United States Department of the Interior

OFFICE OF THE SOLICITOR

JAN 10 2003

Memorandum

To: Secretary

From: Solicitor WJM mjt

Subject: Revised Draft of Proposed R.S. 2477 Policy

I am attaching the most recent revision of the proposed R.S. 2477 policy. It incorporates your comments on the previous draft in underline/~~strikeout~~ format. Where you requested an addition without proposing specific text, those additions are also set out in underline format and are accompanied by an explanatory note. This version also includes some editorial changes proposed by the Forest Service. The Forest Service wants to issue a new R.S. 2477 policy of its own that tracks Interior's new policy as closely as possible. For clarity, I have formatted the Forest Service's proposed changes in ***bold italics with a green font***. An explanatory note also accompanies most of the Forest Service's proposed changes. Finally, your original markup is attached for your reference.

When you return the draft for finalization, let me know if you want the draft to go to the addressees prior to your signature.

Attachment

cc: Deputy Secretary

Explain → right away - ① buy out county
② condem
③ recordation clearly

1902-1934 =
Right away to pave = State law as to when? analytical framework
Abandoned by State now is it abandoned

Appropriations - Recordable disclaimer

Memorandum

To: Assistant Secretary, Fish and Wildlife and Parks
Assistant Secretary, Land and Minerals Management
Assistant Secretary, Indian Affairs
Assistant Secretary, Water and Science

From: Secretary

Subject: Departmental Policy for Revised Statute 2477 Rights-of-Way; Revocation of January 22, 1997, Interim Policy and December 7, 1988, Departmental Policy

Introduction

In a Report to Congress prepared in June of 1993, the Department of the Interior explained that unresolved conflicts over the status of rights-of-way created pursuant to R.S. 2477 were creating "a continuing cloud on Federal agencies' ability to manage federal lands." This conclusion is even more relevant today than it was nearly ten years ago. A cornerstone of the Department's approach to resource management is to identify cooperative ways to manage and conserve resources. Yet, this cooperative approach can be very difficult to achieve when management decisions are dominated by the longstanding, and seemingly intractable, conflicts created by the uncertain status of thousands of R.S. 2477 rights-of-way throughout the American West.

It is long past time to bring some finality to an issue that has created unnecessary conflict between federal land managers and state and local governments since R.S. 2477 was repealed by the Federal Land Policy and Management Act (FLPMA) nearly thirty years ago. In order to move forward with a cooperative approach to the management of federal land, the Department needs to adopt a uniform policy with identifiable criteria, consistent with historical regulation prior to October 21, 1976, for analysis of R.S. 2477 rights-of-way. This policy and the criteria must explicitly acknowledge the history of R.S. 2477 right-of-way disputes.

History of R.S. 2477 Right-of-Way Disputes

On July 26, 1866, President Andrew Johnson signed into law "An Act Granting Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes" (Act of 1866). Section 8 of this Act stated, "[a]nd be it further enacted, that the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." In 1873, Section 8 of the Act of 1866 was reenacted and codified as part of the Revised Statutes of 1873. This codification caused Section 8 of the Act of 1866 to be designated as Section 2477 of the Revised Statutes of 1873.

Revised Statute 2477 was passed during a period when the federal government was promoting the settlement of the American West. Mining and homesteading had been occurring on the public domain without statutory authority, as had construction of roads, ditches, and canals to support these activities. Passage of the Homestead Act in 1862 began a new era of settlement of the Federal lands. Access was promoted by Congress through railroad land grants and special legislation for major transportation routes. However, private and individual access was not directly addressed by the initial homesteading legislation. Private and individual access was instead left to local custom or state law. The Act of 1866 not only established the first system for the patenting of lode mineral claims, but, by including the language that would eventually be codified as R.S. 2477, it also provided statutory authority for access across federal land in the West.

Under the authority granted by R.S. 2477, thousands of miles of highways were established across the public domain. R.S. 2477 was a primary authority under which many current state and county highways were constructed and operated over federal lands in the western United States. Highways were typically constructed without any approval from the federal government beyond the self-executing grant of access created by R.S. 2477. As judicial decisions have recognized, "a[n R.S. 2477] right-of-way could be obtained without application to, or approval by, the federal government." *Sierra Club v. Hodel*, 848 F.2d 1068, 1078 (10th Cir. 1988). *See, also,* 43 C.F.R. § 2822.1-1 (1979); 43 C.F.R. § 244.55 (1939). As a result, there are few official records documenting the rights-of-way or highways that may have been constructed on federal land pursuant to R.S. 2477.

