-of-way. This right does not extend or apply outside or beyond the scope of the right-of-way.

Therefore, the reviewing NPS office shall determine the extent of any right to improve the asserted RS 477 right-of-way facilities based on:

1. the width of the RS 2477 right-of-way recommended for NPS administrative recognition as determined above;
2. the uses for public highway purposes that attached to the RS 2477 right-of-way recommended for NPS administrative recognition as determined above;
3. applicable federal, state, local, and common law.

Within the scope of administratively recognized RS 2477 rights-of-way, major modification, upgrading, or improvement of facilities shall require NPS compliance with the National Environmental Policy Act, the National Historic Preservation Act, and in Alaska, the Alaska National Interest Lands Conservation Act. Although the NPS may have no authority to deny such changes within the scope of RS 2477 rights-of-way, it does have a responsibility to prevent degradation of underlying and adjacent park lands. The U.S. Court of Appeals, Tenth Circuit, found in Sierra Club v. Hodel (Burr Trail) that the Bureau of Land Management had such responsibility with regards to Wilderness Study Areas (WSA) and stated that,

...when a proposed road improvement will impact a WSA the agency has the duty...to determine whether there are less degrading alternatives, and it has the responsibility to impose an alternative it deems less degrading upon the nonfederal actor. While this obligation is limited by BLM's inability to deny the improvement altogether, it is sufficient, we hold, to invoke NEPA requirements. 848 F.2d 1068 (10th Cir. 1988).

Outside the scope of administratively recognized RS 2477 rights-of-way, no expanded width, altered use, or improved facilities shall be permitted on NPS lands without appropriate additional authorization by the NPS and compliance with all applicable federal laws, including the National Environmental Policy Act, the National Historic Preservation Act, and in Alaska, the Alaska National Interest Lands Conservation Act. In general, excepting specific language in park units' establishing legislation, the NPS is not authorized to grant rights-of-way across park lands for public highway purposes.

ATTACHMENT C

TERMS AND CONDITIONS

I. AUTHORITY

The Organic Act of the National Park Service, 16 U.S.C. 1, and specific park enabling legislation require the NPS to manage lands to conserve scenic, natural, historic, and wildlife resources for enjoyment by future generations. Therefore, the NPS has the statutory authority and obligation to manage RS 2477 rights-of-way across NPS lands to prevent derogation of park values.

The Secretary of the Interior's RS 2477 policy (12/07/88) states in the section titled, "Responsibilities of Agency and Right-of-way Holder," that under RS 2477, the Department has management control over use of RS 2477 rights-of-way if unnecessary degradation of the servient estate can be demonstrated. The policy also states that the NPS may have even greater management authority over RS 2477 rights-of-way pursuant to other applicable law. Furthermore, the policy states that whereas RS 2477 did not authorize Departmental review and/or approval of reasonable activities within RS 2477 rights-of-way, such review and approval may be authorized by other applicable law. See Attachment E.

In U.S. v. Vogler, the U.S. Court of Appeals, Ninth Circuit, stated that both the Organic Act of the National Park Service, and the Mining in the Parks Act, 16 U.S.C. §1902, authorize the NPS to regulate use of RS 2477 rights-of-way to prevent derogation of park values. Regarding one alleged RS 2477 right-of-way, the Vogler court wrote that,

Even if we assume that the trail is an established right of way, we do not accept Vogler's argument that the government is totally without authority to regulate the manner of its use.

Congress has made it clear that the Secretary has broad power to regulate and manage national parks. The Secretary's power to regulate within a national park to "conserve the scenery and the nature and historic objects and wildlife therein...." applies with equal force to regulating an established right of way within the park. In Wilkenson v. Dept. of Interior, 634 F. Supp. 1265 (D. Colo. 1986), the district court of Colorado upheld the authority of the NPS to ban commercial access along an established RS 2477 right of way within the Colorado National Monument, and the court rejected an area resident's claim that the use of the road could not be regulated. The

court found the regulation to be well within the broad grant of power under 16 U.S.C. §1. Similarly, the regulations here are necessary to conserve the natural beauty of the Preserve; therefore, they lie within the government's power to regulate national parks. Moreover, the Mining in the Parks Act provides that "all activities resulting from the exercise of valid existing mineral rights on patented or unpatented mining claims within any area of the National Park System shall be subject to such regulations prescribed by the Secretary of the Interior as he deems necessary or desirable for the preservation and management of those areas." Thus, the government is not without authority to regulate the manner of Vogler's use of the Bielenberg trail. 859 F 2d 638 (9th Cir., 1988) [citations and footnotes omitted]

II. TERMS AND CONDITIONS

The reviewing NPS office shall draft terms and conditions on the construction, operation, maintenance, and termination of asserted RS 2477 rights-of-way that will be recommended for administrative recognition by the NPS. Such determinations shall be included as part of any unsigned "Statement of Administrative Recognition" submitted as a recommendation for administrative recognition. When appropriate, terms and conditions may also be incorporated in a Memorandum of Understanding between the NPS and state or local governments asserting RS 2477 rights-of-way.

Terms and conditions shall address all elements of asserted RS 2477 rights-of-way that will be recommended for administrative recognition necessary to prevent derogation of NPS values, and shall include, as appropriate:

- A. requirements to comply with applicable federal, state, local, and common law, and applicable regulations;
- B. requirements to limit use of the right-of-way to the purposes authorized pursuant to RS 2477, within the scope that will be administratively recognized by the NPS;
- C. requirements to ensure that to the maximum extent feasible, RS 2477 rights-of-way are used in a manner compatible with the purposes for which affected NPS lands were established, and approved NPS management plans;
- D. requirements to ensure that visitor use and enjoyment of park resources is protected in accordance with approved NPS management plans;

- E. requirements for restoration, revegetation, and curtailment of erosion on lands affected by RS 2477 rights-of-way;
- F. requirements to halt any activities with the potential to disturb or destroy archeological, paleontological, or historical resources upon discovery of such resources;
- G. requirements for notification of appropriate park superintendents in writing not less than ten (10) working days prior to the start of construction, operation, maintenance, or termination of RS 2477 rights-of-way across NPS lands;
- H. requirements to ensure that activities within RS 2477 rights-of-way will not violate applicable air and water quality standards and related facility siting standards established pursuant to law;
- I. requirements for holders of RS 2477 rights-of-way to do everything reasonably within their power to prevent and suppress fires on or near such rights-of-way;
- J. requirements to prevent damage to the environment, including damage to fish and wildlife habitats;
- K. requirements to prevent hazards to public health and safety;
- L. requirements to allow superintendents or other authorized NPS officials to enter and inspect RS 2477 rights-of-way without restriction;
- M. requirements to employ measures to avoid or minimize adverse environmental or social impacts; and
- N. in Alaska, requirements to protect the interests of those individuals living near RS 2477 rights-of-way who rely on the fish, wildlife, and biotic resources of the area for subsistence purposes.

Terms and conditions may, for example:

- set minimum or maximum road standards for borrow sources, staging areas, materials storage, road surfaces, design speed, drainage systems, culverts, bridges, pullouts, turnarounds, signage, fencing, etc.;
- limit or prohibit certain types of vehicles,
- require or limit maintenance activities,
- provide for seasonal, temporary, or emergency closures,

- require resource monitoring and impact mitigation,
- require plans for activities within the scope of the right-of-way subject to written NPS approval,
- require compliance with applicable federal, state, local, or common law including the National Environmental Policy Act, the National Historic Preservation Act, and in Alaska, the Alaska National Interest Lands Conservation Act.

ATTACHMENT D

SAMPLE DOCUMENTS

- I. Sample Public Notice and Press Release -- Beginning Review of an RS 2477 Assertion
- II. Insufficiency/Sufficiency of Documentation
- III. Determination to Withhold Administrative Recognition
- IV. Statement of Administrative Recognition
- V. Determination of Scope
- VI. Terms and Conditions
- VII. Final Public Notice -- Administrative Recognition of an RS 2477 Assertion

Public Notice (Sample)

Draft Press Release/Notice

Superintendent John O. Lancaster announced that Kane County has asserted a right-of-way for the Warm Creek Road within Glen Canyon National Recreation Area. Under an 1866 law called Revised Statute 2477, rights-of-way were granted for the purpose of establishing public highways. Although RS 2477 was repealed in 1976, controversies periodically arise regarding whether a public highway was established pursuant to the congressional grant under RS 2477.

In the management of Federal lands, it is necessary to determine the existence of public highway grants obtained under RS 2477. To determine this, the National Park Service (NPS) has developed an administrative process to evaluate the probable existence of these rights-of-way.

For an assertion to be acknowledged by the NPS, the road must have been constructed and maintained across public land for public use prior to the withdrawal of these lands from the public domain. For Kane County to have a right-of-way, the road must have been constructed prior to 1910.

The NPS has initiated a formal RS 2477 determination process for the Warm Creek Road inside Glen Canyon National Recreation Area. The road crosses the following lands:

T43S., R1E., SLM
Sec. 9, 10, 12-18

T43S., R4E., SLM
Sec. 5-7

T42S., R4E., SLM
Sec. 31, 32

Anyone having information on the construction of the Warm Creek Road is urged to provide that information to Glen Canyon National Recreation Area. This information must be provided within 30 days of this notice.

For information on the specific route being reviewed, or if you have information that would assist the NPS in making the required RS 2477 determination, please contact Victor Knox, Chief, Division of Professional Services, Glen Canyon National Recreation Area, P. O. Box 1507, Page, Arizona 86040.

NOTE: This is a sample only. Other forms of public notification should be used as necessary.

III

DETERMINATION TO WITHHOLD ADMINISTRATIVE RECOGNITION

The National Park Service has examined the assertion that _____ road was accepted by (asserter) pursuant to Section 8 of the Act of July 26, 1866, commonly known as Revised Statute (RS) 2477.

We have, for administrative purposes only, determined that the Congressional Grant offered in RS 2477 over formerly public lands now administered by the NPS did not attach since:

USE APPROPRIATE PARAGRAPH

-Construction did not occur prior to the withdrawal of the land for _____ park on _____.

-The road was not a public highway at the time the grant was available.

-The lands over which the road passes were reserved from _____ (date) pursuant to _____, and thus not available for an RS 2477 grant.

Sincerely,

Regional Director

cc:
Bureau of Land Management State Office
Regional Solicitor

ACKNOWLEDGEMENT OF RIGHT-OF-WAY

Asserting party: (See Part II A.1.)

Identification asserted right-of-way: (See Part II A.2.)

The National Park Service has examined the assertion that the above-identified road was accepted as a public road by (asserter) pursuant to Section 8 of the Act of July 26, 1866, commonly known as Revised Statute (RS) 2477.

We have, for administrative purposes only, determined that (asserter) has accepted the Congressional Grant offered in RS 2477, over formerly public lands now administered by the NPS, for the above-identified road.

This administrative determination recognizes your right to operate and maintain, within the scope of the right-of-way as set forth in Attachment No. 1 hereto, and to terminate the road.

Pursuant to the National Park Service Organic Act, Section 1 and/or the mining in the Parks Act, 16 U.S.C Section 1902, operation and maintenance of the road within the scope of the right-of-way is further subject to the terms and conditions set forth in Attachment No. 2 hereto:

Administrative recognition of RS 2477 rights-of-way across National Park Service lands by the National Park Service does not grant any interest in land; such administrative recognition is an acknowledgment of the probable validity of a right-of-way established under RS 2477.

The National Park Service reserves management authority over administratively recognized RS 2477 rights-of-way across National Park Service lands pursuant to applicable federal, state, local, and common law.

This acknowledgement will be noted on the National Park Service's official land records and a copy will be provided to the Bureau of Land Management.

Sincerely,

Director
National Park Service

cc:
Bureau of Land Management State Office
Regional Solicitor

DETERMINATION OF THE SCOPE OF THE RIGHT-OF-WAY

Property rights may include the right to possess, use, dispose, transfer, encumber, exclude, or any other right of ownership. The scope of a right-of-way is that collection of property rights that have been granted to allow one party to cross the lands of another party. The U.S. Court of Appeals, Tenth Circuit, stated in footnote 9 of Sierra Club v. Hodel (Burr Trail), that,

The "scope" of a right-of-way refers to the bundle of property rights possessed by the holder of the right-of-way. This bundle is defined by the physical boundaries of the right-of-way as well as the uses to which it has been put. 848 F.2d 1068 (10th Cir. 1988).

The scope of an RS 2477 right-of-way administratively recognized by the NPS is the set of property rights the NPS acknowledges were accepted by construction of a public highway across unreserved public lands before repeal of RS 2477. Only those property rights that could be lawfully accepted under applicable federal, state, local, and common law in effect at the latest time when the RS 2477 grant was available shall be administratively recognized by the NPS.

Determination of scope shall address at least three elements from the bundle of property rights that constitute the scope of RS 2477 rights-of-way, including: width, use, and development.

WIDTH: In accordance with Department of the Interior policy, we have determined that the width of the right-of-way is . (May explain how width was determined, i.e., as defined by state law, area actually in use, etc.)

USE: (Define usage taking into account allowable considerations for changing technology, i.e., may have been animal-drawn vehicles originally, but we now use cars and trucks. In those instances where it was and remains a sled or pack trail, so state.)

DEVELOPMENT: (Normal maintenance, including realignment and reconstruction to no higher standard, within the right-of-way width must be recognized.)

Within the scope of administratively recognized RS 2477 rights-of-way, major modification, upgrading, or improvement of facilities shall require NPS compliance with the National Environmental Policy Act, the National Historic Preservation Act, and in Alaska, the Alaska National Interest Lands Conservation Act.

Outside the scope of administratively recognized RS 2477 rights-of-way, no expanded width, altered use, or improved facilities shall be permitted on NPS lands without appropriate additional authorization by the NPS and compliance with all applicable federal laws, including the National Environmental Policy Act, the National Historic Preservation Act, and in Alaska, the Alaska National Interest Lands Conservation Act. In general, excepting specific language in park units establishing legislation, the NPS is not authorized to grant rights-of-way across park lands for public highway purposes.

TERMS AND CONDITIONS

The Organic Act of the National Park Service, 16 U.S.C. 1, and specific park enabling legislation require the NPS to manage lands to conserve scenic, natural, historic, and wildlife resources for enjoyment by future generations. Therefore, the NPS has the statutory authority and obligation to manage RS 2477 rights-of-way across NPS lands to prevent derogation of park values.

The National Park Service has therefore, determined that the following terms and conditions are necessary:

(Develop with reference to Attachment C and with assistance of the Regional Solicitor.)

