

## 2800 - RIGHTS-OF-WAY

01. Purpose. The Bureau of Land management (Bureau) Manual Section 2800 provides policy and program direction for issuing, administering, amending, and renewing right-of-way grants and temporary use permits in an environmentally, socially, and economically sound manner. This Manual Section provides instructions to the program managers for right-of-way planning and program management.

02. Objectives. The objectives of the right-of-way program are to:

A. Recognize that right-of-way uses of the public lands are a major use of the public lands authorized by the Federal Land Policy and Management Act (FLPMA) and the Mineral Leasing Act (MLA); as such, the Right-of-Way program must receive the level of management interest, priority, and attention commensurate to the other principal uses of the public lands and to the magnitude of the impacts associated with the various rights-of-way proposals.

B. Provide policy, procedures, and guidance for managing rights-of-way on public land so as to:

1. Minimize the proliferation of separate rights-of-way and adverse environmental impacts resulting from such proliferation.
2. Promote the utilization of rights-of-way in common with respect to engineering and technological compatibility, national security, and land use planning.
3. Provide a system of designated right-of-way corridors on public land to help meet future right-of-way needs as appropriate.

C. Promote efficiency in granting rights-of-way.

D. Promote uniform right-of-way application processing and granting requirements and procedures.

E. Promote to the greatest extent practicable the use of applicant/holder generated plans of development.

03. Authority.

A. Title V of the Federal Land Policy and Management Act of October 21, 1976, as amended 43 U.S.C. 1761-1771.

B. Section 28 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. 185.

C. The Federal-Aid Highway Act of August 27, 1958, 23 U.S.C. 107(d), 317.

D. Title XI of Alaska National Interest Lands Conservation Act of December 2, 1980 16 U.S.C 3161-3173.

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## E. 43 Code of Federal Regulations:

1. Part 2800, Rights-of-Way, Principles and Procedures, Subpart 2800 Rights-of-Way, General.
2. Part 2810, Tramroads and Logging Roads.
3. Part 2880, Oil and Natural Gas Pipelines and Related Facilities, General.

04. Responsibility.

A. Director and Associate Director are responsible for overall compliance with statutory authorities, Department policies, and right-of-way development and management programs affecting the public lands.

B. Deputy Director for Lands and Renewable Resources, through the Assistant Director, Land Resources, and the Chief, Division of Rights-of-Way, is responsible for providing regulation, direction, policy, and procedural guidance for efficiently evaluating and processing right-of-way applications, issuing right-of-way authorizations, monitoring and terminating right-of-way grants, managing the Bureau's right-of-way program, and providing for future needs through designation of right-of-way corridors.

C. State Directors, District Managers, and Area Managers, within their delegated areas of responsibility, are responsible for uniformly implementing and carrying out the guidance and instruction contained in this 2800 Manual series, implementing and managing the rights-of-way program in their States, Districts or Areas, programming and budgeting right-of-way funds, issuing local instructions, maintaining program quality control, maintaining a cadre of personnel proficient in developing, evaluating and processing right-of-way applications, providing timely compliance and monitoring during construction, designating and managing corridors as necessary to meet future right-of-way needs.

05. References. (Reserved)06. Policy. It is the policy of the BLM to:

A. Authorize all right-of-way uses on public and Federal lands at the discretion of the authorized officer in the most efficient and economical manner possible by a right-of-way grant or temporary use permit except for:

1. Transportation and utility facilities which have been otherwise authorized by statute, regulation, or a Bureau approved land-use authorizations
2. Casual use.

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B. Manage right-of-way use of the public land through a system of designated right-of-way corridors. The use of right-of-way corridors will be actively encouraged by the Bureau managers whenever practical and feasible.

C. Whenever applicable, apply categorical exclusion provisions for rights-of-way applications for lands within designated corridors.

D. Allow owners of non-Federal lands surrounded by public land managed under FLPMA a degree of access across public land which will provide for the reasonable use and enjoyment of the non-Federal land. Such access must conform to rules and regulations governing the administration of the public land; keep in mind, however, that the access necessary for the reasonable use and enjoyment of the non-Federal land cannot be denied.