In 1938, R.S. 2477 was recodified as 43 U.S.C. § 932. The original language of Section 8 of the Act of 1866 stayed in effect as 43 U.S.C. § 932 until it was repealed by the passage of FLPMA. The repeal of R.S. 2477 through FLPMA became effective on October 21, 1976. Almost immediately after the FLPMA repeal of R.S. 2477, controversies began to emerge around the West involving the ownership and management of highways that had been constructed pursuant to R.S. 2477.

While isolated at first, disputes over the control of R.S. 2477 rights-of-way became widespread in the 1980s. In the State of Utah, for example, the State has asserted over 5,000 potential R.S. 2477 rights-of-way. By the early 1990s, only a handful these rights-of-way had been recognized by the federal government. In the State of Alaska, nearly all of the land was public domain under federal control prior to the State's admission to the Union in 1959. During this period, a wide variety of routes developed in order to provide access across Alaska's rugged terrain. The status of many of these access routes continues to be disputed.

On December 7, 1988, then-Secretary Hodel issued "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)." The "Hodel Policy" established criteria for recognizing existing R.S. 2477 rights-of-way and instructed Interior Bureaus to "develop, as appropriate, internal procedures for administratively recognizing those highways." Interior bureaus subsequently followed the general

guidelines of the "Hodel Policy" to develop procedures for determining the validity of an asserted R.S. 2477 right-of-way. The Department used the "Hodel Policy" and the procedures implemented pursuant to the Policy to review R.S. 2477 right-of-way claims until 1993.

In 1992, Congress sought to find a resolution to the deepening conflict between western states and federal land managers over R.S. 2477 right-of-way disputes by ordering the Department of the Interior to prepare a status report as part of the 1993 appropriations process. The Conference Report accompanying the 1993 Interior Appropriations Bill states:

> The managers agree that by May 1, 1993, the Department of the Interior shall submit to the appropriate committees of the Congress a report on the history of rights of way claimed under section 2477 of the Revised Statutes, the likely impacts of current and potential claims of such rights of way on the management of the Federal lands, Indian and Native lands, on multiple use activities, the current status of such claims, possible alternatives for assessing the validity of such claims and alternatives to obtaining rights of way, given the importance of this study to the Western public land States.

The Conference Report admonished the Department of the Interior to find some method of resolving the conflicts: "[t]he managers expect sound recommendations for assessing the validity of claims to result from the study, consonant with the intent of Congress both in enacting R.S. 2477 and FLPMA." Finally, the Conference Reports states that any "validity criteria" developed by the Department of the Interior "should be drawn from the intent of R.S. 2477 and FLPMA," and that "any proposed changes in use of a valid right of way shall be processed in accordance with the requirements of applicable law."

In June of 1993, the Department of Interior submitted a "Report to Congress on R.S. 2477" pursuant to the direction set out in its 1993 Appropriations Bill. The Interior Report announced that the Department would respond to Congress' instructions by promulgating regulations that would implement the Department's recommendations for resolving R.S. 2477 rights-of-way disputes. As part of the report, Interior announced that until final rules addressing R.S. 2477 rights-of-way had been developed, "the Bureau of Land Management will defer any processing of R.S. 2477 assertions except in cases where there is a demonstrated, compelling, and immediate need to make such determination." ***In September, 1997, the Forest Service issued substantially similar direction.***

Nearly ten years later, very little progress has been made toward accomplishing the Congressional charge to develop "sound recommendations for assessing the validity" of R.S. 2477 claims. However, the resolution of this issue is even more urgent now than it was in 1993, when the Department's Report to Congress explained that the continuing conflict over R.S. 2477 rights-of-way "creates a continuing cloud on Federal agencies' ability to manage federal lands." The "continuing cloud" presented by the myriad unresolved R.S. 2477 claims is a constant impediment to effective land use planning decisions.