ATTACHMENT E

DEPARTMENT OF THE INTERIOR'S POLICY



THE SECRETARY OF THE INTERIOR
WASHINGTON

Memorandum

To: Secretary

From: ~~Assistant~~ Assistant Secretary for Fish and Wildlife and Parks *John C. Sizer Rec'd*
Assistant Secretary for Land and Minerals Management *TT*

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 Hedel

Disapprove: _____

Date: DEC 07 1988

Date: _____

Attachments: 1-RS 2477 Policy
2-BLM Report

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 use, 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 use, 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 use:

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 use, 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 use, do not include public lands pre-empted or ceded by settlers under the public land laws or located under the mining laws which ceased to be public lands during the pendency of the entry, claim, or other.

Construction:

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

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 as 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:

3

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 policy 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.

2801 - RIGHTS-OF-WAY MANAGEMENT

2. Examples of Casual Use. Casual use may include the following activities and practices:

a. Recreation activities such as use of roads for hunting and sightseeing. This does not include driving in areas where vehicle use is prohibited.

b. Domestic uses or activities associated with managing ranches, farms, and rural residences includes trucking of products and use of support vehicles.

c. Ingress and egress on existing roads and trails.

d. Activities necessary to collect data for filing a right-of-way application such as vehicle use on existing roads, sampling, marking of routes or sites, including surveying or other activities that do not unduly disturb the surface or require the extensive removal of vegetation.

e. Minor activities or practices that have existed over a period of time without a grant and without causing appreciable disturbance to the public land resources or improvements.

B. Revised Statute 2477 (RS 2477). (See Departmental Policy Statement, RS 2477 in appendix 3.) The Act of July 26, 1866, RS 2477, repealed October 21, 1976, (formerly codified at 43 U.S.C. 932) provided: "The right of way for the construction of highways over public lands, not reserved for public use, is hereby granted." Acceptance of the grant occurred when a public highway was constructed on unreserved public lands. Holders of such rights-of-way shall be encouraged to have them acknowledged by having the BLM note the right-of-way on the records (MTP/ALMRS) in the same manner as other existing rights-of-way.

1. Criteria for Identification of RS 2477 Public Highway Rights-of-Way. Three conditions must have occurred before October 21, 1976 (date of repeal) for BLM to acknowledge the existence of an RS 2477 right-of-way; the lands involved must have been public lands, not reserved for public uses, (called unreserved public lands) at the time of acceptance; some form of construction of the highway must have occurred; and the highway so constructed must be considered a public highway.

2801 - RIGHTS-OF-WAY MANAGEMENT

a. Unreserved Public Lands.

(1) Public lands of the United States that were open to the operation of the various public land laws enacted by Congress are considered unreserved public lands. Lands that were reserved or dedicated by an Act of Congress, Executive Order, Secretarial Order, or, in some cases, classification actions authorized by statute, were not subject to RS 2477 during the existence of the reservation or dedication. Likewise, lands preempted by settlers under the public land laws or located under the mining laws were not subject to RS 2477 during the pendency of the entry, claim, or other. The general withdrawals by Executive Orders 6910 and 6964 are not considered to have removed public lands from unreserved status.

(2) Between 1866 and 1976 it is possible that a single parcel of land was subject to and not subject to RS 2477 numerous times through various land status changes. Thus, a highway initiated while land was reserved might subsequently qualify under RS 2477 if the conditions were later met when the land returned to the status of unreserved public lands. Appropriate status must be checked relative to any highway being considered for acknowledgement.

b. Construction.

(1) Construction must have occurred, or have been initiated (actual construction must have followed within a reasonable time), while the lands were unreserved public lands. 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. Road maintenance or the passage of vehicles by users over time may equal construction.

(2) Where construction was initiated by survey, planning, or pronouncement by public authority while the lands were unreserved public lands, actual construction could occur within a reasonable time even if the status of the land changed. Reasonable time must be determined in accordance with the specific conditions, i.e., one or two construction seasons for a minor county road, perhaps 3 to 5 years for a Federal-aid highway.

c. Public Highway. A public highway is a definite route or way that is freely open for all to use for the type of use intended. A toll road may be a public highway if the only limitation is the payment of the toll by all users. Roads or ways that have had access restricted to the public by locked gates or other means are not considered public highways. The inclusion of a highway in a State, county, or municipal road system constitutes it being a public highway. Absent evidence to the contrary, a statement by an appropriate public body that the highway was and is considered a public highway will be accepted.

NOTE: Appropriate local law must be considered in determining what constitutes a public highway; some jurisdictions allow or permit a public highway to exist with the general public; others may require a formal resolution by the State, county, or municipality adopting the road as a public highway.

2. Acknowledgment. Acknowledgment of the existence of an RS 2477 highway right-of-way is an administrative action and is not subject to appeal to the Interior Board of Land Appeals. Where conditions exist on public lands to support the acceptance of the Congressional grant, the Authorized Officer will issue a letter of acknowledgement and treat the highway as a valid use of the public lands. Where the evidence does not support acceptance, the Authorized Officer will inform the assenter, if any, that BLM does not recognize a highway. (Again, this is not a rejection and carries no right of appeal.)

3. Documenting RS 2477 Rights-of-Way. Minimal documentation, either submitted by the assenter/holder or developed by BLM, consists of (1) map(s), survey(s), aerial photography, or similar from which the location can be determined; (2) descriptive information to show that the highway was constructed on unreserved public lands; (3) information on public highway status; (4) the name and address of the assenter/holder, if known; and (5) where acknowledged by BLM, a copy of the acknowledgement letter to the holder or, where holder is unknown, a memorandum for the file.

a. For acknowledged RS 2477 right-of-way, a case file must be established, a serial number assigned, and the official records noted. For State, county, or municipal RS 2477 rights-of-way, a single case file and serial number may be established for the individual entity (State of Idaho, Bingham County, Idaho, etc.) regardless of the number of separate RS 2477 rights-of-way held by that entity.

b. Where the authorized officer refused to acknowledge an RS 2477 right-of-way, a case file need not be established. However, discretion is advised. On controversial cases or where the material upon which the decision was based may be unrecoverable, establish a case file, assign a serial number, and close the case 30 days after the letter refusing to acknowledge the right-of-way has been issued.

2801 - RIGHTS-OF-WAY MANAGEMENT

4. Management Issues. Reasonable activities within the RS 2477 right-of-way are within the jurisdiction of the holder. These include, but are not necessarily limited to, maintenance, reconstruction, upgrading, and the like. Under RS 2477 BLM has no authority to review and/or approve such reasonable activities. BLM's concern is whether such activities are confined within the boundaries of the right-of-way or whether such activities are so extreme that they will cause unnecessary degradation of the servient estate. Activities beyond the boundaries may require a right-of-way or other authorization. Where unnecessary degradation is anticipated, BLM's recourse is to negotiate or, as a last resort, seek injunctive relief.

a. Width.

(1) For those RS 2477 rights-of-way in the State, county, or municipal road system, i.e., the right-of-way is held and maintained by the appropriate government body, the width of the right-of-way is as specified for the type of highway under State law, if any, in force at the latest time the grant could be accepted. The width may be specified by a general State statute, i.e., secondary roads are 60 feet in width, or may be very specific, i.e., the statute authorizing State Highway 1 specifies the width to be 200 feet. Some statutes may establish a width that is "reasonably necessary" for the needs of the particular road - a floating width. In these cases "reasonably necessary" is determined under the conditions existing on the date of repeal (October 21, 1976), or such earlier date when RS 2477 was no longer applicable to the parcel of land.

(2) Where the right-of-way 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.

b. Ancillary Uses.

(1) Ancillary uses or facilities usual to public highways have historically involved electric transmission lines and communication lines located adjacent to but within the highway right-of-way. Prior to November 7, 1974, the holders of such facilities were not required to obtain permission from BLM, only from the holder of the highway right-of-way. Facilities constructed outside the highway right-of-way on or after November 7, 1974, require authorization from BLM.

(2) For ancillary facilities constructed prior to November 1974, place such information that is available, e.g., a copy of the highway holder's permission or similar documentation, in the RS 2477 case file. No further action is necessary.

(3) For ancillary facilities constructed subsequent to November 1974 with the highway holder's permission, BLM authorization is required, including payment for use during the period between construction and BLM authorization. It is Departmental policy that such facilities constructed between November 1974 and December 7, 1988, be accommodated by right-of-way or other authorization; removal or relocation will be considered only in rare and unusual circumstances and with prior approval of the Director (320).

(4) Ancillary facilities constructed outside the highway right-of-way, without the highway right-of-way holder's permission, or subsequent to December 7, 1988, are not authorized and appropriate action to resolve the unauthorized use situation should be undertaken.

c. Abandonment. Abandonment, including relinquishment by proper authority, occurs in accordance with State, local or common law or Judicial precedence. For highways held by local governments, most states have procedural statutes for abandonment proposal, hearing, and final order by the appropriate governmental entity. For those highways held by the "public in general," local statutes may or may not exist. Petitioning the appropriate governmental entity for abandonment of unnecessary RS 2477 highways is a tool available to BLM.

d. Conversion to Title V Highway Rights-of-Way. Due to the uncertain nature of RS 2477 highway rights-of-way, it may be mutually beneficial to BLM and the local highway entity to convert RS 2477 highway rights-of-way to Title V of FLPMA. This should be considered when the local highway entity seeks a Title V right-of-way to authorize partial realignment or similar action in conjunction with an RS 2477 right-of-way.

C. Access to Mining Claims. (Reserved)

D. Access to Salable Minerals. (Reserved)

E. Access to Leasable Minerals Other than Oil and Gas. (Reserved)

F. Fact Finders Act. Subsection 4F of the Act of December 5, 1924, (43 Stat. 704; 43 USC 417) authorizes the reservation of a right-of-way or easement to the United States over public land withdrawn for Bureau of Reclamation project purposes by the Bureau of Reclamation. Any needs for Bureau of Reclamation projects, not located on withdrawn public lands, shall be authorized with a FLPMA right-of-way grant. A Bureau of Land Management/Bureau of Reclamation Interagency Agreement dated March 25, 1983, establishes when this procedure will be used and the means by which reservations are made. The authorized officer shall note such reservations on the Master Title Plats. These reservations may be transferred or assigned to an irrigation district or to various water user groups by the Bureau of Reclamation.

2801 - RIGHTS-OF-WAY MANAGEMENT

G. Reservoirs, Canals, and Ditches under RS 2339 and RS 2340. The Act of July 26, 1866, as amended (formerly codified at 43 USC 661), granted rights-of-way on public land for reservoirs, canals, and ditches for the conveyance of water necessary for use in mining, agriculture, manufacturing, and other purposes. No right-of-way grant from BLM was necessary. The authority to use the public lands was contingent upon the holders obtaining a water right under the appropriate State laws. Holders of these grants shall be encouraged to have them acknowledged by having BLM note the rights-of-way on the records. The Act was repealed by FLPMA and all new reservoirs, canals, and ditches on public lands must be authorized by a FLPMA right-of-way grant.

1. Documenting Reservoirs, Canals, and Ditches Under RS 2339.

The suggested procedure for acknowledging such rights-of-way in BLM records is as follows:

a. The person or entity wishing to have existing ditches, canals, or reservoirs noted to the public land records under RS 2339 should file a written request with the appropriate District or Resource Area Office. The request should include information on dates of construction, rights to water, and other pertinent information. A copy of the document evidencing the vested water right should also be filed. A suitable map should be included. No fees, reimbursement costs, or rentals are collected.

b. Review the documents filed to determine that the facility was constructed prior to October 21, 1976, and that a vested and accrued water right existed at the time of construction.

c. The request should be serialized and the documents assembled in a case file when a determination is made that a valid right-of-way under the 1866 Act exists. Send a letter to the proponent acknowledging receipt of the documents and stating that the request has been forwarded to the State Office for notation of the records.

d. The records will be noted and the file stored in conformance with the procedures of the particular State.

2. Reconstruction, Realignment, and Maintenance. The holder of a reservoir, canal, or ditch under RS 2339 and RS 2340 has the right to maintain the facility. The statute does not define the length, width, or extent of these rights-of-way. Reasonable maintenance activities shall be allowed. Any substantial realignment, relocation, or reconstruction of a facility must be authorized with a FLPMA right-of-way grant. Any surface disturbance not within an area previously disturbed by the facilities including construction, operation, or maintenance activities is considered realignment or reconstruction.

2801 - RIGHTS-OF-WAY MANAGEMENT

.49 Ingress and Egress.

A. Required Access. Pursuant to Section 1323(b) of ANILCA (16 USC 3210), BLM is required to allow access to nonfederally owned land surrounded by public land managed under FLPMA as necessary to secure to the owner the reasonable use and enjoyment thereof. Ingress and egress need not necessarily require the highest degree of access, but rather, a degree of access commensurate with the reasonable use and enjoyment of the non-Federal land. The access necessary for the reasonable use and enjoyment of the non-Federal land cannot be denied, so long as the landowner complies with the authorized officer's rules and regulations.

B. NEPA Analysis. The alternatives analyzed in the NEPA document do not have to be limited to proposed routes located entirely on public lands. An analysis of alternative routes may identify a route with less negative environmental impact, that entails the use of nonpublic lands. The proponent of the right-of-way and the owner of the potentially affected nonpublic lands should be personally informed of the results of the NEPA analysis. There should not be the slightest implication that BLM will require the use of the nonpublic lands.

C. Decision. The best route for the right-of-way should be granted, using a notice to proceed to prevent construction on the public land until the access across the nonpublic land is assured. When these situations arise, a well documented case file is essential and shall be maintained by the authorized officer.



United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Utah State Office
324 South State, Suite 301
Salt Lake City, Utah 84111-2303



IN REPLY REFER TO

2800
(U-942)

June 19, 1991

Instruction Memorandum No. UT 91-235
Expires 9/30/92

To: District Managers
From: State Director
Subject: BLM Utah R.S. 2477 Policy

The following is Bureau of Land Management's (BLM) Utah policy implementing the Secretary of the Interior's December 7, 1988, Policy on Revised Statute (R.S.) 2477 and the BLMs 2801 Manual.

This memorandum supersedes and replaces Instruction Memorandum UT 90-261.

Beginning with the Henry Mountain Resource Management Plan (RMP) and each RMP subsequently prepared, Utah BLM will, for administrative purposes only, address the presence or absence of R.S. 2477 rights-of-way on public lands. During preparation of the Management Situation Analysis (MSA), the District will inventory existing roads and issue letters of acknowledgement for R.S. 2477 rights-of-way that are administratively determined to be present on public lands within the RMP boundaries or issue findings of nonacceptance of R.S. 2477 grants where the congressional grant is administratively determined not to have attached.

