



THE SECRETARY OF THE INTERIOR
WASHINGTON

AUG 27 1997

Honorable Newt Gingrich
Speaker of the House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

There is enclosed a draft bill which would be cited as "The Revised Statute (R.S.) 2477 Rights-of-Way Act."

This bill represents the collaborative efforts of several Interior agencies -- Fish and Wildlife Service, National Park Service, and Bureau of Land Management -- and the Departments of Agriculture and Defense. The enclosed draft bill would establish a uniform, workable administrative process by which those States and local governments that claim R.S. 2477 rights-of-way across Federal land can have the appropriate Federal land manager make binding determinations of their existence and validity.

Background

R.S. 2477 was adopted by Congress in 1866 and granted a right-of-way for the construction of highways across public land not reserved for public uses. In the Federal Land Policy and Management Act (FLPMA), enacted in 1976, Congress repealed R.S. 2477, but did not terminate valid rights-of-way existing on the date of FLPMA's enactment. Inconsistent court decisions and incomplete guidance from Federal land managers over the succeeding years have not resulted in settling claims asserted under R.S. 2477.

To that end, in 1992, Congress directed the Department of the Interior to study the history, impacts, status and alternatives to R.S. 2477 rights-of-way and to make recommendations for assessing claims. As an essential element of the Department's study, officials of the Department of the Interior sought input from and consulted with affected interests from the public land states, including public hearings conducted in Alaska, California, Idaho, Oregon, Montana, Nevada and Utah. In addition, the Department received and reviewed more than 4,000 pages of written comments. In June, 1993, the Department reported the results of its study to Congress.

Chief among the Department's recommendations was that regulations should be written for R.S. 2477. In August, 1994, the Department published proposed rules to govern the determination of the validity of claimed rights-of-way under R.S. 2477. Over the course of the year-long notice and comment period, the Department received more than 3,200 comments on the proposed rules. Shortly thereafter, Congress prohibited the Department from

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developing, promulgating, and/or implementing any final rule concerning rights-of-way under R.S. 2477. For fiscal year 1997, Congress re-authorized the Department to issue final rules on R.S. 2477, but mandated that such rules may take effect only after they are expressly ratified by Congress. To date, no final rules have been implemented.

In May, 1997, a rider was attached to a supplemental appropriations bill that would have significantly altered R.S. 2477 standards. This rider was removed after the Administration strongly objected, and the Administration agreed to propose legislation on the subject.

Need for Federal Legislation

Rights-of-way validly acquired pursuant to R.S. 2477 provide access to and across Federal lands for States and local governments, and the general public. Historically, these rights-of-way have not presented many problems to Federal land managers, because in general their existence is obvious and unquestioned.

In recent years, however, there has been controversy over whether certain claimed access routes are "highways" that were "constructed" pursuant to R.S. 2477. This controversy causes uncertainty for Federal land managers charged with managing and protecting Federal lands according to current environmental, land use, and national security laws.

In the absence of uniform Federal guidance, court decisions -- sometimes applying widely varying State laws -- have also failed to provide consistent interpretations. Some recent State laws, including some adopted after the repeal of R.S. 2477, are inconsistent with the statutory requirements. Federal land managers and State and local governments need consistent, coherent guidance on how to apply R.S. 2477. Now, more than twenty years after the repeal of R.S. 2477, the time has come to bring closure to the process of asserting claims under it.

Objectives of the Draft Bill

This draft bill would provide a process so that validly accepted rights-of-way can be recognized and administered consistently and fairly. To accomplish that goal, the draft bill would establish a uniform administrative procedure and standards for determining which claimed rights-of-way were validly accepted under the grant from the Federal government. Furthermore, the draft bill would require the filing of a claim within a specified time period. The draft bill also would establish a process for input from the public prior to the final administrative determination of a claim and an appeal process for an adversely affected party. Finally, the draft bill would require those found to hold valid R.S. 2477 rights-of-way to

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perform a center-line survey of the right-of-way and to file the survey with official public land records of the Bureau of Land Management.