The Department is poised to revise a significant number of BLM Resource Management Plans (RMPs) in the near future. Many of these RMP revisions will occur in areas where the disputes over R.S. 2477 rights-of-way are centered. The Department must utilize all available tools to resolve the status of R.S. 2477 rights-of-way to facilitate the Department's obligations to manage federal public land while also acting as a responsible partner with state and local governments in the American west.

Departmental Policy

The purpose of this memorandum is to establish uniform policy with identifiable criteria, consistent with historical ***practices and*** regulation prior to October 21, 1976, for any analysis of R.S. 2477 rights-of-way that the Department might perform. Issuing this uniform policy and criteria is consistent with the 1993 Congressional directive to develop "validity criteria" that are based on the "intent of R.S. 2477 and FLPMA."

[Your editorial comments asked for an expansion of the following paragraph. Is this sufficient?]

In utilizing this policy, the Department must be mindful of both the property rights of R.S. 2477 right-of-way owners and federal rights. In areas that have been reserved for specified purposes after the creation of R.S. 2477 rights-of-way, the Department intends to work in a collaborative manner with those who live, work and recreate in and around these areas to ensure that unnecessary conflict can be resolved and that unnecessary impact can be avoided. It is particularly important to recognize that management and use of R.S. 2477 rights-of-way may require reasonable efforts to minimize impacts to adjoining federal land, especially those areas that have been set aside for conservation purposes. This policy will also apply when working with local and state governments to assert R.S. 2477 rights-of-way to ensure and protect access to public lands.

In order to ensure consistency, the following documents are hereby revoked:

- "Interim Departmental Policy on Revised Statute 2477 Grant of Right-of-Way for Public Highways; Revocation of December 7, 1988 Policy," dated January 22, 1997;
- "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)," dated December 7, 1988;
- Letter from Deputy Solicitor Frederick Ferguson to Assistant Attorney General James Moorman regarding "Standards to be applied in determining whether highways have been established across public lands under the repealed statute R.S. 2477 (43 U.S.C. § 932)," dated April 28, 1980;

In particular, the 1997 Interim Departmental Policy's instruction to BLM to "defer any processing of R.S. 2477 assertions except in cases where there is a demonstrated, compelling, and immediate need to make such determinations" is revoked.

Criteria for Determining R.S. 2477 Rights-of-Way

In 1997, Congress placed a moratorium on the promulgation of any "final rule or regulation . . . pertaining to the recognition, management, or validity of a right of way pursuant to Revised Statute 2477" as part of the appropriations process. *See* Pub. L. 104-208, § 108, 110 Stat. 3009 (1996). The 1997, "Interim Departmental Policy" recognized this limitation and referred to it as a basis for developing interim policy "[u]ntil final rules are effective." While the 1997 Interim Departmental Policy is repealed by this memorandum, it is crucial to have some consistent policy criteria in place for use by the Department. Indeed, the legislative history accompanying the 1997 moratorium specifically states that the moratorium language "does not limit the ability of the Department to acknowledge or deny the validity of claims under RS 2477."

The criteria below are not final rules or regulations. Since they are not final rules or regulations, they only ***apply to*** the Department of the Interior. ~~But reviewing courts have made it clear that informal policy statements by federal agencies interpreting a statute, like the criteria below, are "entitled to respect," and will be afforded deference "to the extent that those interpretations have the 'power to persuade.'" *See Christensen v. Harris County*, 529 U.S. 576, 586 (2000), *quoting Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).~~

Acceptance by Grantee

Since R.S. 2477 was a self-executing grant of access, highways were typically constructed without any prior approval from the federal government other than R.S. 2477 itself. ~~Judicial decisions have recognized, "a[n R.S. 2477] right-of-way could be obtained without application to, or approval by, the federal government." *Sierra Club v. Hodel*, 848 F.2d 1068, 1078 (10th Cir. 1988). *See, also*, 43 C.F.R. § 2822.1-1 (1979); 43 C.F.R. § 244.55 (1939).~~ But the historical regulations in effect at the time a grant of an R.S. 2477 right-of-way could be perfected and the applicable judicial decisions demonstrate that all three of the following conditions must have been met to constitute the acceptance by the grantee of the federal grant of an R.S. 2477 right-of-way:

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

[The Forest Service proposes to strengthen the connection between "establishment" and actual "construction" by adding "undertaken with due diligence" to Number 2, below.]