No RMP or Management Framework Plan (MFP) will be amended solely for the purpose of making R.S. 2477 administrative determinations. Amendments to land use plans may address R.S. 2477s at the discretion of the District Manager.

Where the MFP or RMP has not considered R.S. 2477 rights-of-way, the authorized officer shall, on a case-by-case basis, make administrative determinations as to the status of rights-of-way across public lands when the presence or absence of a R.S. 2477 right-of-way is a factor in land use decisions.

All information developed by BLM or submitted to BLM concerning rights-of-way being administratively reviewed will be retained in the appropriate serialized case file and shall be available for public inspection. If the authorized officer issues a letter of acknowledgement, he or she shall forward a copy of the letter of acknowledgement and a map showing the location of the R.S. 2477 right-of-way to the BLM Utah State Office Division of Operations requesting that the Master Title Plats be noted. If the authorized officer issues a finding of nonacceptance of R.S. 2477 Grant, he or she is not required to forward a copy of finding to the BLM Utah State Office Division of Operations nor shall the Master Title Plats be noted for findings of nonacceptance of R.S. 2477 grant.

The authorized officer shall use the guidance in BLM Manual 2801.48B in making R.S. 2477 administrative determinations. The BLM Utah State Office Division of Operations will abstract the Historical Index to determine if public lands were reserved or unreserved between July 26, 1866, and October 21, 1976.

The authority to make administrative determinations for R.S. 2477 rights-of-way may be delegated to Resource Area Managers.

Notice of Intent (NOI) published for upcoming RMPs should note that BLM will be inventorying all existing roads in the subject planning area, including R.S. 2477 rights-of-way. For roads that are asserted by counties outside the HSA cycle of RMPs, appropriate public notification of at least 30 days should be made. The public notification will take the form of a listing of pending administrative determinations that are posted in the jurisdictional office and forwarded to other BLM Utah District Offices as well as the State Office and Public Room. All notices of pending administrative determinations will be posted for public inspection from the date of receipt until the first of the month following the date of receipt. The list should be updated the first of every month. In instances where the authorized officer determines that an administrative determination must be issued in advance of the 30 days mentioned above, then a notice should be published in a newspaper of local circulation at least 1 week in advance of the administrative determination and notices sent to the BLM offices referenced above.

When a right-of-way is asserted for a road that crosses both BLM and National Park Service administered lands, the BLM shall coordinate with the National Park Service and issue a joint administrative determination or a finding of nonacceptance.

Where BLM administratively determines that a R.S. 2477 grant was accepted, BLM shall manage the public lands recognizing the valid right-of-way over the subject public lands. However, BLM may have additional management responsibilities for the underlying servient estate pursuant to Section 302(b) of FLPMA.

Where we find that the congressional grant did not attach for roads categorized by the State of Utah as Class B or Class C, BLM will offer to accept applications from the counties for FLPMA rights-of-way over the subject lands.

A determination by a State or Federal Court that all or a portion of the asserted right-of-way has been judicially determined to be a "road" is conclusive, and no additional administrative review is required. Such judicial determinations should be sent to the Utah State Office Division of Operations so that the records may be noted.

Attachment 1 to this memorandum is guidance relative to minimal requirements for the administrative record required for each administrative determination. The case file developed for each county must contain an individual factual determination sheet for each asserted ROW reviewed.

Attachment 2 to this memorandum is the format for letters of acknowledgement to the asserting county for class B and C roads.

Attachment 3 to this memorandum is the format for letters of acknowledgement to the asserting county for roads other than class B or C.

Attachment 4 to this memorandum is the format for findings of nonacceptance of R.S. 2477 grant.

Attachment 5 to this memorandum is the format for a combined letter of acknowledgement and finding of nonacceptance.

Questions on the policy may be directed to Ted D. Stephenson at FTS 581-4100 or commercial 801 539-4100.



5 Attachments

1. Administrative Record Check List (1p)
2. Example for Utah State, County, and Municipal Class B & C Roads (1p)
3. Example of Letter of Acknowledgement for Roads Other than Class B or C (1p)
4. Example of Finding of Nonacceptance of R.S. 2477 Grant (1p)
5. Example of Both Acknowledgement and Nonacceptance (1p)

Distribution

Director, 320, MIB Room 3643
SCD, SC-100

ADMINISTRATIVE RECORD CHECK LIST

R.S. 2477 Administrative Determination for road _____

At a minimum, each assertion of a R.S. 2477 right-of-way must be reviewed and the three determining characteristics of acceptance of the congressional grant documented.

Each administrative record for each asserted R.S. 2477 right-of-way must contain the following headings and supportive documentation:

CONSTRUCTION prior to October 21, 1976:

Documentation addressing construction should include the county assertion. It may also include maintenance or other county records. Review of maps or aerial photographs, for example, U.S.G.S. topographic maps, Utah Department of Transportation maps, review of BLM records that might show existence or construction of the asserted right-of-way, exchange of use maintenance agreements between the BLM and the county, grazing files which might reference access by a particular road, etc. Other examples of documentation suitable to establish evidence of construction include affidavits from persons attesting to personal knowledge of the road or local newspaper articles from the appropriate dates describing the asserted road. Not all of these examples must be included in every record but some explanation of how we determined that there was construction, i.e., that the road existed on October 21, 1976.

For sole source or physically deteriorated documents such as old maps or mylar overlays, it is acceptable to reference the location of those documents and make them available for public inspection at the custodial office rather than damaging the document attempting to reproduce it for each administrative record for each asserted right-of-way.

PUBLIC HIGHWAY:

Documentation must be developed showing that the asserted right-of-way was considered a public highway. The county's assertion may be sufficient. Additional material may include county records, BLM records, or personal affidavits.

UNRESERVED PUBLIC LANDS:

Include the Historical Index Review performed by the Utah State Office Division of Operations in each case file.

Attachment 1

EXAMPLE FOR UTAH STATE, COUNTY, AND MUNICIPAL CLASS B & C ROADS

Letter of Acknowledgement

The Bureau of Land Management (BLM) has examined the assertion that _____ road was accepted by _____ County pursuant to Revised Statute (R.S.) 2477.

We have, for administrative purposes only, determined that _____ County has accepted the Congressional Grant offered in R. S. 2477 over public lands administered by the BLM for the _____ County road.

This administrative determination recognizes the County's right to operate, maintain, to the extent that such county road was maintained on October 21, 1976, and terminate the County road. Any change in scope or alignment on public lands may require separate authorization from the BLM pursuant to Title V of the Federal Land Policy Management Act of October 21, 1976.

This acknowledgement will be noted on the BLM's official land records.

Sincerely,

Area Manager

Attachment 2

EXAMPLE OF LETTER OF ACKNOWLEDGEMENT FOR ROADS OTHER THAN CLASS B OR C

The Bureau of Land Management (BLM) has examined the assertion that _____ road was accepted by _____ County pursuant to Revised Statute (R.S.) 2477.

We have, for administrative purposes only, determined that the _____ County has accepted the Congressional Grant offered in R.S. 2477 over public lands administered by the BLM for the _____ County road.

This administrative determination recognizes the County's right to operate, maintain, to the extent that such county road was maintained on October 21, 1976, and terminate the County road. Any change in scope or alignment on public lands will require separate authorization from the BLM pursuant to Title V of the Federal Land Policy Management Act of October 21, 1976.

Pursuant to Section 302 (b) of FLPMA, you are required to inform us in advance of any new surface disturbing activity over public lands administered by BLM.

This acknowledgement will be noted on the BLM's official land records.

Sincerely,

Area Manager

Attachment 3

EXAMPLE OF FINDING OF NONACCEPTANCE OF R.S. 2477 GRANT

Finding of Nonacceptance of R.S. 2477 Grant

The Bureau of Land Management (BLM) has examined the assertion that _____ road was accepted by _____ County pursuant to Revised Statute (R.S.) 2477.

We have, for administrative purposes only, determined that the Congressional Grant offered in R.S. 2477 over public lands administered by the BLM for the _____ County road did not attach since:

USE APPROPRIATE PARAGRAPH

-Construction did not occur prior to (a) October 21, 1976, or (b) October 21, 1966.

-The road was not a public highway.

-The public lands over which the road crosses were reserved from _____ pursuant to _____.

If the county wishes to make application for a Federal Land Policy Management Act Right-Of-Way for this road, you may make such application to _____.

Sincerely,

Area Manager

Attachment 4

EXAMPLE OF BOTH ACKNOWLEDGEMENT AND NONACCEPTANCE

Letter of Acknowledgement and Finding of Nonacceptance

The Bureau of Land Management (BLM) has examined the assertion that _____ road was accepted by _____ County pursuant to Revised Statute (R.S.) 2477.

We have, for administrative purposes only, determined that the _____ County has accepted the Congressional Grant offered in R.S. 2477 over the following public lands administered by the BLM for the _____ County road.

This administrative determination recognizes the County's right to operate, maintain, to the extent that such county road was maintained on October 21, 1976, and terminate the County road on those public lands described above. Any change in scope or alignment on public lands may require separate authorization from the BLM pursuant to Title V of the Federal Land Policy Management Act of October 21, 1976.

This acknowledgement will be noted on the BLM's official land records.

We have, for administrative purposes only, determined that the Congressional Grant offered in R.S. 2477 over the following described public lands administered by the BLM for the _____ County road did not attach since:

USE APPROPRIATE PARAGRAPH:

-Construction did not occur prior to (a) October 21, 1976, or (b) October 21, 1966.

-The road was not a public highway.

-The public lands over which the road crosses were reserved from date to date pursuant to _____.

If the county wishes to make application for a Federal Land Policy Management Act Right-Of-Way for this road over the public lands determined not to have a R.S. 2477, you may make such application to _____.

Sincerely,

Area Manager

Attachment 5

UNITED STATES DEPARTMENT OF THE INTERIOR

Bureau of Land Management
Alaska State Office
222 W. 7th Avenue, #13
Anchorage, Alaska 99513

2800 (932)

February 18, 1992

Instruction Memorandum No. AK 92-075
Expires: 09/30/93

To: DMs
From: State Director, Alaska
Subject: Guidelines for Processing R.S. 2477 Assertions

Since the State of Alaska is becoming more active in the filing of assertions of rights under R.S. 2477, we need to assure that we are ready to respond promptly and that all offices are using standardized procedures for handling of filings. For the purpose of R.S. 2477, "highway" is defined as a definite route or way that is freely open for all to use for the type of use intended. Historically, the term "highway" has been used to include such things as dog sled trails, foot trails, wagon roads, etc. These types of rights-of-way are acceptable if they meet the criteria set out below. The following guidelines for processing R.S. 2477 assertions should be followed:

1. Assertion filings should include the following items. (If all of the necessary information is not included in the initial filing, request the additional information needed from the person/office filing the assertion.)
 - a. A map or aerial photograph of a scale 1:63,360 or better with the highway plotted on it. Maps of the scale 1:250,000 are not accurate enough to allow us to note our records.
 - b. Date of construction of highway, if known, (must have been prior to October 21, 1976). If date of construction is unknown, date(s) of known use should be given.

- c. Information as to who used the facility, when they used it, and how it is currently being used.
 - d. The actual constructed width of the Highway.
2. Review the BLM land records to see if the lands were unappropriated at the time of construction and if the lands are still under BLM jurisdiction. Lands not open to R.S. 2477 assertions include the following:
 - a. All lands in Alaska from December 13, 1968, (PLO 4582) through March 18, 1972 (90 days after ANCSA) and after March 28, 1974 (PLO 5418);
 - b. Lands which are segregated by reservations, Act of Congress, Executive Order, Secretarial Order, or, in some cases, classification actions authorized by statute, and;
 - c. Lands entered by settlers or located under the mining laws and lands included in allowed homestead entries which ceased to be public lands during the pendency of an entry or claim.
3. Review BLM land records, aerial photographs, and/or examine on the ground to determine when actual construction occurred. The term construction includes:
 - a. A process of clearing to make a route passable (i.e. removing vegetation or rocks, filling in low areas);
 - b. Road maintenance over several years, or expenditure of public funds;
 - c. The passage of vehicles by users over time.
4. Query the State Department of Natural Resources/ Department of Transportation and Public Facilities or other public body to determine if the highway was and still is a public highway. The determination that the route is a public highway includes the following elements:
 - a. It is freely open for all to use;
 - b. It is included as part of the State, Borough, or local road system;
 - c. Public funds have been expended for construction and/or maintenance.
5. Determine the extent of the right-of-way ancillary uses. Allowed uses include acreage for ditches, sloping, turnouts, and rest areas. (Unauthorized uses include

power or telephone lines after 1974.)

6. Establish a serialized case file and enter into AALMRS under Case Type 282201, if the R.S. 2477 is to be noted to the BLM records.
7. Prepare a letter to the person/office making the filing:
 - a. Records are noted; OR
 - b. Refuse to acknowledge the assertion (No Appeal Rights).
8. Compliance checks:
 - a. Is there any degradation of the surface estate?
 - b. Existence of a highway can be challenged at any time. Has the trail been litigated (matter for a court of competent jurisdiction, Federal or State)?
 - c. Rerouting of highway, widening beyond State designated width, and installation of ancillary facilities requires a separate right-of-way grant.



FOR Edward F. Spang
State Director, Alaska

APPENDIX III

R.S. 2477 SCOPING PROCESS

Exhibit

A R.S. 2477 Scoping Process and Issue Summary

Scoping Process and Issue Summary

Introduction

This appendix summarizes the comments received during the information-gathering or "scoping" phase of the Department of Interior's Congressionally-directed study of R.S. 2477 rights-of-way. The information received is appreciated and has greatly assisted in the preparation of this draft report.

Purpose

The purpose of scoping in for this report was to gather views, comments, and information regarding the history of R.S. 2477 and current and future management of these rights-of-way. The specific topics of study directed by Congress to the Interior Department included:

- the history of rights-of-way claims under section 2477 of the Revised Statutes
- the likely impacts of current and potential claims of such rights-of-way:
 - on the management of Federal lands,
 - on the access to Federal lands, private lands, State lands, Indian and Native lands,
 - on multiple use activities.
- the current status of claims
- alternatives to assessing the validity of claims for rights-of-way
- alternatives for obtaining rights-of-way

In order to respond to Congressional direction within the short time provided for this study, affected interests were asked to provide information relating to these areas as well as any other feedback they wished to express to the task force preparing the report. The deadline for submitting information to the task force was originally January 4, 1992. That date was subsequently moved back to January 14, 1993, in response numerous requests for a comment period extension.