Role of State and Federal Law

The relationship between State and Federal law is important for determining whether a right-of-way was validly acquired. The interplay between State and Federal law has created some confusion, which this draft bill is intended to eliminate. The draft bill would continue to recognize the role of State law, to the extent State law is consistent with Federal law. Federal land managers cannot recognize highways purported to have been established under State laws that do not meet the minimal R.S. 2477 requirements for the construction of highways over unreserved public lands.

This draft bill would apply to all lands owned or controlled by the Departments of the Interior, Agriculture and Defense.

There is no appropriation of funds involved in this initiative.

The Office of Management and Budget has advised that there is no objection to the submission of this legislative proposal to the Congress from the standpoint of the Administration's program.

Sincerely,



Enclosures

cc:
Honorable Don Young (w/enclosures)
Honorable George Miller (w/enclosures)

A BILL

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Revised Statutes (R.S.) 2477 Rights-of-Way Act".

DEFINITIONS

SEC. 2. As used in this Act:

(1) The term "abandonment" means an intentional relinquishment of any right, title or claim to a right-of-way pursuant to R.S. 2477. Intent to relinquish may be inferred from a preponderance of the evidence showing:

(A) The absence of public use of the R.S. 2477 right-of-way since October 21, 1976;

(B) The failure of the claimant to perform routine maintenance on the R.S. 2477 right-of-way since October 21, 1976; or

(C) Conduct by the claimant inconsistent with the use of the R.S. 2477 right-of-way by highway traffic.

(2) The term "appropriate Federal agency" means any Federal agency having management jurisdiction over any portion of a claimed R.S. 2477 right-of-way.

(3) The term "authorized officer" means the Secretary of the Federal department having management jurisdiction over the longest lineal portion of a claimed

R.S. 2477 right-of-way or the Secretary's designee within the Federal agency having management jurisdiction over the longest lineal portion of a claimed R.S. 2477 right-of-way.

(4) The term "claim" means the filing of appropriate documentation under Section 3 of this Act asserting the existence of and a property interest in a right-of-way pursuant to R.S. 2477 across any part of any lands owned or controlled by the United States.

(5) The term "claimant" means any State or political subdivision of a State that asserts the existence of and a property interest in a right-of-way pursuant to R.S. 2477 across any part of any lands owned or controlled by the United States.

(6) The term "construction" means an intentional physical act or series of intentional physical acts that were intended to, and that accomplished, preparation of a highway by a durable, observable, physical modification of land for use by highway traffic.

(7) The term "highway" means a thoroughfare that was prior to the latest available date used by the public, without discrimination against any individual or group, for the passage of vehicles carrying people or goods from place to place.

(8) The term "latest available date" means the latest date on which a right-of-way pursuant to R.S. 2477 could have been acquired, which shall be prior to:

(A) October 21, 1976, in the case of lands that were unreserved public lands as of that date; or

(B) The date the public lands were reserved for public uses (such as date

of withdrawal from entry or designation of public use by statute, Presidential Proclamation or Executive Order, Secretarial Order, or administrative decision) in the case of public lands reserved for public uses before October 21, 1976.

(9) The term "public lands not reserved for public uses" or "unreserved public lands" means lands owned by the United States that were available and open to the public under various public land laws that provided for disposition to the public, but lands that had not yet been set aside, dedicated, withdrawn, reserved, settled, preempted, entered, appropriated, or disposed of, or on which claims had not been located.

FILING OF CLAIM FOR DETERMINATION OF VALIDITY OF R.S. 2477

RIGHT-OF-WAY

SEC. 3.(a) FILING DEADLINE-- Within three years from the date of enactment of this Act, each claimant shall file a claim with each appropriate Federal agency in the State or regional office wherein the claimed R.S. 2477 right-of-way lies or, in the case of a claim across lands owned or controlled by the Department of Defense, the claim shall be filed with the commanding officer of the installation having real property accountability for the land wherein the claimed R.S. 2477 right-of-way lies.

(b)(1) COORDINATION AMONG APPROPRIATE FEDERAL AGENCIES-- The authorized officer shall coordinate with each appropriate Federal agency in the review and processing of the claim.