E. Recognize as an authorized use, any rights-of-way constructed on public land on or before October 21, 1976, under the authority of any act repealed as to future authorization by FLPMA. No further authorization is required by the holder for the following:

1. Ditches and canals constructed on public land under the authority of the Act of July 26, 1866 (43 U.S.C. 661).

2. A right-of-way for a highway, road, or trail constructed on public land under R.S. 2477 or other appropriate authority.

3. Facilities usual to a highway located within the limits of a right-of-way granted pursuant to Title 23 of the Federal Aid Highway Act.

4. On acquired public lands, facilities which have been authorized by the previous landowner and not acquired by the United States.

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5. On acquired public lands facilities for which the right-of-way use was established by adverse possession or prescription. The adverse possession or prescriptive use had to have been established prior to acquisition of the land by the United States.

F. Provide all right-of-way applications and grants timely and equitable consideration and the highest degree of public service.

G. Maximize the use of performance stipulations through the use of construction, operation and maintenance plans, while allowing management discretion for the use of development stipulations for small projects, small contractors, or for special situations.

H. Recognize the importance of right-of-way grant administration and make available to field level managers the resources commensurate to the anticipated impacts of the various right-of-way projects.

I. Assure to the greatest extent possible that all identified impacts are mitigated and that the terms and conditions of the right-of-way grant are complied with.

07. Scope.

A. The Manual Section 2800 provides the basic source of permanent internal written policy, procedures, and program direction needed to manage rights-of-way on the public lands. This Manual Section will be primarily used for program management.

B. Handbooks will be the source of detailed instructions needed to carry out policy, procedures, and program direction contained in the Manuals. Handbooks are considered part of the Manual and have the same force of authority as the Manual Section.

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- a. The exclusive (and/or perpetual) easement must be appraised unless the right to receive fair market value is waived in writing by the landowner.
  - b. If the appraised value of the perpetual easement is greater than the lump sum right-of-way rental amount determined as described in 47B6 above, BLM must pay the difference as part of the easement consideration.
3. Processing. Processing and execution of the R/W grant and easement should be done concurrently; however, issuance of the R/W grant should not be held up by work on the easement. The R/W grant should contain the stipulation, that if the holder is unwilling or unable to grant the easement, the waiver or reduction of full cost recovery and annual rental payments is null and void.

48 Right-of-Way Uses not Requiring a Right-of-Way Grant. Some right-of-way uses are authorized by other statutes (e.g., mining laws), or have grandfather rights from law that predates FLPMA (e.g., Revised Statute (RS 2477)), or other uses that are minor in nature.

A. Casual Use. The authorized officer shall make every effort to allow uses of the public lands without a right-of-way grant or temporary use permit, under the provisions for casual use. Casual use does not provide the user with any interest or rights in or to the affected public land. If a proposed use is expected to cause appreciable disturbance or damage to public lands or resources and needs to be controlled, it is not casual use.

### 1. Criteria for Identifying Casual Use.

- a. The need for BLM to control or regulate access is a guide for determining whether casual use is applicable. If access needs to be controlled or regulated through the use of stipulations, casual use is not applicable.
- b. The possibility of appreciable disturbance or damage is a judgment call that needs to be made in advance. It may be helpful to review similar activities that have previously occurred in other locations. Did they cause appreciable damage? Will there be any significant evidence of the activity in the near future? Would the majority of observers be aware of or concerned by the activity?

### 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

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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**.

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 acknowledgment.

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

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on public lands to support the acceptance of the Congressional grant, the Authorized Officer will issue a letter of acknowledgment 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 asserter, 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 asserter/holder or developed by BLM, consists of (1) m' ap(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 asserter/holder, if known; and (5) where acknowledged by BLM, a copy of the acknowledgment letter to the holder or, where holder is unknown, a memorandum for the file.

a. For acknowledged RS 2477 rights-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.

4. Management Issues. Reasonable activities within the RS 2477 right-of-way are within the jurisdiction of the holder. These includes 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.

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(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 4P 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.

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