The BLM Study Process

To address this important public land issue in a manner that responds to Congressional direction, the BLM assembled a study task force comprised of representative(s) from each BLM State organization, the BLM Headquarters Office, and affected Federal land management agencies. Non-BLM participating offices include the National Park Service Rocky Mountain Region in Denver, Colorado, Bureau of Indian Affairs Washington Office, United States Fish and Wildlife Service Washington Office, and the United States Forest Service Region 4 Office located in Ogden, Utah.

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, 1993 *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. Meetings dates and locations included:

- | | |
|-------------------------|--------------------------|
| ▪ Salt Lake City, Utah | November 14 and 15, 1992 |
| ▪ Fairbanks, Alaska | December 15, 1992 |
| ▪ Anchorage, Alaska | December 17, 1992 |
| ▪ Boise, Idaho | December 22, 1992 |
| ▪ Billings, Montana | January 5, 1993 |
| ▪ Riverside, California | January 5, 1993 |
| ▪ Reno, Nevada | January 7, 1993 |
| ▪ LeGrande, Oregon | January 12, 1993 |

Throughout this scoping process, numerous additional contacts were made, through the members of the study task force, with affected interests. To date, 2,345 individuals and organizations have responded to the task force indicating a desire to participate in the study process.

Scoping Information

Complete copies of all the information submitted to the task force has been reproduced and sent to each BLM State Office and a designated office from each of the other Federal agencies participating in this project. In addition to scoping letters and support documentation received, these files contain appropriate State statutes, citations to court cases, past administrative guidance, and other materials. These files are available for review at the offices listed below. For additional information, please contact the representative listed under each office location.

BLM Office Locations

Alaska

Alaska State Office
222 West 7th Avenue, #13
Anchorage AK 99513-759
Sue Wolf (907) 271-3293

Arizona

Arizona State Office
3707 North 7th Street
P.O. Box 16563
Phoenix AZ 85011-6563
Bob Archibald (602) 640-5509

California

California State Office
Federal Building
2800 Cottage Way, E-2841
Sacramento CA 95825-1889
Dave MacInlay (916) 978-4730

Colorado

Colorado State Office
2850 Youngfield Street
Lakewood CO 80215-7076
Herb Olsen (303) 239-3709

Eastern States

Eastern States Office
350 South Pickett Street
Alexandria VA 22304
Ed Ruda (703) 440-1685

Idaho

Idaho State Office
3380 Americana Terrace
Boise ID 83706
Bill Wiegand (208) 384-3127

Montana

Montana State Office
Granite Tower, 222 North 32nd Street
P.O. Box 36800
Billings MT 59107-6800
Jim Binando (406) 255-2935

Nevada

Nevada State Office
850 Harvard Way
P.O. Box 12000
Reno NV 89520-0006
Ken Stowers (702) 785-6478

New Mexico

New Mexico State Office
P.O. Box 27115
Santa Fe NM 87502-7115
Teodoro Rael (505) 438-7419

Oregon

Oregon State Office
1300 N.E. 44th Avenue
P.O. Box 2965
Portland OR 97208-2965
Bob Mollahan (503) 280-7158

Utah

Utah State Office
P.O. Box 45255
Salt Lake City UT 84145-0155
Ted Stephenson (901) 539-4100

Washington DC

Bureau of Land Management (1620 LS)
1849 C Street, NW
Washington DC 20240-9998
Ron Montagna (202) 653-9202

Wyoming

Wyoming State Office
2515 Warren Avenue
P.O. Box 1828
Cheyenne WY 82003
Mel Schlagel (307) 775-6115

Other Federal Agency Office Locations

Bureau of Indian Affairs, Tech Services
849 C Street , 4522 MIB
Washington DC 20240
Alice Harwood

U.S. Forest Service
324 25th Street
Ogden UT 84401
Sue Bybee

US. Forest Service
14th and Independence St. SW
P.O. Box 9690
Washington DC 20090
Gordon Small

U.S. Fish and Wildlife Service
1849 C Street NW, MS-670-ARLSQ
Washington DC 20240
Donald Voros

National Park Service, Rocky Mtn. Region
12795 West Alameda Parkway
Lakewood CO 08227
Dick Young, Land Resources

Scoping Comment Summary

As stated previously, this appendix summarizes comments received during the scoping effort. The purpose of this section is to consolidate comments into the issue(s) addressing each category of information requested from Congress. Comments have been consolidated into the headings listed below:

- History of R.S. 2477 Rights-of-way
- Current Status of Claims
- Impacts of Current and Potential Claims on Access To Federal lands, State lands Indian and Native lands, private lands.
- Impacts of Current and Potential Claims on the Management of Federal Lands
- Impacts of Current and Potential Claims on Multiple Use Activities
 - Mining and Other Commercial Uses
 - Motorized Recreation Opportunities
- Impact of Current and Potential Claims on State and Local Governments
- Impacts of Current and Potential Claims on Alaskan Native Lands
- Alternatives To Obtaining Rights-of-way
- Alternatives To The Current Validation Process

I. History of R.S. 2477 Rights-of-Way

Congressional intent was the key issue raised. What did Congress grant and to whom? And, if a grant was established, to what extent were rights conveyed? How and when should these rights be applied? What jurisdictional entity governs these rights?

Numerous interpretations of the Statute were offered to answer these and other questions. Most discussion, however, can be grouped into one of two general categories.

The Congressional grant and the correct application of the law is very broad. For example:

"R.S. 2477 was a blanket authority granting the right to local government to build access across the public domain for purposes of public conveyance and convenience. The right granted to local government was not limited to specific tracts or specific dimensions or specific modes of access. Access ways could be "built" where needed in a manner as needed and modified as needed under the blanket R.S. 2477 right. The right was total and without reservation."

R.S. 2477 should be interpreted in much narrower terms with specific limitations to the establishment and application of rights. For example:

". . . the historical purpose and intent was to allow miners and homesteaders access across federal lands in order to relieve a situation of mass trespass."

and (paraphrasing) the right is not prospective in establishment of a right-of-way or in the application of an existing R.S. 2477 highway

Similar positions were presented regarding many of the key elements of the Statute. Various definitions of the statutory elements of the law were given; including what constitutes a "highway," "construction," and "reserved public lands."

Other key issues raised, include questions regarding the governing law (State or Federal), the role of FLMPA and the Alaska National Interest Lands and Conservation Act (ANILCA), and positions regarding the "scope" of rights conveyed. For example:

FLMPA does not govern interpretation of R.S. 2477, nor can any later Congressional enactment do so:"

"The BLM is violating the intent of both statutes by granting R.S. 2477's pro forma and by limiting the Secretary's ability to retain and manage the public lands for multiple use and sustained yield . . ."

Key Issues

- There are several relevant interpretations regarding the intent and application of the Statute.

- The Department of Interior should clarify what its position has been on this issue historically.

2. Current Status of Claims

Some information pertaining to past R.S. 2477 determinations, such as serialized case numbers or other documentation found on the public land record, was received from participating agencies and, in some cases, the public. While it is intuitively known that many of the Interstate/State highways, county thoroughfares, and other roads in the West were granted under the authority of R.S. 2477, little documentation is apparent.

Likewise, very little "hard" or quantifiable information was received on potential R.S. 2477 roads likely to be claimed in the future. Most speculated only in very broad terms. The number being either very great, moderate, or very few. These relative values depend upon how the Statute is interpreted, applied, and most likely adjudicated in the courts, in the future.

The following comments exemplify the range of viewpoints expressed as to the existence of R.S. 2477 rights-of-way on the public and private lands.

"There are hundreds of major and perhaps thousands of minor R.S. 2477 rights-of-way in Alaska. They exist under law whether they have been "asserted" or not. They exist whether or they have been recognized by the Federal Government or the State of Alaska. They will continue to exist until they are "vacated" in accordance with State law."

"In Nevada alone there are undoubtedly thousands of vehicle tracks going back to 1866 which are still traceable in this arid and fragile land. To maintain that these are constructed roads is ridiculous."

Other comments under this category refer to the existing Departmental R.S. 2477 policy. Numerous comments, both pro and con, were received.

Key Issues

- Lack of inventory, confusion over the law and its application make it difficult to inventory, thus asses impacts of potential R.S. 2477 claims.
- 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.

3. Impacts of Current and Potential Claims On Access To Federal Lands, State Lands, Indian and Native lands, and private lands.

Many comments stressed that R.S. 2477 was essential because it maximized access options and that no actions should be taken to change this.

"Any road that was in place before that date (FLPMA) should be left alone and not closed

to the public."

Several 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 with underlying preexisting R.S. 2477 rights-of-way. This unique situation makes R.S. 2477 rights-of-way particularly important for access and travel in all types of land in Alaska.

"Because Alaska is a young and sparsely populated state and is only now experiencing the kinds of growth and development pressure most states experienced long ago, Alaska's access rights, of which R.S. 2477 is a key element, must be protected."

Other comments voiced that R.S. 2477 might expand vehicular access opportunities to lands currently closed to due to Federal wilderness legislation or regulatory actions such as off-road vehicle closures.

"Appropriate processes need to be developed to acknowledge R.S. 2477 roads, paths, and ways inside of wilderness areas and wilderness study areas."

Others noted that denial of an R.S. 2477 right-of-way does not eliminate access. Access would remain open under Federal jurisdiction.

"... It merely leaves the access under the management and jurisdiction of the BLM or other federal administrator. This is precisely what Congress intended in the passage of FLPMA."

Similar to the above point, many comments identified that existing regulations pertaining to several multiple-use activities contain access provisions (i.e., 3809 mining regulations) precluding the need for other authorizations such as a FLMPA or an R.S. 2477 rights-of-way.

Several key issues were raised concerning the present or potential effect of R.S. 2477 rights-of-way on access to, or through, private lands.

R.S. 2477 facilitates access to private lands. This is particularly important in the West where land-ownership patterns are often checkerboarded or large areas of public lands surround private inholdings.

Maintaining R.S. 2477 rights-of-way across private lands ensures future access of the public to public lands; and,

Federal, State, or private individuals should reestablish R.S. 2477 rights-of-way on roads currently blocked by private land owners in order to gain access to public lands.

Key Issues

- Assessment of potential impacts is difficult due to lack of information available.
- Alaska may present a unique situation.

- R.S. 2477 maximizes access options.
- R.S. 2477 may present an opportunity to gain access to areas currently closed, both public and private lands.
- Denial of R.S. 2477 does not eliminate access, it merely leaves access under jurisdiction of Federal land manager.

4. Impacts Of Current and Potential Claims On The Management of Federal Lands

Pending and other potential R.S. 2477 claims pose a serious risk to Alaska and other Western National Parks. They potentially threaten the values and purposes for which park lands have been established. They may also impair the National Park Service's ability to manage the parks under the Organic Act mandate.

Similar concerns were voiced regarding Federally designated wildlife refuges, preserves, conservation units, and other areas. For example:

"Congress certainly 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 in law."

Other comments focused on development and maintenance of a rural road system due to R.S. 2477 and the benefits that system provides to Federal land managers.

"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 local taxpayers and to the benefit of the non-taxpaying federal agency managing the land."

Other comments stated that the proliferation of R.S. 2477 rights-of-way across the public land threatens resources and impairs the Federal manager's ability to carry out management plans or legal obligations in accordance with environmental protection legislation.

"The fact is public lands can not be managed by the BLM, as Congress intends, when the lands are covered with a "spaghetti plate" of rights-of-way."

Wilderness was a special concern of many comments.

Confirmation of past R.S. 2477s and the large number of potential assertions, if deemed valid, would degrade or disqualify areas of public lands proposed for wilderness designation by members of the public.

Pending and potential R.S. 2477 assertions within wilderness and WSAs threaten to degrade or

disqualify areas currently designated or under consideration for wilderness status.

... Millard County in western Utah has given BLM notice that it intends to file suit against the agency to quiet title to an R.S. 2477 that is asserted within a Wilderness Study Area. The implications of this action must also be discussed."

Other comments stated that R.S. 2477 presents a good way of preventing areas that are not truly roadless from qualifying as wilderness.

"... road closures are done to further enhance or expand (artificially) wilderness boundaries. R.S. 2477 may be our only hope in keeping this from happening any further."

Key Issues

- Current and potential R.S. 2477 roads disrupt management of Federal lands and threaten resources and public purposes and values of public lands.
- Confirmation of pending or potential R.S. 2477 assertions would degrade or disqualify areas of public lands designated or proposed for designation as wilderness areas.

5. Impacts Of Current and Potential R.S. 2477 Claims On Multiple Use Activities--Mining and Other Commercial Uses

R.S. 2477 is essential to the mineral industry because it helps to maximize access options for exploration and development. For example:

"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 which is absolutely vital to this country's economy and national security."

R.S. 2477 rights-of-way have a minimal effect upon the mineral industry due to availability of access under casual use, "built-in" provisions for access under mining law, and the availability FLPMA, ANILCA, and other rights-of-way provisions which provide reasonable, alternative means of access.

Key Issues

- R.S. 2477 rights-of-way are essential to mining and other commercial purposes on public lands
 - Casual-use and alternative rights-of-ways are adequate and more appropriate considering contemporary management of public lands
6. Impacts Of Current and Potential Claims On Multiple Use Activities--Motorized Recreation Opportunities

R.S. 2477 rights-of-way are important because they maximize access options and help to maintain "traditional" access.

R.S. 2477 may enhance motorized recreation opportunities by offering the opportunity to regain vehicular access to areas currently closed. For example:

"...highways closed subsequent to the passage of FLPMA which meet R.S. 2477 should be open."

"Key Issue

- R.S. 2477 enhances motorized recreational access by maintaining access and providing the opportunity to reopen roads currently closed.

7. Impacts Of Current and Potential Claims On State and Local Governments

R.S. 2477 rights-of-way provide State and local governments greater flexibility in administering lands within their jurisdictions. It also gives them greater control over access and the uses of neighboring public and private lands deemed vital to the interests and stability of local economies and culture. To repeal or limit the R.S. 2477 statute would cause undue hardship on local government and rural communities.

Key Issues

- R.S. 2477 has provided State and local governments greater flexibility in administering lands within their jurisdictions and has provided access to neighboring public and private lands.

8. Impacts of Current and Potential Claims To Alaskan Native Lands

Several Alaska Native organizations identified problems regarding the possibility of further R.S. 2477 claims across their lands. Many comments characterized assertions as trespass, impacting Native land and resources, and in some situations partially threatening to traditional subsistence pursuits. For example:

"R.S. 2477 right-of-ways within Native conveyed lands have the serious potential to undermine one of the Alaska Native Claims Settlement Act-to allow the Native people of Alaska to maintain their own land and resources."