(2) Upon a determination by the authorized officer that the claimant has not met the

filing deadline, the authorized officer shall notify the claimant and all parties of record in writing and shall notify each appropriate Federal agency that no further action on the claim is required.

(c)(1) EFFECT OF FAILURE TO MEET FILING DEADLINE-- The failure of any claimant to file a claim with the office or installation of each appropriate Federal agency specified in subsection (a) within the time specified by subsection (a) shall constitute an abandonment and a relinquishment of any rights purported to have been acquired under R.S. 2477.

(2) A decision by the authorized officer that the claimant has not met the filing deadline specified in subsection (a) shall constitute final agency action subject to review either by the United States District Court for the District of Columbia or the United States District Court in the district within which the longest lineal portion of the claimed R.S. 2477 right-of-way lies.

(3) Any action initiated in a United States District Court pursuant to subsection (c)(2) shall be filed no later than three years from the date of the written notice from the authorized officer that the claimant has not met the filing deadline.

(4) Judicial review of a decision by the authorized officer that the claimant has not met the filing deadline specified in subsection (a) shall be limited to a review of the administrative record.

ADMINISTRATIVE DETERMINATION OF VALIDITY

OF R.S. 2477 RIGHT-OF-WAY

SEC. 4(a) BURDEN OF PROOF-- The claimant shall have the burden to prove that the grant of a right-of-way pursuant to R.S. 2477 was validly accepted.

(b) CONTENTS OF THE CLAIM-- A claim shall contain sufficient information to demonstrate to the authorized officer that each element of R.S. 2477 has been met. At a minimum, the claim shall contain:

- (1) The name, affiliation, address, phone number and facsimile number, if available, of the claimant;
- (2) The names, affiliations, addresses, phone numbers and facsimile numbers, if available, of all persons and/or entities with property interests in land over which the claimed R.S. 2477 right-of-way lies;
- (3) Proof of notification of the claim to all persons and/or entities with property interests in land over which the claimed R.S. 2477 right-of-way lies;
- (4) Proof that the claimant has a property interest in the claimed R.S. 2477 right-of-way;
- (5) A description of the highway on which the claim is based, including, but not limited to, identification of the highway on an official State, county or borough map, if available; the local name; State, county or borough number, if available; beginning and ending points; type of surface; and width;
- (6) Evidence of construction including, but not limited to, evidence of use of tools and of expenditures for highway construction;
- (7) Evidence that the claimed route is a highway including, but not limited to,

evidence of routine maintenance by a State or local government public highway management agency and of public vehicular use;

(8) A statement of whether any photographs, profiles, constructions, as-built or similar detail maps or diagrams of the right-of-way, are available and, if so, where such material may be viewed or copies obtained;

(9) If the right-of-way has been the subject of a prior judicial or administrative determination, the case or file identification number, the results of the last action taken, and the dates thereof.

(c)(1) REVIEW OF CLAIM-- The authorized officer shall review the evidence submitted by the claimant to determine whether the claim of a right-of-way across lands owned or controlled by the United States contains sufficient evidence to prove construction of a highway over unreserved public lands prior to the latest available date.

(2) If the authorized officer determines that the claim contains sufficient evidence to prove construction of a highway over unreserved public lands prior to the latest available date, he or she shall determine whether the claimant has abandoned the R.S. 2477 right-of-way.

(d) CONSULTATION-- The authorized officer shall consult with the appropriate Federal agencies, and States, Tribal governments and/or Alaska Native Corporations (as defined in the Alaska Native Claims Settlement Act) that own or control lands affected by the claimed R.S. 2477 right-of-way regarding whether the claim of a right-of-way across land owned or controlled by the United States contains sufficient evidence to prove construction of a highway over unreserved public lands prior to the latest available date, and if so, whether the R.S. 2477 right-of-way has been abandoned.

(e)(1) DRAFT ADMINISTRATIVE DETERMINATION-- After review of all the evidence, review of Bureau of Land Management official public land records, consultation with States, Tribal governments and/or Alaska Native Corporations that own or control lands affected by the claimed R.S. 2477 right-of-way, and concurrence by the appropriate Federal agencies, the authorized officer shall prepare a draft administrative determination.