2. Construction or, alternatively, establishment of the "highway" followed by construction ***undertaken with due diligence*** within a reasonable period of time, must have occurred no later than the earlier of the date the underlying lands were reserved for public uses or October 21, 1976 (hereinafter "cut-off date"). The "construction" of the "highway" must have occurred pursuant to the State law in

effect on the cut-off date.

3. The highway so constructed must be considered a public highway according to the definition of "highway" set out below.

[The first change proposed by the Forest Service in the following paragraph reflects its desire to make it clear that the "historical regulations" referred to in the policy are Interior's regulations. The second change moves a sentence from the "Construction" section, below, to this introductory section because it applies to all definitions, not just the definition of "Construction." And the Forest Service proposes to soften this moved sentence by inserting the word "may."]

R.S. 2477 includes a number of important terms and phrases like "construction," "highway,"and "public lands, not reserved for public uses." ***The Department of Interior's h***~~H~~historical regulations and judicial decisions incorporate the concept of "establishment" into R.S. 2477 determinations. ***As a matter of federal law, State law in effect on the cut-off date may controls the existence and scope of an R.S. 2477 right-of-way*** While R.S. 2477, itself, does not define these terms and phrases, the definitions below are intended to provide consistency in their application.

Public Lands, Not Reserved for Public Uses

"Public lands, not reserved for public uses" were surface lands of the United States that were open to operation of the various public land laws enacted by Congress and those public lands, not reserved by Act of Congress, Executive Order, Proclamation, Secretarial Order, or other classification actions authorized by statute.

Construction

[The Forest Service believes that it is unnecessary to explicitly reference "foot, horse, vehicle, etc." in the definition of "Construction" when the same sentence within the definition already refers to "the available or intended mode of transportation." This change will remove an easy point of focus for the policy's potential critics.]

"Construction" necessary to satisfy R.S. 2477 must have occurred while the lands were public lands, not reserved for public uses. If allowed under State law on the cut-off date, the term "construction" includes physical acts of readying the highway for use by the public according to the available or intended mode of transportation~~ - foot, horse, vehicle, etc~~. More specifically, it may include removing vegetation, moving large rocks out of the way, filling low spots, creation or maintenance of the highway by grading or installing culverts, cattle guards, hardened crossings, bridges or other such activity. The existence of a highway in a condition suitable for public use may constitute evidence of construction sufficient to conclude that a grant under R.S. 2477 has taken place, if consistent with applicable state law.

[The Forest Service proposes to strengthen the connection between "establishment" and actual "construction" by adding "undertaken with due diligence" to the definition of "Establishment," below.]

Establishment

"Establishment" includes a completed survey, planning or pronouncement by public authorities prior to the cut-off date, followed by construction activity ***undertaken with due diligence*** within a reasonable time on the highway.

[The Forest Service proposes to change the definition of "Highway" by making a general reference to "state or territorial law in effect at the time of the construction" instead of specifically referring to "a pedestrian or pack animal trail." Again, this change will remove a potential focus point for the policy's critics. The Forest Service also proposes to delete the second to the last sentence since it makes the same point as the final sentence.]

Highway

The evaluation of a***n access*** route for eligibility as a "highway" for purposes of R.S. 2477 must be evaluated in a manner that is consistent with Congressional intent in 1866 when the self-executing grant of rights-of-way were originally made. A "highway" is a definitive route or way that is freely open for all to use ***as defined by state or territorial law in effect at the time of construction***. ~~It need not necessarily be open to vehicular traffic because a pedestrian or pack animal trail may qualify~~. A toll road or trail is a highway if the only limitation is the payment of the toll by all users. Multiple ways through a general area presumably will not qualify as a definite route. However, evidence may show that one or more of the ways may be a highway. ~~A highway need not have termini that are some kind of landmarks distinguishable from other points along the highway -~~ *T*the highway need only accommodate travelers from a place along the road to other points as often as convenient or necessary.

[The Forest Service proposes to delete the phrase "establishes the route as a highway" because the phrase is a definitive conclusion rather than merely one of the three enumerated factors.]