Key Issues

- R.S. 2477 right-of-way regarded as trespass, impact Native land and resources and may undermine self-determination of Native Alaskans.

9. Alternatives Methods of Obtaining Rights-of-way

Right-of-way provisions contained within Title V of FLPMA and Title XI of ANCLIC are adequate for future needs and more properly allow for the selection and determination of travel corridors within the framework of contemporary laws including NEPA.

Others express that Title V and especially Title XI are inadequate, and that neither meets the needs nor gives the flexibility and latitude to local governments that R.S. 2477 provides.

Some comments expressed problems associated with cost, time delays, and diminishment of rights when commenting on the conversion of R.S. 2477 rights-of-way to either FLPMA or ANCLIC rights-of-way.

Right-of-way provisions in FLPMA and ANCLIC do not govern preexisting rights of R.S. 2477

Key Issues

- Right-of-way provisions contained in FLPMA and ANCLIC are adequate for future needs and within the framework of contemporary law.
- FLPMA and ANCLIC are inadequate and do not provide the flexibility that R.S. 2477 provides.
- Neither FLPMA or ANCLIC govern the preexisting rights of R.S.2477.

10. Alternatives To the Current Validation Process

Several different alternatives to the validation process currently in use were identified:

Adopt the process outlined in House of Representative Bill 1096 introduced during the 102 session of Congress.

DOI should establish separate regulations dealing with R.S. 2477 that should preclude BLM from acting in an adjudicatory capacity and include; no review by IBLA, provide for direct recourse to Federal Courts, no automatic stay, no standing for third parties.

DOI should engage in rulemaking to establish a confirmation process 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 Department for confirmation. Public notice would be given of all asserted claims and the public would have an opportunity to comment and appeal any confirmation of the grant.

The current DOI policy and supplemental procedures used by Utah BLM should be adopted with certain operational refinements to add precision, clarity, and efficiency to the process.

The DOI should combine procedures currently in use by the State of Alaska and the BLM into a single process to yield a uniform program benefitting DOI, the State of Alaska, private land owners, and the public.

No policy is needed.

Key Issues

- New policy significantly different from current policy is needed.
- The existing policy is adequate with operational changes to improve efficiency.
- A consistent, uniform confirmation process by combining features currently in use by the State of Alaska and BLM would produce a good program benefitting all.

APPENDIX IV

EMERY COUNTY CONSENT DECREE

Exhibit

A Consent Decree, U.S. v. Emery County, Utah, Civil
No. 92-c-106s (D. Utah, filed December 15, 1992)

RECEIVED CLFRK

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FILED IN UNITED STATES DISTRICT COURT OF UTAH

RECEIVED
UNITED STATES
U.S. DISTRICT COURT
DISTRICT OF UTAH

DEC 15 1992

MARKUS S. ZWISLER, CLERK
BY
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA,
Plaintiff,

vs.

EMERY COUNTY, a political
subdivision of the State of
Utah,

Defendant.

Civil No. _____
92-C-1069S
CONSENT DECREE

The Parties, Emery County (the County), a subdivision of the State of Utah, and the Bureau of Land Management (BLM), an agency of the U.S. Department of the Interior, hereby agree as follows:

1. Emery County does not admit any facts alleged in the Complaint which are not specifically stated in this Consent Decree and as such, Emery County's agreement to this Consent Decree should not be deemed an admission of any allegation contained in the Complaint.

2. Highways exist in Emery County which have in the past been, or may in the future be, administratively recognized by the BLM as R.S. 2477 highways across public lands, including the Buckhorn Wash Road which the BLM administratively recognized as an R.S. 2477 highway on May 1, 1991.

3. The law in Utah, as established by the U.S. Tenth Circuit Court of Appeals in Sierra Club v. Hodel, 848 F.2d 1068, 1083 (10th Cir. 1988); Sierra Club v. Lujan, 949 F.2d 362, 369 (10th Cir. 1992), is that the extent of an R.S. 2477 highway over public lands in Utah is not necessarily restricted to the width and extent of the disturbance on the date of its acceptance as a public highway, or the repeal of R.S. 2477 on October 21, 1976; but is what is reasonable and necessary for the type of use to which the road has been put and should not be restricted to the actual beaten path, but should be wide enough to allow travelers to pass each other. Hodel at 1083. The determination of what is reasonable and necessary shall be made by the BLM.

4. Congress has provided in Section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b), that, "In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent any unnecessary or undue degradation of the lands." The BLM acts on behalf of the Secretary of the Interior to perform this responsibility.

5. Insofar as the County is performing routine maintenance within the previously disturbed area and on existing associated

structures on a road which has been administratively recognized by the BLM as an R.S. 2477 highway, the county is not required to notify the BLM of the work.

6. If, however, the County proposes any work outside the previously disturbed area and existing associated structures or initiates any improvements (improvements include, but are not limited to, widening the existing road and do not specifically include adding gravel surface), the County will notify the BLM Authorized Officer in writing at least sixty (60) working days before the County begins any work so that both the County and the BLM may be satisfied that the proposed work on the R.S. 2477 highway is reasonable and necessary and that no unnecessary or undue degradation to the public lands would occur thereby. The County will also share its plans with the BLM Authorized Officer and arrange to visit jointly the proposed work areas to assure that both the County and Federal rights are protected and responsibilities are met prior to the start of any work. The County may not proceed with work until the BLM Authorized Officer determines in writing that there will be no unnecessary or undue degradation to the public lands as a result of the proposed work. Such written determination will not be unreasonably withheld, and the BLM shall respond to the County within thirty (30) days of receiving notification. After approval and at least five (5) working days before beginning work, the County will notify the BLM in writing of the date and time work will begin.

7. If a dispute arises between the parties concerning their rights and duties on a recognized R.S. 2477 highway, the dispute shall be resolved by prior consultation and, to the extent possible, negotiations with the other party. If, after consultation or negotiations, the parties are not in agreement concerning the rights and duties of either party, the unresolved issues must be submitted to a court of competent jurisdiction.

8. If the County proposes to realign an R.S. 2477 road, to comply with applicable safety standards or for any other reason, through a non-adjointing deviation from the existing disturbed area of the R.S. 2477 right-of-way, or if the BLM mandates a less degrading alternative which is a reasonable substitute for the County's proposal, the County will apply to the BLM for a permit to do so. However, the granting of such permit shall not unreasonably be denied by the BLM nor be burdened by unreasonable conditions. The County shall not be required to accept the right-of-way permit issued by the BLM in place of its R.S. 2477 grant and such acceptance by the County shall not constitute an abandonment or waiver of its R.S. 2477 right-of-way.

9. At least five (5) working days before any on-the-ground work pursuant to a BLM permit as described in paragraph 8 is begun on an R.S. 2477 road, the County will notify the BLM Authorized Officer in writing so that representatives of the BLM can (i) participate in a pre-construction conference, and (ii) schedule appropriate BLM monitoring of the work, so that the BLM can prevent any deviations by the County or its contractor from

the plans which have been reviewed and approved by the BLM Authorized Officer, and prevent potential violations of any applicable laws, which the BLM is required to enforce in order to protect the public lands and their resources.

10. The procedures outlined above for construction projects on R.S. 2477 roads in Emery County, as administratively determined by the BLM, shall be amended consistent with any and all policies and procedures which may be promulgated by a special task force comprised to include representatives of the BLM, the Utah Association of Counties, and the State of Utah, and subsequently adopted by the BLM.

11. This consent decree fully resolves the issues raised in plaintiff's prayer for relief, as set forth in the complaint filed herewith.

Doris K. Thomson
County Commissioner for Emery County

11 Dec 1992
Date

Richard D. Anderson
Utah State Director
relief U.S. Bureau of Land Management

11 Dec 1992
Date

Approved this 14th day of December, 1992.

David L. ...
UNITED STATES DISTRICT COURT JUDGE

United States District Court
for the
District of Utah
December 15, 1992

mr

* * MAILING CERTIFICATE OF CLERK * *

Re: 2:92-cv-01069

True and correct copies of the attached were mailed by the clerk to the following:

Daniel D Price, Esq.
U.S. ATTORNEY'S OFFICE
350 South Main #476
Salt Lake City, UT 84101

Joseph W. Anderson, Esq.
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APPENDIX V

STATE STATUTE AND CASE LAW SUMMARIES

Appendix V contains summaries of State statutes and case law relevant to public highways and R.S. 2477 rights-of-ways. The purpose of the summaries is to illustrate the differences between States. The summaries are not intended to be all inclusive and do not attempt to give a complete statutory history

A	Alaska
B	Arizona
C	California
D	Colorado
E	Idaho
F	Kansas
G	Montana
H	Nebraska
I	Nevada
J	New Mexico
K	North Dakota
L	Oklahoma
M	Oregon
N	South Dakota
O	Utah
P	Washington
Q	Wyoming

ALASKA

STATUTES

ALASKA STAT. § 19.10.010 (1988 & Supp. 1992) (section lines dedicated for use as public highways, enacted 1953)

ALASKA STAT. § 19.10.015 (1988) (establishment of highway widths, enacted 1963, amended 1980)

ALASKA STAT. § 19.45.001(9) (1988 & Supp. 1992) (definition of highway, enacted 1961)

Note: The Alaska territorial legislature accepted the federal grant of public lands for highway purposes in 1923. (19 SLA 1923, reenacted as 1721 CLA 1933, repealed by 1 SLA 1949). 19 SLA 1923 had similar provisions to ALASKA STAT. § 19.10.010. Brice v. State, Div. of Forest, Land & Water, 669 P.2d 1311 (Alaska 1983)

CASES

Hammerly v. Denton, 359 P.2d 121 (Alaska 1961)

Mercer v. Yutan Construction Co., 420 P.2d 323 (Alaska 1966)

Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Alaska 1975) (citing ALASKA STAT. § 19.10.010)

Fisher v. Golden Valley Elec. Ass'n, Inc., 658 P.2d 127 (Alaska 1983) (citing ALASKA STAT. § 19.10.010)

State v. Alaska Land Title Ass'n, 667 P.2d 714 (Alaska 1983)

Brice v. State, Div. of Forest, Land & Water, 669 P.2d 1311 (Alaska 1983)

Dillingham Comm. Co., Inc. v. City of Dillingham, 705 P.2d 410 (Alaska 1985)

Summary: To complete the grant offered in 43 U.S.C. § 932, there must be either some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept a grant, or there must be public user for such a period of time and under such conditions as to prove that the grant has been accepted. Dillingham at 413 citing Hammerly. ALASKA STAT. § 19.10.010 was held to constitute an acceptance of the grant. Girves at 1226. The statutory period of use is ten years. Dillingham at 415.

LAW REVIEW ARTICLES

Leroy K. Latta, Jr., Public Access Over Alaska Public Lands As Granted by Section 8 of the Lode Mining Act of 1866, 28 Santa Clara L. Rev. 811 (1988).

ARIZONA

STATUTES

ARIZ. REV. STAT. ANN. § 18-201 (1990) (Title 18 - Highways and Bridges, Ch. 2 - County Highways; establishing, altering or abandoning local highways, original source was Par. 3972 CIVIL CODE 1901 (effect. 1871), which has remained effective and substantially the same to the present. Par. 3972 eventually became ARIZ. REV. STAT. §§ 18-201 through 18-205 (1956) (§§ 18-204, 18-205 were repealed 1961))

ARIZ. REV. STAT. ANN. § 28-1862 (1989 & Supp. 1992) (Title 28, Ch. 13, Art. 4 - State Highways and Routes; width of highways; errors in establishing (enacted 1973); formerly Title 18 - Highways and Bridges, Chap. 1 - State Highways, ARIZ. REV. STAT. § 18-152 (enacted 1927, repealed 1973))

CASES

Territory v. Richardson, 76 P. 456 (Ariz. 1904) (public highways are such only as come within the express provisions of the statutes declaring them to be such, citing Par. 3956, 3972, 3990 REVISED STATUTES 1901)

Tucson Consol. Copper Co. v. Reese, 100 P. 777 (Ariz. 1909) (the establishment of public highways is governed entirely by statute, roads established otherwise are not public highways, RS2477 is not to be construed as contrary to the laws of the state or territory, Arizona has no territorial statutes which recognize that a public highway may be established by adverse user or prescription, citing Par. 3956, 3972 CIVIL CODE 1901 (in effect since 1871))

Duffield v. Ashurst, 100 P. 820 (Ariz. 1909) (the status of the Bright Angel trail as a public highway, constructed, as it was, under the grant of RS2477, prior to the establishment of the Grand canyon forest reserve, is permanently fixed. The establishment of the reserve did not operate to change that status)

State v. Crawford, 441 P.2d 586 (Ariz. Ct. App. 1968) (in order for there to be a public highway, the right-of-way for which is granted by RS2477, the highway must be established in strict compliance with the provisions of Arizona law, citing ARIZ. REV. STAT. § 18-154(a) (enacted 1927, repealed 1973))

County of Cochise v. Pioneer Nat'l Title Ins. Co., 565 P.2d 887 (Ariz. Ct. App. 1977) (in order for there to be a public highway, the right-of-way for which is granted by RS2477, the highway must be established in strict compliance with the provisions of Arizona law, citing Par. 3972 CIVIL CODE 1901; ARIZ. REV. STAT. §§ 18-152, 18-152(A) (enacted 1927, repealed 1973))

CALIFORNIA

STATUTES

CAL. STREETS AND HIGHWAYS CODE § 25 (West 1990) (definition of "county highway", enacted 1935, derived from Political Code § 2618 (1883-1935))

CAL. STREETS AND HIGHWAYS CODE § 978 (West 1990) (federal grant of property to county for highway purposes)

CASES

McRose v Bottver, 22 P. 393 (Cal. 1889)

Bequette v. Patterson, 37 P.917 (Cal. 1894)

Schwerdtle v. Placer County, 41 P.448 (Cal. 1895) (citing St. 1870, p. 457)

Sutton v. Nicolaisen, 44 P. 805 (Cal. 1896) (citing Pol. Code § 2619, enacted 1873, amended by Act of March 30, 1874, repealed 1883)

Town of Red Bluff v. Walbridge, 116 P. 77 (Cal. Ct. App. 1911)

People v. Quong Sing, 127 P. 1052 (Cal. Ct. App. 1912) (citing Pol. Code § 2619)

Central Pacific Ry. Co. v. Alameda County, 299 P. 77 (Cal. 1931)

Ball v. Stephens, 158 P.2d 207 (Cal. Ct. App. 1945) (citing Pol.Code § 2618 as reenacted in 1883 and in force until 1935)

Summary: Acceptance of the offer of the government could be manifested and dedication could be effected by selection of a route and its establishment as a highway by public authority. Dedication could also be effected without action by the state or county, by the laying out of a road and its use by the public sufficient in law to constitute an acceptance by the public of an offer of dedication. In order that a road should become a public highway, it must be established in accordance with the law of the state in which it is located. Ball at 209.