(2) The draft administrative determination shall include proposed findings regarding:

(A) Whether the grant of the right-of-way pursuant to R.S. 2477 over public land not reserved for public uses was validly accepted prior to the latest available date;

(B) If the grant of the R.S. 2477 right-of-way over public land not reserved for public uses was validly accepted prior to the latest available date, whether the R.S. 2477 right-of-way has been abandoned; and

(C) If the grant of the R.S. 2477 right-of-way over public land not reserved for public uses was validly accepted prior to the latest available date, and has not been abandoned, a description of the width, type of surface, and beginning and ending points of the right-of-way, as of the latest available date.

(3) The draft administrative determination shall be sent to the claimant.

(4) The authorized officer shall publish a notice of the draft administrative determination in a newspaper of general distribution in the vicinity of the claim and in the Federal Register. The notice shall request public comment only on the draft administrative determination. The public comment period shall last for a minimum of 30 days.

(f)(1) FINAL ADMINISTRATIVE DETERMINATION-- Within one year of the date of publication of the notice of the draft administrative determination, the authorized officer

shall review public comment, if any, and shall consult with each appropriate Federal agency. Upon concurrence by each appropriate Federal agency, the authorized officer shall prepare the final administrative determination.

(2) The final administrative determination shall include findings regarding:

(A) Whether the grant of the right-of-way pursuant to R.S. 2477 over public land not reserved for public uses was validly accepted prior to the latest available date;

(B) If the grant of the R.S. 2477 right-of-way over public land not reserved for public uses was validly accepted prior to the latest available date, whether the R.S. 2477 right-of-way has been abandoned; and

(C) If the grant of the R.S. 2477 right-of-way over public land not reserved for public uses was validly accepted prior to the latest available date, and has not been abandoned, a description of the width, type of surface, and beginning and ending points of the right-of-way, as of the latest available date.

(3) The final administrative determination shall be sent to the claimant.

(4) The authorized officer shall publish a notice of the final administrative determination in the Federal Register.

(g)(1) FINAL AGENCY ACTION-- A final administrative determination made pursuant to subsection (f)(1) shall constitute final agency action subject to review either by the United States District Court for the District of Columbia or the United States District Court in the district within which the longest lineal portion of the claimed R.S. 2477 right-of-way lies.

(2) Any action initiated in a United States District Court pursuant to subsection (g)(1) shall be filed no later than three years from the date of publication in the Federal Register of a

notice of the final administrative determination.

(3) Judicial review of a final administrative determination shall be limited to a review of the administrative record.

(h)(1) RECORDATION OF VALID R.S. 2477 RIGHT-OF-WAY-- Within five years from the date of publication in the Federal Register of a final administrative determination recognizing a valid R.S. 2477 right-of-way, the claimant shall complete a center-line survey of the right-of-way in accordance with the Bureau of Land Management Manual of Surveying Instructions (1973) and shall file the survey with the State office of the Bureau of Land Management and with the appropriate land records of the State.

(2) The failure of any claimant to complete a center-line survey and to file such survey with the Bureau of Land Management within the time specified by subsection (h)(1) shall constitute an abandonment and a relinquishment of any rights purported to have been acquired under R.S. 2477.

LAW GOVERNING ADMINISTRATIVE DETERMINATIONS

SEC. 5(a) RELATIONSHIP OF FEDERAL AND STATE LAW REGARDING DETERMINATION OF VALIDITY OF R.S. 2477 RIGHT-OF-WAY-- In making an administrative determination of whether the grant of a right-of-way pursuant to R.S. 2477 over unreserved public lands was validly accepted prior to the latest available date, the authorized officer shall apply the law of the State in which the claimed right-of-way is located, and which was in effect on the latest available date, to the extent that law is consistent with this Act and other Federal law.

(b) EFFECT OF PRIOR ADJUDICATIONS-- Where the validity of any portion of a claimed R.S. 2477 across lands owned or controlled by the United States has been adjudicated by a court of competent jurisdiction in a matter where the United States was a party, the authorized officer shall recognize such adjudication.