If consistent with State law in effect as of the cut-off date, the following additional factors may be considered to determine the existence of a highway:

1. The inclusion of a right-of-way in a state, county, or municipal road system prior to the cut-off date ~~establishes the route as a highway~~.

2. Expenditure of money for construction or maintenance on the right-of-way by an appropriate public body prior to the cut-off date.

3. A statement by an appropriate public body prior to the cut-off date that the right-of-way was and still is considered a highway.

In addition to the definitions set out above, a number of issues related to the determination of R.S. 2477 rights-of-way have consistently emerged over the years. Like the definitions of statutory terms and phrases, the policy guidance for the specific issues set out below is intended to ensure that Department of Interior will be consistent as it applies R.S. 2477.

Burden of Proof

[You editorial remarks ask for a discussion of the basis for asserting that the proponent of the right of way has the burden of proof. Does the new language below accomplish this?]

The party who has the burden of proof regarding the elements of an R.S. 2477 right-of-way can vary depending on the forum where the right-of-way is asserted. In federal court litigation involving R.S. 2477 rights-of-way, for example, the party presenting evidence can vary depending on whether the litigation is a quiet title action filed against the federal government or a trespass action filed by the federal government.

The Department hopes to avoid the need for federal court litigation involving R.S. 2477 rights-of-way by utilizing the "recordable disclaimer of interest" process under section 315 of FLPMA to resolve the ownership of claimed R.S. 2477 rights-of-way. BLM's regulations implementing the "recordable disclaimer of interest" process require applicants for a "recordable disclaimer of interest" to provide certain proof of that the United States no longer has an ownership interest in the property that is the subject of the recordable disclaimer application. *See* 43 C.F.R. § 1864.1-2. Therefore, as a practical matter, the proponent of the right-of-way has the burden of proof to demonstrate by a preponderance of the evidence the validity of an asserted R.S. 2477 right-of-way. The Department ~~shall~~ should make its best effort to help the proponent meet this burden if possible by makeing available to the proponent all information in the Department's possession that is relevant to the determination of the R.S. 2477 right-of-way in question.

Ancillary Uses or Facilities Usual to Public Highways

[Your editorial remarks ask whether the features referenced in the section below must have been built before the repeal of R.S. 2477 in 1976. In particular, you point out that it is probably beyond the scope of any right perfected under R.S. 2477 to build a new "rest area" after 1976. Do you want to condition all of the features below by stating that they must have been built before 1976 or do you want to delete "rest areas" from the list? The latter approach would give BLM more flexibility to include features constructed after 1976, but are still logically part of the original right of way, in any resolution procedure.]

If ~~consistent with State law in existence as of the cut-off date,~~ the grantee has created facilities such as road drainage ditches, back and front slopes, turnouts, ~~rest areas~~ **[??]**, and similar features that facilitate use of the highway by the public, or if the grantee has widened the road, ~~are~~ these changes may be considered part of the right-of-way grant if consistent with state law in effect as of the cut-off date.

[The Forest Service proposes two additions to the new section below.]

Future Uses of Road Rights-of-Way

The determination that a right-of-way exists may not resolve all outstanding issues related to the management of the right-of-way itself and the federal land adjacent to the right-of-way. In some situations, the primary questions may relate to road maintenance. To facilitate the long-term resolution of R.S. 2477 disputes, the Department should work with the proponents to resolve maintenance issues. In other situations, road access may cause management problems for surrounding federally-owned lands, especially in lands set aside for conservation purposes. Land managers may use all of the ***authorities and*** techniques available in other contexts for resolving disputes regarding inholdings on adjoining lands, including consideration of acquisition, ***to protect public resources from unreasonable or unnecessary damage.***

~~Width and Ongoing Maintenance~~

~~Width and ongoing maintenance is an essential aspect of the management of an R.S. 2477 right-of-way. The Department shall work with the proponents of an R.S. 2477 right-of-way to include the width and maintenance in any R.S. 2477 right-of-way determination that the Department may be called upon to make.~~

Abandonment

Abandonment, including relinquishment by proper authority, occurs in accordance with State or local statutory or common law. To determine abandonment, the Department may rely on state law in existence during the relevant time period, including post-1976 state law if the abandonment occurred subsequent to the enactment of FLPMA.