COLORADO

STATUTES

COLO. REV. STAT. § 43-1-202 (1984) (public highways or roads, formerly § 120-3-2 (1953), adopted in 1921)

COLO. REV. STAT. § 43-2-201 (1984) (public highways declared, formerly § 120-1-1 (1953), adopted in 1921, source L. 1883, p.251, § 1)

CASES

Estes Park Toll-Road Co. v. Edwards, 32 P. 549 (Colo. Ct. App. 1893)

Sprague v. Stead, 139 P. 544 (Colo. 1914) (grant accepted by public use of road.)

Korf v. Itten, 169 P. 148 (Colo. 1917) (citing § 5834, Revised Statutes 1908, which provided that the board of county commissioners may declare any section or township line on the public domain a public highway, held to be authorized by RS2477)

Greiner v. Board of Comm'rs of Park County, 173 P.719 (Colo. 1918) (school sections, grant accepted by public user)

Nicholas v. Grassle, 267 P. 196 (Colo. 1928) (use of way by those for whom it was necessary was an "acceptance, a road may be a highway though it reaches but one user, construction not required)

Rozman v. Allen, 68 P.2d 440 (Colo. 1937) (stock driveway)

Leach v. Manhart, 77 P.2d 652 (Colo. 1938) (acceptance by user, construction or action by public authorities not required, citing '35 C.S.A. c. 143, § 44, C.L. 1921, § 1290, which provided that the board of county commissioners could declare a section line to be a public highway)

Uhl v. McEndaffer, 225 P.2d 839 (Colo. 1950) (refers to an 1889 resolution passed by the board of county commissioners declaring all section and township lines on the public domain in the county to be public highways, acceptance by use)

Martino v. Board of County Comm'rs of County of Pueblo, 360 P.2d 804 (Colo. 1961) (citing C.R.S. §§ 120-1-1, 120-3-2 (1953), also C.R.S. §§ 120-3-18, 120-1-4, 120-1-5 (1953) now 43-1-218, 43-2-204 and 43-2-205 (1984 & Supp. 1992) respectively)

COLORADO

CASES cont.

Board of County Commissioners of County of Ouray v. Masden, 385 P. 2d 601 (Colo. 1963) (citing C.R.S. § 120-1-1 (1953) to define public highway)

Brown v. Jolley, 387 P.2d 278 (Colo. 1963) (citing C.R.S. §§ 120-1-1, 120-3-2 (1953), road is highway as defined by statute)

IDAHO

STATUTES

IDAHO CODE § 40-109(5) (1985 & Supp. 1992) (definition of "highways", formerly 40-107(1947))

IDAHO CODE § 40-117(4) (1985) (definition of "public highways", formerly 40-2604(e) (1977))

IDAHO CODE § 40-202 (1985 & Supp. 1992) (recorded and worked highways, formerly 40-103 (1947), the exact language of this section is incorporated into 40-109(5))

IDAHO CODE § 40-604 (1985 & Supp. 1992) (duties and powers of commissioners with respect to highways, formerly 40-133 and 40-501(1947))

NOTE: Former Title 40 of the Idaho Code was repealed in its entirety in 1985. A new Title 40 was substituted. Various statutes with language similar to IDAHO CODE § 40-109(5) have been in effect since approximately 1887. IDAHO CODE § 40-109(5) appears to be a compilation of these prior statutes. See Rich at 1089.

CASES

Gooding Highway Dist. of Gooding County v. Idaho Irr. Co., 164 P. 99 (Idaho 1917) (concerns "Carey Act" land, cites §§ 916, 934 Rev. Codes (????) prescribing how and who could establish public highways)

Oregon Short Line R. Co. v. Pfost, 27 P.2d 877 (Idaho 1933) (the term "highway" does not include railroads; citing § 850, Rev. St. 1887 (§ 874, Rev. Codes), as defining the word "highway."; citing § 39-101 Idaho Code Ann. (1932))

Kirk v. Schultz, 119 P.2d 266 (Idaho 1941) (there must be either user by the public under the laws of the State or some positive act by the proper public authorities to accept grant; citing 1881 Session Laws, sec. 1, page 277; § 851, Rev. St. 1887 stating what constituted a highway)

Rich v. Burdick, 362 P.2d 1088 (Idaho 1961) (citing IDAHO CODE §§ 40-101 (§ 850, Rev. St. 1887; § 874, Rev. Codes; Idaho Code Ann. § 39-101 (repealed 1950)); IDAHO CODE § 40-103 (§ 851 Rev. St.; Idaho Code Ann § 39-103); IDAHO CODE § 40-402 (enacted 1939, repealed 1951, reenacted 1951 essentially the same as IDAHO CODE § 40-107))

Roper v. Elkhorn at Sun Valley, 605 P.2d 968 (Idaho 1980)

French v. Sorensen, 751 P.2d 98 (Idaho 1988) (citing IDAHO CODE § 40-202)

KANSAS

STATUTES

KAN. STAT. ANN. §§ 68-101 to 68-106 (1985) (general provisions, roads; en. 1911, history uncertain, has source in 1864 Kan. Sess. Laws, ch. 112, §§ 1-5)

CASES

Tholl v. Koles, 70 P. 881 (Kan. 1902) (citing Laws 1867, c. 67, declared all section lines in Washington county to be highways, subsequently amended to include other counties, held to constitute an acceptance of the congressional grant)

Walbridge v. Board of County Comm'rs of Russell County, 86 P. 473 (Kan. 1906) (held that the act of the Legislature of Kansas in 1873 (Laws 1873, p. 230, c. 122), which declared all section lines in Russell County to be public roads, was an acceptance of the RS 2477 grant, also citing § 6058, Gen. St. 1901, concerning the "opening" of roads)

Molyneux v. Grimes, 98 P.278 (Kan. 1908) (citing §§ 6018, 6020, 6021, Gen. St. 1901, concerning the requirements of the road law and the procedures to establish a public road)

Hughes v. Veal, 114 P. 1082 (Kan. 1911) (the congressional grant for public highways may be accepted by the acts of the public authorities, or by the public itself, or by the concurrent action of both)

Lockard v. Hartley, 145 P. 900 (Kan. 1915)

MONTANA

STATUTES

MONT. CODE ANN. § 60-1-103 (1991) (General definitions, enacted 1965, R.C.M. 1947, § 32-2203(part))

MONT. CODE ANN. § 60-1-201 (1991) (Classification - highways and roads, enacted 1965, R.C.M. 1947, § 32-2301.)

MONT. CODE ANN. § 60-4-101, 60-4-102 (1991) (Rights acquired by public in highway; general power of department of transportation to acquire interests in property, enacted 1965, R.C.M. 1947, §§ 32-3901, 32-3902)

NOTE: History uncertain before 1947. Need to establish link between present statutes and those cited in the case law.

CASES

City of Butte v. Mikosowitz, 102 P. 593 (Mont. 1909) (in using the term "highway, the Congress must have intended such a highway as is recognized by the local laws, customs and usages, citing § 1339, Rev. Codes, (1907?) providing that state public highways are generally 60 feet wide)

State ex rel. Danise v. Nolan, 191 P. 150 (Mont. 1920) (The grant is but an offer of the right of way for the construction of a public highway and can only become fixed when a highway is definitely established and constructed in some one of the ways authorized by the laws of the state; citing §§ 1337, 1340, Rev. Codes 1907 (enacted 1903, repealed 1913) as reenactments of §§ 2600, 2603, Pol. Code 1895; § 1337 (reenacted as § 3, Ch. 1, General Highway Law, 1913-15) describes what constitutes a public highway, § 1340 (omitted from the General Highway Law of 1913-15) concerns establishment of a road by use)

Moulton v. Irish 218 P. 1053 (Mont. 1923) (federal grant of right of way for highway purposes over public domain does not become operative until accepted by construction of highway according to the provisions of the law the state; citing § 1612, Rev. Codes 1921, originally enacted as § 2600, Pol. Code 1895; citing § 1340, Rev. Codes 1907, originally enacted as § 2603, Pol. Code 1895)

Warren v. Chouteau County, 265 P. 676 (Mont. 1928) (citing Moulton, i.e., federal grant of right of way for highway purposes over public domain does not become operative until accepted by construction of highway according to the provisions of the law the state; citing § 2603, Pol. Code 1895, later § 1340, Rev. Codes 1907, repealed by the General Highway Law, Chap. 72, L. 1913; citing § 2600, Pol. Code 1895, later § 1337, Rev. Codes 1907, repealed by Chap. 72, L. 1913, reenacted as § 3 of the

MONTANA

CASES cont.

General Highway Law of 1913, later § 1612, Rev. Codes 1921; citing §§ 2750, 2759, Pol. Code 1895, providing for establishment of a highway through petition and a formal order declaring a public highway by board of county commissioners)

Parker v. Elder, 758 P.2d 292 (Mont. 1988) (citing Nolan, i.e., the grant is but an offer of the right of way for the construction of a public highway and can only become fixed when a highway is definitely established and constructed in some one of the ways authorized by the laws of the state, citing § 1339, Rev. Codes (1915), formerly § 1337, Rev. Codes (1907))

NEBRASKA

STATUTES

NEB. REV. STAT. § 39-1410 (1988) (County roads - General provisions, section lines declared roads, enacted 1957, language is virtually identical to L. 1879, p. 130, § 46; Comp. St. 1905, c. 78, § 46 (See Scotts Bluff at 297))

NEB. REV. STAT. § 39-1402 (1988) (County roads - General provisions, public roads, supervision by county board, enacted 1957)

NEB. REV. STAT. § 39-1401 (1988) (County roads - General provisions, terms defined, county board, public roads, enacted 1957)

NEB. REV. STAT. § 39-1302(12)(20)(21)(26) (1988) (State highways, terms defined, enacted 1955)

CASES

Streeter v. Stalnaker, 85 N.W. 47 (Neb. 1901) (evidence of long, continued use by the public tends to show the establishment of a road by dedication over the public domain. So, also, does the surveying, marking out, platting and improvement of a road by the public authorities)

Van Wanning v. Deeter, 110 N.W. 703 (Neb. 1907) (an acceptance of the federal grant may be shown by the acts of the public authorities, or by the acts of the public itself)

Scotts Bluff County v. Tri-State Land Co., 142 N.W. 296 (Neb. 1913) (citing L. 1879, p. 130, § 46, Comp. St. 1905, c. 78, § 46, declaring section lines in each county of the state to be public roads)

County of Banner v. Young, 169 N.W.2d 280 (Neb. 1969) (citing L. 1879, p. 130, § 46, opening public roads on section lines in the state as accepting the congressional grant of 1866)

NEVADA

STATUTES

NEV. REV. STAT. ANN. § 403.090 (Michie 1991) (general powers of board of county commissioners over public highways, enacted 1913)

NEV. REV. STAT. ANN. § 403.410 (Michie 1991) (public highways, enacted 1866)

NEV. REV. STAT. ANN. § 403.430 (Michie 1991) (procedure for opening public road, enacted 1866)

NOTE: The following statutes were found, but date of enactment is after 1976. Need to find if there's any prior history.

NEV. REV. STAT. ANN. § 244.277 (Michie 1986) (acceptance of grant of right-of-way over federal lands, enacted 1977); apparently in effect since 1917 (§ 3008, Rev. Laws of Nevada, see AG opinion, State of Nevada, letter to Mr. Russell A. Fields dated 4-13-92, page 4)

NEV. REV. STAT. ANN. § 405.191(2) (Michie 1991) ("Public road" defined, refers specifically to RS 2477 roads on or before July 1, 1979, enacted 1979)

NEV. REV. STAT. ANN. § 405.193 (Michie 1991) (public agency not required to accept or maintain roads meeting NRS § 405.191, enacted 1979)

NEV. REV. STAT. ANN. § 405.195 (Michie 1991) (action to prevent denial of public use of road qualifying under NRS § 405.191, enacted 1979)

CASES

Anderson v. Richards, 608 P.2d 1096 (Nev. 1980) (citing NRS § 403.410)

NEW MEXICO

STATUTES

N.M. STAT. ANN. § 67-2-1 (1978 & Supp. 1992) (definition of public highways, originally enacted in 1905, former codification includes § 58-101, N.M. STAT. (1941); § 55-1-1, N.M. STAT. ANN. (1953))

N.M. STAT. ANN. § 67-5-1 (1978 & Supp. 1992) (county bridges, township and section lines are parts of public highways; width, originally enacted in 1891, former codification includes § 64-702, Comp. St. 1929)

N.M. STAT. ANN. § 67-5-2 (1978 & Supp. 1992) (width of public highways, enacted 1905)

N.M. STAT. ANN. § 67-5-5 (1978 & Supp. 1992) (alteration or establishment of roads, enacted 1905)

CASES

Atchison, T. & S.F. Ry. Co. v. Richter 148 P. 478 (N.M. 1915) (when a valid entry has been made by a citizen, that portion of the public land covered by the entry is segregated from the public domain and is not subject to further entry, and is not included in subsequent grants made by Congress)

Frank A. Hubbell Co. v. Gutierrez, 22 P.2d 225 (N.M. 1933) (citing § 64-702, Comp. St. 1929, declaring section and township lines public highways, roads lying along section lines in county must be established under ordinary statutory proceedings for establishment of highways)

Wilson v. Williams, 87 P.2d 683 (N.M. 1939) (under federal statute granting right to establish highway over public land, generally the construction of a highway or establishment by user is sufficient)

King v. Brown 284 P.2d 214 (N.M. 1955) (upheld Wilson, public use is sufficient to constitute dedication of highway over public land)

State v. Walker, 301 P.2d 317 (N. M. 1956) (citing § 55-1-1, N.M. Stat. Ann. (1953), defining public highways, Enabling Act, school sections and RS 2477)

Lovelace v. Hightower, 168 P.2d 864 (N.M. 1946) (continuous use of a road for such time and under such circumstances as to clearly prove acceptance of federal grant will suffice to establish a highway regardless of the length of time of such user, citing § 58-101, N.M. Stat. (1941), discusses the history of RS 2477 in other states)

NEW MEXICO

CASES cont.