SAVINGS PROVISION

SEC. 6 APPLICATION OF FLPMA AND ANILCA-- Nothing in this Act is intended to or shall be construed to affect, change, alter, or modify Title V of the Federal Land Policy and Management Act (43 U.S.C. 1761-1771) or Title XI of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3161-3173).

SECTION BY SECTION ANALYSIS OF
REVISED STATUTE (R.S.) 2477 RIGHTS-OF-WAY ACT

Section 1. Short Title

This section states the title of the Act.

Section 2. Definitions

This section defines the key statutory terms of R.S. 2477 and other key terms of the Act.

Paragraph (1): Abandonment. The definition would codify common law standards for determining whether the holder of a right-of-way has abandoned the right-of-way. The draft bill, therefore, would require the authorized officer to find that the claimant intended to relinquish any right, title or claim to the R.S. 2477 right-of-way; the authorized officer may infer an intent to relinquish the R.S. 2477 right-of-way by a preponderance of the evidence showing lack of public use of the right-of-way since October 21, 1976, the failure of the claimant to perform routine maintenance on the right-of-way since October 21, 1976, and/or acts by the claimant inconsistent with the use of the right-of-way by highway traffic.

Paragraph (2): Appropriate Federal Agency. Each Federal agency with management jurisdiction over any portion of the Federal land over which the claimed R.S. 2477 right-of-way lies would be an appropriate Federal agency.

Paragraph (3): Authorized officer. The authorized officer would be the Secretary of the Federal department having management jurisdiction over the longest lineal portion of the claimed R.S. 2477 right-of-way or the Secretary's designee within the Federal agency having management jurisdiction over the longest lineal portion of the claimed R.S. 2477 right-of-way.

The authorized officer would coordinate action among all appropriate Federal agencies.

Paragraph (4): Claim. The claim would be the filing of documentation that asserts the existence of a right-of-way pursuant to R.S. 2477 across Federal lands. Claims must contain sufficient information to demonstrate to the authorized officer that each element of R.S. 2477 has been met.

Paragraph (5): Claimant. The claimant would be any State or political subdivision of a State that asserts the existence of and a property interest in a right-of-way pursuant to R.S. 2477 across Federal land.

Paragraph (6): Construction. The definition recognizes that Congress intended in R.S. 2477 to authorize a specific activity -- the construction of a highway -- and did not intend to authorize less durable forms of access. The draft bill, therefore, would require intentional physical acts be performed with the achieved purpose of preparing a durable, observable physical modification of land and that this modification be suitable for highway traffic.

Paragraph (7): Highway. When R.S. 2477 was enacted, a highway was understood to mean an open public road that served public travel or commerce needs or connected places between which people or goods traveled. The draft bill, therefore, would require that a claimant show construction of a thoroughfare that was, prior to the latest available date, used by the public without discrimination against any individual or group for passage of vehicle carrying people or goods from place to place.

Paragraph (8). Latest available date. This is the latest date on which a party could have acquired a right-of-way pursuant to R.S. 2477. The latest available date is the earlier of (A) October 21, 1976, in the case of lands that were unreserved public lands as of that date; or

(B) the date the public lands were reserved for public uses (such as date of withdrawal from entry or designation of public use by statute, Presidential Proclamation or Executive Order, Secretarial Order, or administrative decision) in the case of public lands reserved for public uses before October 21, 1976.

Paragraph (9): Public Lands Not Reserved for Public Uses. The term is used in R.S. 2477 and means lands owned by the United States that were available and open to the public under various public land laws that provided disposition to the public, but lands that had not been set aside, withdrawn, reserved, dedicated, settled, preempted, entered, appropriated, or disposed of, or on which claims had not been located.

Section 3. Filing of Claim for Determination of Validity of R.S. 2477 Right-of-Way

Subsection (a): Filing Deadline. Each claimant would be required to file a request for an administrative determination of the validity of each claimed R.S. 2477 right-of-way within 3 years from the date of enactment of the Act.

Subsection (b): Coordination Among Appropriate Federal Agencies. The authorized officer would coordinate action among appropriate federal agencies in the review and processing of the claim. The authorized officer would notify the other appropriate federal agencies, the claimant, and other parties of record if the claimant failed to meet the filing deadline.