Luchetti v. Bandler, 777 P. 2d 1326 (N.M. Ct. App. 1989) (use of road to reach single private residence, hike, picnic, etc. was insufficient to require finding of acceptance of government's offer to dedicate road as a public highway)

NORTH DAKOTA

STATUTES

N.D. CENT. CODE § 24-07-03 (1991) (Section lines considered public roads, originally en. 1871 as L. 1871, ch. 33; am. 1897 as L. 1897, c. 112, § 3; former codification includes § 1920, Comp. Laws 1913; § 24-0703, N.D. Rev. Code (1943))

N.D. CENT. CODE § 24-07-04 (1991) (jurisdiction of proceedings to open or vacate highways, en. 1897, former codification includes § 1921, Comp. Laws 1913)

N.D. CENT. CODE § 24-07-01 (1991 & Supp. 1992) (en. 1897, public roads by prescription)

N.D. CENT. CODE § 24-07-02 (1991) (en. 1897, established roads are public highways)

CASES

Walcott Tp. of Richland County v. Skauge, 71 N.W. 544 (N.D. 1897)

Wenberg v. Gibbs Tp., 153 N.W. 440 (N.D. 1915) (citing L. 1871, ch. 33, declaring all section lines in the territory to be public highways; citing § 1348, Rev. Codes 1905, providing for compensation of the owners of section lines opened as public highways)

Faxon v. Lallie Civil Tp., 163 N.W. 531 (N.D. 1917) (citing L. 1871, ch. 33, declaring all section lines in the territory to be public highways, held to be legislative acceptance of the congressional highway grant; citing L. 1897, ch. 112, § 3, section lines considered public roads)

Huffman v. Board of Supervisors of West Bay Tp. Benson County, 182 N.W. 459 (N.D. 1921) (citing L. 1871, ch. 33, a public highway was unquestionably established on a section line by virtue of the legislative acceptance of the federal grant)

Hillsboro Nat'l Bank v. Ackerman, 189 N.W. 657 (N.D. 1922) (citing §§ 1920, 1921 Compiled Laws (1913?), providing that section lines are public roads and who has jurisdiction to open such roads; citing L. 1871, ch. 33, as accepting the congressional highway grant)

Lalim v. Williams County, 105 N.W.2d 339 (N.D. 1960) (citing L. 1871, ch. 33; citing § 24-0703, N.D. Rev. Code (1943))

Small v. Burleigh County, 225 N.W.2d 295 (N.D. 1975) (citing § 24-07-03, N.D. CENT. CODE, section lines considered public roads, no action by public authorities is necessary, also cites several

NORTH DAKOTA

CASES cont.

other laws relating to section line roads, discusses legislative history and intent of laws)

Minot Sand & Gravel Co. v. Hjelle, 231 N.W.2d 721 N.D. 1975) (discusses extraction of minerals from beneath section lines)

DeLair v. County of LaMoure, 326 N.W.2d 55 (N.D. 1982) discusses history of § 24-07-03, N.D. CENT. CODE)

LAW REVIEW ARTICLES

Note, The Public Trust Doctrine in North Dakota, 54 N.D. L. REV. 565, 572 (1978)

OKLAHOMA

STATUTES

OKLA. STAT. ANN. tit. 69, § 1201 (West 1969 & Supp. 1992) (enacted 1968, amended 1975; section lines public highways, width; former codifications in effect since 1909, § 6072, Wilson's Rev. & Ann. St. 1903 was incorporated in former OKLA. STAT. tit. 69, § 1 (1961), now § 1201)

OKLA. STAT. ANN. tit. 69, §§ 628, 629 (West 1969 & Supp. 1992) (power of county commissioners to open roads, width of roads, en. 1968, former codifications in effect since 1909)

Osage Allotting Act, ch. 3572, § 10, 34 Stat. 545 (1906)

OKLA. CONST. art. XVI, § 2 (1907) (acceptance of lands granted or reserved for highway)

Organic Act, ch. 182, § 23, 26 Stat. 92 (1890)

CASES

Mills v. Glasscock, 110 P. 377 (Okla. 1910) (Constitutional and statutory provisions constituted an acceptance of congressional grant for highways; citing the Osage allotting act, ch. 3572, § 10, 34 Stat. 545 (1906), providing for public roads on all section lines in the Osage Indian Reservation; citing § 6072, Wilson's Rev. & Ann. St. 1903, declaring all section lines in the territory to be public highways; citing OKLA. CONST. art. XVI, § 2 (1907), accepting lands for public highways made under any grant of Congress)

St. Louis & S.F.R. Co. v. Love, 118 P. 259 (Okla. 1911) (citing § 7753, Compiled Stat. 1909, vesting jurisdiction in the township boards to open and establish public roads)

Sebranak v. Board of County Comm'rs of Garfield County, 27 P.2d 632 (Okla. 1933) (citing ch. 72, Stat of Okla. 1893 (§ 5708 et. seq.), declaring all section lines in the territory of Oklahoma to be public highways and authorizing the board of county commissioners to lay out, alter, or vacate any road)

OREGON

STATUTES

OR. REV. STAT. § 368.131 (1991) (right of way over United States public lands, formerly § 368.555(1953?))

OR. REV. STAT. § 368.001 (1991) (definition "public road", en. 1981)

OR. REV. STAT. § 368.016 (1991) (county authority over roads, en. 1981)

OR. REV. STAT. § 368.161 (1991) (use of road viewers to establish road, en. 1981))

CASES

Wallowa County v. Wade, 72 P. 793 (Or. 1903) (long continued user by the public together with the action of the county authorities in surveying and locating a road was sufficient to constitute an acceptance of the grant made by Congress for public highways)

Montgomery v. Somers, 90 P. 674 (Or. 1907) (an acceptance of the grant of congress may be effected by public user alone, without any action by the public highway authorities, citing B. & C. Comp. § 4790 (Session L. 1903, p. 267), providing that all county roads shall be 60 feet wide)

Wilkens v. Lane County, 671 P.2d 1178 (Or. Ct. App. 1983) (followed Wallowa)

SOUTH DAKOTA

STATUTES

S.D. CODIFIED LAWS ANN. § 31-18-1 (1984 & Supp. 1992) (existence of section line highways, orig. en. 1871 S.D. Laws ch.33, § 1; former codification includes 1877 Pol. Code ch. 29, § 1; § 1189, Comp. Laws 1887; § 1594, Rev. Pol. Code 1903)

S.D. CODIFIED LAWS ANN. § 31-18-2 (1984) (width of highways, orig. en. 1877; former codification includes 1877 Pol. Code ch. 29, § 3; § 1191, Comp. Laws 1887; § 1596, Rev. Pol. Code 1903)

S.D. CODIFIED LAWS ANN. § 31-18-3 (1984 & Supp. 1992) (vacation or change of location of highways, orig. en. 1869; former codification includes 1877 Pol. Code ch. 29, § 2; § 1190, Comp. Laws 1887; § 1595, Rev. Pol. Code 1903)

S.D. CODIFIED LAWS ANN. § 31-1-1 (1984) (en. 1929, highway defined)

S.D. CODIFIED LAWS ANN. § 31-3-1 (1984 & Supp. 1992) (en. 1877, dedication to public by continuous use)

S.D. CODIFIED LAWS ANN. § 31-3-2 (1984) (en. 1893, public highway not established by mere use)

CASES

Wells v. Pennington County, 48 N.W. 305 (S.D. 1891) (citing §§ 1189, 1191 Comp. Laws 1887, declaring all section lines public highways (§ 1189), 66 ft. in width (§ 1191), held to be an acceptance of the congressional highway grant)

Smith v. Pennington, 48 N.W. 309 (S.D. 1891) (citing §§ 1189, 1191 Comp. Laws 1887, the territorial law declaring section lines to be public highways became operative as an acceptance of the congressional grant as soon as those lines were definitely settled)

Riverside Tp. v. Newton, 75 N.W. 899 (S.D. 1898) (citing §§ 1189, 1191 Comp. Laws 1887, the withholding of portions of public lands for school purposes was neither a "grant or reservation for public uses," within the exception of RS 2477)

City of Deadwood v. Whittaker, 81 N.W. 908 (S.D. 1900) (Indian lands)

Great Northern Ry. Co. v. Town of Viborg, 97 N.W. 6 (S.D. 1903) (the right of the public to use a section line highway is not impaired by incorporation of a town according to a plat)

SOUTH DAKOTA

CASES cont.

Lawrence v. Ewert, 114 N.W. 709 (S.D. 1908) (citing 1871 S.D. Laws ch.33, later carried into §§ 1594, 1595, 1596 Rev. Pol. Code (1903); also cites former law and discusses prior legislative history)

Sample v. Harter 156 N.W. 1016 (S.D. 1916) (citing §§ 1594, 1596 Rev. Pol. Code (1903))

Gustafson v. Gem Tp., 235 N.W. 712 (S.D. 1931) (citing 1871 S.D. Laws ch.33, § 1; now § 8519, Rev. Code 1919)

Pederson v. Canton Tp., 34 N.W.2d 172 (S.D. 1948) (citing 1871 S.D. Laws ch.33 as accepting dedication of Congress; citing § 28.0101, S.D.Code (1939), now S.D. CODIFIED LAWS ANN. § 31-1-1; citing § 28.0102, S.D.Code (1939), now S.D. CODIFIED LAWS ANN. § 31-18-1)

Costain v. Turner County, 36 N.W.2d 382 (S.D. 1949) (citing 1871 S.D. Laws ch.33; citing § 28.0105, S.D.Code (1939), now S.D. CODIFIED LAWS ANN. § 31-18-2)

Dave Gustafson Co. v. State, 169 N.W.2d 722 (S.D. 1969) (citing 1871 S.D. Laws ch.33; now embodied in S.D. CODIFIED LAWS ANN. § 31-18-1 (1967))

Thormodsgard v. Wayne Township Board of Supervisors, 310 N.W.2d 157 (S.D. 1981) (citing S.D. CODIFIED LAWS ANN. §§ 31-18-1, 31-3-1)

UTAH

STATUTES

UTAH CODE ANN. § 27-12-2(8) (1989 & Supp. 1991)(en. 1963, definition of "public highway")

UTAH CODE ANN. § 27-12-89 (1989)(en. 1963, public use constituting dedication, originally enacted as 1886 Utah Laws, ch. 12; formerly codified as § 2066, Comp. Laws 1888; § 1115, Rev. Stat. 1898 & Comp. Laws 1907; § 2801, Comp. Laws 1917; § 36-1-2, Rev. Stat. 1933 & Utah Code Ann. 1943; § 27-1-2, Utah Code Ann. 1953)

UTAH CODE ANN. § 27-12-90 (1989)(en. 1963, highways once established continue until abandoned, formerly codified as § 1116, Comp. Laws 1907; § 2802, Comp. Laws 1917; § 27-1-3, Utah Code Ann. 1953)

UTAH CODE ANN. § 27-12-92 (1989)(en. 1963, United States patents)

UTAH CODE ANN. § 27-12-93 (1989)(en. 1963, width of rights-of-way for public highways, prior history not known)

UTAH CODE ANN. § 27-12-25 (1989)(en. 1963, control of highways not otherwise designated, prior history not known)

CASES

Lindsay Land & Livestock Co. v. Churnos, 285 P. 646 (Utah 1930)(citing 1880 Utah Laws, ch. 29, §§ 2,3 (§ 2 has language similar to UTAH CODE ANN. §27-12-2(8) (1989)); citing 1886 Utah Laws, ch. 12, § 2 (contains language similar to UTAH CODE ANN. §27-12-89 (1989)); held that public use over period of years was sufficient to constitute an acceptance of congressional grant, road width determined by what is reasonable and necessary)

Sullivan v. Condas, 290 P. 954 (Utah 1930)(citing 1880 Utah Laws, ch. 29; 1886 Utah Laws, ch. 12; § 2066, Comp. Laws 1888; § 1115, Rev. Stat. 1898; § 2802, Comp. Laws 1917)

Jeremy v. Bertagnole, 116 P. 2d 429 (Utah 1941)(citing 1880 Utah Laws, ch. 29, §§ 2,3; citing 1886 Utah Laws, ch. 12, § 2)

Oregon Short Line Railroad Co. v. Murray City, 277 P.2d 798 (Utah 1954)(citing § 1115, Rev. Stat. 1898 & Comp. Laws 1907; § 2801, Comp. Laws 1917; § 36-1-2, Rev. Stat. 1933 & Utah Code Ann. 1943; § 27-1-2, Utah Code Ann. 1953)

Boyer v. Clark, 326 P.2d 107 (Utah 1958)(citing Utah Code Ann. § 27-1-3 (1953))

Clark v. Erekson, 341 P.2d 424 (Utah 1959)(citing Utah Code Ann. §§ 27-1-2, 27-1-3 (1953))

UTAH

CASES cont.

Cassity v. Castagno, 347 P.2d 834 (Utah 1959) (evidence insufficient to show that trail constituted public highway under federal grant)

Thomson v. Condas, 493 P.2d 639 (Utah 1972) (dissenting opinion citing 1886 Utah Laws, ch. 12, § 2, in substance the same as Utah Code Ann. § 27-12-89 (1953, Replacement Vol. 3); citing § 1116, Rev. Stat. 1898, which is practically identical to Utah Code Ann. § 27-12-90 (1953, Replacement Vol. 3))

Memmott v. Anderson, 642 P.2d 750 (Utah 1982) (citing Utah Code Ann. § 27-12-2(8) (1953); citing Utah Code Ann. § 27-12-89 (1953))

WASHINGTON

STATUTES

WASH. REV. CODE ANN. § 36.85.030 (1991) (en. 1963, acceptance of federal grants over public lands; originally enacted as Laws 1903, p. 155, c. 103; formerly § 6450-17, Remington's Rev. Stat. (1932); § 5607, Remington & Ballinger's Code (1910))

WASH. REV. CODE ANN. § 36.85.040 (1991) (en. 1963, acceptance of federal grants over public lands - prior acceptance ratified; originally enacted as Laws 1903, p. 155, c. 103; formerly § 6450-18, Remington's Rev. Stat. (1932); § 5608, Remington & Ballinger's Code (1910))

CASES

Smith v. Mitchell, 58 P. 667 (Wash. 1899) (RS 2477 is a grant for highways without any limitations as to the method for their establishment; a highway may be established in any of the ways recognized by the law of the state in which such lands are located; in this state, highways may be established by prescription, dedication, user or proceedings under statute)

Okanogan County v. Cheetham, 80 P. 262 (Wash. 1905) (citing Laws 1903, p. 155, c. 103, authorized boards of county commissioners to accept rights of way for highways as granted by RS 2477, provided that nothing in the statute should be construed to invalidate the acceptance of such grant by general public use and enjoyment, held that public user constituted an acceptance of the grant without any resolution of the board of county commissioners accepting the highway)

Peterson v. Baker, 81 P. 681 (Wash. 1905) (citing § 3846, Ballinger's Ann. Codes & St. (1897?), declaring all public roads and highways used as such for not less than seven years to be lawful roads and highways, school lands are not "reserved for public uses" within the meaning of RS 2477)

McAllister v. Okanogan County 100 P. 146 (Wash. 1909) (citing Laws 1903, p. 155, c. 103, overturned the holding in Cheetham that the grant is a grant in praesenti, held that the grant remains in abeyance until a highway is established under some public law authorizing it and takes effect from that time)

Stofferan v. Okanogan County, 136 P. 484 (Wash. 1913) (citing Laws 1903, c. 103, §§ 5607, 5608, Rem. & Bal. Code (1910?), authorizing the boards of county commissioners to accept the grant for public highways and ratifying any action already taken by the boards purporting to accept such grant; citing § 5657, Rem. & Bal. Code (1910?), providing that roads may be established by prescription by use by the public for not less than seven years; upheld McAllister ruling that the grant is not a grant in praesenti)

WASHINGTON

CASES cont.