Subsection (c): Effect of Failure to Meet Filing Deadline. Each claimant would be required to file a request for an administrative determination of the validity of each claimed R.S. 2477 right-of-way within 3 years from the date of enactment of the Act. The failure to

file a claim by that date would result in a complete relinquishment of any rights purported to have been acquired under R.S. 2477. The authorized officer's decision that a claimant has not met the filing deadline would be considered final agency action and would be immediately appealable. Any aggrieved party would be required to file an action challenging the authorized officer's determination that the claimant had failed to meet the filing deadline within 3 years from the date of that determination.

Section 4. Administrative Determination of Validity of R.S. 2477 Right-of-Way

Subsection (a): Burden of Proof. Each claimant would have the burden of proof that the grant of a right-of-way under R.S. 2477 was validly accepted.

Subsection (b): Contents of Claim. Each claimant would be required to submit sufficient information to demonstrate to the authorized officer that each element of R.S. 2477 has been met. Each claimant would be required to submit general historical and descriptive information and any additional documentation necessary to demonstrate that a claimed right-of-way across unreserved public land was validly acquired.

Subsection (c): Review of Claim. The authorized officer would review the contents of each claim and make a preliminary determination of whether the claim presents sufficient information to demonstrate that each element of R.S. 2477 has been met, and, if so, whether the R.S. 2477 right-of-way has been abandoned.

Subsection (d): Consultation. The authorized officer would consult with other appropriate Federal agencies, and States, Tribes, and/or Alaska Native Corporations that own or control lands affected by the claimed R.S. 2477 right-of-way regarding whether the claim

presents sufficient information to demonstrate that each element of R.S. 2477 has been met, and, if so, whether the R.S. 2477 right-of-way has been abandoned.

Subsection (e): Draft Administrative Determination. After review of all the evidence, review of Bureau of Land Management official public land records, consultation with States, Tribal governments and/or Alaska Native Corporations that own or control lands affected by the claimed R.S. 2477 right-of-way, and concurrence by the appropriate federal agencies, the authorized officer would prepare a draft administrative determination. The draft administrative determination would contain proposed findings regarding the validity and scope of the claimed R.S. 2477 right-of-way, and, whether a valid R.S. 2477 right-of-way has been abandoned. The draft administrative determination would be sent to the claimant, and would be subject to public notice and comment.

Subsection (f): Final Administrative Determination. Within one year of the date of publication of the draft administrative determination, the authorized officer would review public comment, gain the concurrence of each appropriate Federal agency, and prepare a final administrative determination. The final administrative determination would be sent to the claimant. The final administrative determination would contain final findings regarding the validity and scope of the claimed R.S. 2477 right-of-way, and whether a valid R.S. 2477 right-of-way has been abandoned.

Subsection (g): Final Agency Action. The final administrative determination would constitute final agency action on a claim and would be immediately appealable. Any aggrieved party would be required to file an action challenging the final administrative determination within 3 years from the date of publication in the Federal Register of that determination.

Subsection (h): Recordation of Valid R.S. 2477 Rights-of-Way. Within 5 years from the date of publication in the Federal Register of a final administrative determination recognizing a valid R.S. 2477 right-of-way, the claimant would be required to conduct a center-line survey and to file the survey with the Bureau of Land Management and with the appropriate land records of the State.

Section 5. Law Governing Administrative Determination.

Subsection (a): Relationship of Federal and State Law Regarding Determination of Validity of R.S. 2477 Right-of-Way. The authorized officer would follow the law of the State in which the claimed right-of-way lies to determine the validity of a right-of-way under R.S. 2477, but only to the extent the State law is consistent with this Act and other Federal law.

Subsection (b): Effect of Prior Adjudications. The authorized officer would recognize the final decision of a court of competent jurisdiction finding valid any portion of a claimed R.S. 2477 right-of-way.

Section 6. Savings Provision.

This section provides that the administrative procedure established by the Act is not intended to, nor does it effect, any changes, amendments, alterations or modifications of Title V of the Federal Land Policy and Management Act (43 U.S.C. 1761-1771) or Title XI of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3161-3173).