Rodiger v. Cullen, 175 P.2d 669 (Wash. 1946)

WYOMING

STATUTES

WYO. STAT. § 24-1-101 (1977 & Supp. 1991) (originally enacted as 1895 Wyo. Sess. Laws ch. 69, § 1; public highways defined and established; former laws and codifications include 1919 Wyo. Sess. Laws, ch. 112, § 1; § 2977, Comp. Stat. 1920; 1921 Wyo. Sess. Laws ch. 100, § 1;)

CASES

Hatch Bros. Co. v. Black, 165 P. 518 (Wyo. 1917) (citing 1895 Wyo. Sess. Laws ch. 69, § 1 (source of present statute); also cites prior legislative history to 1869)

Hatch Bros. Co. v. Black, 165 P. 267 (Wyo. 1918) (extensive legislative history and discussion of early laws concerning public highways)

Bishop v. Hawley, 238 P. 284 (Wyo. 1925) (citing 1919 Wyo. Sess. Laws, ch. 112; § 2977, Comp. Stat. 1920; 1921 Wyo. Sess. Laws ch. 100; grant of highway is a dedication, effective on acceptance by construction or establishment by public user)

Cottman v. Lochner, 278 P. 71 (Wyo. 1929) (citing § 2997, Comp. Stat. 1920)

Nixon v. Edwards, 264 P.2d 287 (Wyo. 1953) (extensive legislative history and discussion of early laws concerning public highways)

APPENDIX VI

ALTERNATIVE NO. 2 - H.R. 1096

Exhibit

A H.R. 1096, 102d Cong., 1st Sess. (1991)

102D CONGRESS
1ST SESSION

H. R. 1096

IN THE SENATE OF THE UNITED STATES

JULY 24 (legislative day, JULY 8), 1991

Received; read twice and referred to the Committee on Energy and Natural Resources

AN ACT

To authorize appropriations for programs, functions, and activities of the Bureau of Land Management for fiscal years 1992, 1993, 1994, and 1995; to improve the management of the public lands; and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. AUTHORIZATION.

4 There are hereby authorized to be appropriated such
5 sums as may be necessary for programs, functions, and
6 activities of the Bureau of Land Management, Depart-
7 ment of the Interior (including amounts necessary for in-
8 creases in salary, pay, retirements, and other employee

1 to denial thereof, shall be subject to judicial review in ac-
2 cordance with and to the extent provided by the Adminis-
3 trative Procedure Act (5 U.S.C. 551-559 and 701 et seq.).
4 For the purposes of this section, the term 'rule' has the
5 same meaning as such term has in the Administrative Pro-
6 cedure Act (5 U.S.C. 551(4))."

7 (b) The table of contents of the Act is amended by
8 inserting after the item relating to section 707 the follow-
9 ing new item:

"Sec. 708. Judicial review."

10 **SEC. 15. CLAIMED RIGHTS-OF-WAY.**

11 The Act is hereby amended by adding at the end of
12 title III the following new sections 319 and 320:

13 **"SEC. 319. RECORDATION OF CLAIMED RIGHTS-OF-WAY.**

14 "(a) **FILING REQUIREMENTS.**—(1) Any party claim-
15 ing to be a holder of a right-of-way across public or other
16 Federal lands for the construction of a highway pursuant
17 to a grant made by Revised Statutes section 2477 (43
18 U.S.C. 932) that became operative before repeal of such
19 section on October 21, 1976, shall, on or before January
20 1, 1994, file for record in the office or offices of the Bu-
21 reau of Land Management responsible for management of
22 public lands within the State or States wherein such
23 claimed right-of-way is located either a notice of intent
24 to hold and maintain the right-of-way or a notice of aban-
25 donment of such party's claim to be the holder of such

1 right-of-way. A notice of intent to hold and maintain such
2 a right-of-way shall be accompanied by information con-
3 cerning the actual construction, maintenance, and public
4 use on which such party bases its claim to have established
5 such a right-of-way, and by such other information regard-
6 ing the uses, location, and extent of such claimed right-
7 of-way as the Secretary of the Interior may require. The
8 Secretary may allow information already in the possession
9 of the Bureau of Land Management to be included by ref-
10 erence to the documents in which such information is re-
11 corded.

12 “(2) A party filing a notice pursuant to paragraph
13 (1) shall also simultaneously file a copy thereof in the ap-
14 propriate office of any other agency responsible for man-
15 agement of any Federal lands traversed by the claimed
16 right-of-way, and shall give public notice of the party's in-
17 tention to hold and maintain or to abandon the claimed
18 right-of-way by publication of information concerning such
19 intention in one or more newspapers of general circulation
20 in the areas where the affected lands are located.

21 “(b) EFFECT.—(1) The failure of any party subject
22 to the requirements of subsection (a) to file the notices
23 or to publish the information required to be filed and pub-
24 lished by such subsection within the time specified by such
25 subsection shall be conclusively deemed to constitute an

1 abandonment and relinquishment of a right-of-way with
2 respect to which such filing and publication is required
3 by such subsection.

4 “(2) Recordation pursuant to this section shall not.
5 of itself, render valid any claim which would not otherwise
6 be valid under applicable law or provide a basis for chang-
7 ing the scope, alignment, or character or extent of use of
8 any claimed right-of-way; and nothing in this section shall
9 be construed as waiving, altering, or otherwise affecting
10 any terms or conditions applicable to any right-of-way
11 under this Act or any other applicable law.

12 “(c) INVESTIGATIONS.—(1) Upon receipt of a notice
13 filed pursuant to subsection (a) that a party intends to
14 hold and maintain a claimed right-of-way involving any
15 lands specified in paragraph (2) of this subsection, the
16 Secretary of the Interior, acting through an appropriate
17 officer of the Bureau of Land Management or (if any por-
18 tion of a claimed right-of-way covered by this subsection
19 is located within a unit of the National Park System) of
20 the National Park Service, shall conduct an investigation
21 to determine the validity of each such claimed right-of-
22 way. The Secretary shall provide an opportunity for the
23 public to contest or request an investigation of the validity
24 of any other claimed right-of-way.

1 “(2)(A) The Secretary shall investigate the validity
2 of each claimed right-of-way any portion of which
3 involves—

4 “(i) any lands within the National Park Sys-
5 tem, the National Wild and Scenic River System, or
6 the National Wilderness Preservation System; or

7 “(ii) any lands being managed so as to preserve
8 their suitability for designation as wilderness, pursu-
9 ant to section 603 of this Act or any other provision
10 of law or regulation; or

11 “(iii) any area of critical environmental con-
12 cern; or

13 “(iv) any other lands whose use for highway
14 purposes would be inconsistent with the land-use
15 plans for those lands.

16 “(B) The Secretary shall also investigate any claimed
17 right-of-way not involving lands specified in subparagraph
18 (A) but with respect to which a challenge is filed that
19 states grounds which, if proved or confirmed, would con-
20 stitute reason to doubt the validity of such claimed right-
21 or-way or any portion thereof.

22 “(3) If any portion of such claimed right-of-way is
23 on Federal lands managed by an agency other than the
24 Bureau of Land Management or the National Park Serv-
25 ice, the investigating officer shall request the comments

1 of such agency with respect to the validity of such right-
2 of-way.

3 “(4) Appropriate notice to the public, including the
4 owners of any non-Federal lands affected by the claimed
5 right-of-way, shall be provided with respect to initiation
6 of each investigation carried out pursuant to this para-
7 graph, and the investigating officer shall provide an oppor-
8 tunity for the public to submit comments concerning the
9 subject of the investigation.

10 “(5) If information or comments submitted to the in-
11 vestigating officer demonstrate that there is a dispute as
12 to any relevant facts with respect to the validity of a right-
13 of-way subject to an investigation under this paragraph,
14 the parties to such dispute shall be afforded an adjudica-
15 tory hearing on the record with respect to such disputed
16 issues of fact. Any such adjudicatory hearing shall be be-
17 fore a qualified administrative law judge whose findings
18 shall govern disposition of such issues of fact in any deter-
19 mination concerning the validity of a claimed right-of-way,
20 subject to administrative and judicial review under appli-
21 cable provisions of law.

22 “(6) If after an investigation pursuant to this para-
23 graph, the investigating officer finds either that a claimed
24 right-of-way or portion thereof is valid or that there is rea-
25 son to doubt the validity of such claimed right-of-way or

1 portion thereof, notice of such finding and the reasons
2 therefor shall be provided to the party claiming the right-
3 of-way and to all other affected parties, including the pub-
4 lic.

5 “(7) For purposes of this section, if any portion of
6 a claimed right-of-way includes lands managed pursuant
7 to section 603 of this Act, that fact shall constitute a rea-
8 son to doubt the validity of such portion of such right-
9 of-way.

10 “(d) APPEALS.—(1) Any claimed right-of-way or por-
11 tion thereof with respect to which it is found, pursuant
12 to subsection (b), that there is reason to doubt the validi-
13 ty, shall be deemed to be invalid unless, within 30 days
14 after such finding the party claiming the right-of-way has
15 filed with the Secretary of the Interior an appeal of such
16 finding, and the Secretary thereafter determines the right-
17 of-way to be valid. Any party other than the party claim-
18 ing the right-of-way, may intervene in any appeal filed
19 under this paragraph in support of the finding of invalidi-
20 ty by filing with the Secretary a notice of such intervention
21 within the period allowed for filing of the appeal.

22 “(2) Any finding by the investigating officer with re-
23 gard to the validity or invalidity of a claimed right-of-way
24 or portion thereof valid shall become final unless within

1 30 days after such finding a notice of appeal of such find-
2 ing is filed with the Secretary of the Interior.

3 “(3) Any decision by the Secretary with regard to an
4 appeal under this subsection shall be made after the party
5 claiming or contesting a right-of-way has been provided
6 with the evidence upon which the investigating officer's
7 finding regarding its validity or invalidity was based and
8 has been given an opportunity to respond, including an
9 adjudicatory hearing on the record with respect to any dis-
10 puted issues of fact.

11 “(4)(A) Pending a final determination of validity with
12 respect to a claimed right-of-way that is subject to an ap-
13 peal under this subsection, the Federal land covered by
14 such claimed right-of-way shall be managed in accordance
15 with applicable law (including this Act) and management
16 plans as if such right-of-way did not exist, except that
17 such lands may continue to be used for lawful transporta-
18 tion, access, and related purposes of the same nature and
19 to the same extent as was properly permitted by the Secre-
20 tary on the date of enactment of this section. Any such
21 continued uses shall be subject to appropriate regulations
22 to protect the resources and values of the affected lands.

23 “(B) Upon a final determination of invalidity with re-
24 spect to a claimed right-of-way subject to an appeal under
25 paragraph (3), Federal lands covered by such claimed

1 right-of-way shall be managed in accordance with applica-
2 ble law and management plans.

3 “(C) A determination by an investigating officer as
4 to the validity or invalidity of a claimed right-of-way may
5 be appealed to the Secretary by any person, provided such
6 appeal is made no later than 30 days after the determina-
7 tion of the investigating officer. Any person filing such an
8 appeal shall be afforded an adjudicator hearing on the
9 record with regard to any disputed issue of fact. Any deci-
10 sion of the Secretary regarding such an appeal shall be
11 subject to judicial review.

12 “(5) Any decision by the Secretary pursuant to this
13 subsection shall be subject to judicial review under appli-
14 cable provisions of law, but nothing in this subsection shall
15 be construed as affording any right to seek or participate
16 in any judicial proceeding by any party not otherwise enti-
17 tled to see or participate in such proceeding.

18 “(e) CHANGE IN USE.—Any change in the scope,
19 alignment, or character of use of a valid right-of-way es-
20 tablished pursuant to Revised Statutes section 2477 shall
21 be subject to terms and conditions required by section 505
22 of this Act or other applicable law.

23 “(f) SAVINGS CLAUSE.—Nothing in this section shall
24 be construed as increasing or diminishing the require-
25 ments of any applicable law with respect to establishment.

1 construction, or maintenance of a highway for purposes
 2 of obtaining a valid right-of-way pursuant to Revised Stat-
 3 utes section 2477 prior to its repeal.

4 "SEC. 320. RIGHT-OFF-WAY IN ALASKA CONSERVATION SYS-
 5 TEM UNITS.

6 "Nothing in this Act shall be construed as exempting
 7 any proposal for any construction on or change in the
 8 scope, alignment, or character or extent of use of any por-
 9 tion of any right-of-way claimed to have been established
 10 pursuant to Revised Statutes section 2477 on any lands
 11 within any conservation system unit in Alaska from the
 12 requirements of title XI of the Alaska National Interest
 13 Lands Conservation Act."

14 SEC. 16. WILD HORSE SANCTUARY REPORT.

15 (a) WAITING PERIOD.—The Secretary shall take no
 16 action to remove any animals covered by Public Law 92-
 17 195 (commonly known as the "Wild Free-Roaming Horses
 18 and Burros Act") from any area being operated, under
 19 an agreement with the Secretary, as a sanctuary for such
 20 animals on May 22, 1991, or to alter arrangements exist-
 21 ing on such date for care and maintenance of such ani-
 22 mals, sooner than 120 days after transmittal to the House
 23 Committee on Interior and Insular Affairs and the Senate
 24 Committee on Energy and Natural Resources of the report
 25 required by this section.



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2477 : the history and

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