[The Forest Service proposes to delete the phrase "road or trail" from the conclusion because roads and trails are already implicitly included in the definition of "Highway," above. This change will remove another focus point for the policy's critics.]

Conclusion

If a particular highway~~, road or trail~~ satisfies the criteria set out above, Interior agencies should work cooperatively to recognize that highway, ~~road or trial~~ as an R.S. 2477 right-of-way.

Bill - Please get me a copy of the 1993 report.

THE SECRETARY OF THE INTERIOR

WASHINGTON

Memorandum

DRAFT

To: Assistant Secretary, Fish, Wildlife and Parks
Assistant Secretary, Land and Minerals Management
Assistant Secretary, Indian Affairs
Assistant Secretary, Water and Science

From: Secretary

Subject: Departmental Policy for Revised Statute 2477 Rights-of-Way; Revocation of January 22, 1997, Interim Policy and December 7, 1988, Departmental Policy

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The Conference Report admonished the Department of the Interior to find some method of resolving the conflicts: "[t]he managers expect sound recommendations for assessing the validity of claims to result from the study, consonant with the intent of Congress both in enacting R.S. 2477 and FLPMA." Finally, the Conference Reports states that any "validity criteria" developed by the Department of the Interior "should be drawn from the intent of R.S. 2477 and FLPMA," and that "any proposed changes in use of a valid right of way shall be processed in accordance with the requirements of applicable law."

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Departmental Policy

The purpose of this memorandum is to establish uniform policy with identifiable criteria, consistent with historical regulation prior to October 21, 1976, for any analysis of R.S. 2477 rights-of-way that the Department might perform. Issuing this uniform policy and criteria is consistent with the 1993 Congressional directive to develop "validity criteria" that are based on the "intent of R.S. 2477 and FLPMA."

In utilizing this policy, the Department must be mindful of both the property rights of R.S. 2477 right-of-way owners and federal rights. In areas that have been reserved for specified purposes after the creation of R.S. 2477 rights-of-way, the Department intends to work in a collaborative manner with those who live, work and recreate in and around these areas to ensure that unnecessary conflict can be resolved and that unnecessary impact can be avoided.

In order to ensure consistency, the following documents are hereby revoked:

- "Interim Departmental Policy on Revised Statute 2477 Grant of Right-of-Way for Public Highways; Revocation of December 7, 1988 Policy," dated January 22, 1997;
- "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)," dated December 7, 1988;
- Letter from Deputy Solicitor Frederick Ferguson to Assistant Attorney General James Moorman regarding "Standards to be applied in determining whether highways have been established across public lands under the repealed statute R.S. 2477 (43 U.S.C. § 932)," dated April 28, 1980;

In particular, the 1997 Interim Departmental Policy's instruction to BLM to "defer any processing of R.S. 2477 assertions except in cases where there is a demonstrated, compelling, and immediate need to make such determinations" is revoked.

Criteria for Determining R.S. 2477 Rights-of-Way

In 1997, Congress placed a moratorium on the promulgation of any "final rule or regulation . . . pertaining to the recognition, management, or validity of a right of way pursuant to Revised Statute 2477" as part of the appropriations process. *See* Pub. L. 104-208, § 108, 110

Stat. 3009 (1996). The 1997, "Interim Departmental Policy" recognized this limitation and referred to it as a basis for developing interim policy "[u]ntil final rules are effective." While the 1997 Interim Departmental Policy is repealed by this memorandum, it is crucial to have some consistent policy criteria in place for use by the Department. Indeed, the legislative history accompanying the 1997 moratorium specifically states that the moratorium language "does not limit the ability of the Department to acknowledge or deny the validity of claims under RS 2477."

The criteria below are not final rules or regulations. Since they are not final rules or regulations, they only bind the Department of the Interior. But reviewing courts have made it clear that informal policy statements by federal agencies interpreting a statute, like the criteria below, are "entitled to respect," and will be afforded deference "to the extent that those interpretations have the 'power to persuade.'" *See Christensen v. Harris County*, 529 U.S. 576, 586 (2000), *quoting Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Acceptance by Grantee

Since R.S. 2477 was a self-executing grant of access, highways were typically constructed without any prior approval from the federal government other than R.S. 2477 itself. Judicial decisions have recognized, "a[n R.S. 2477] right-of-way could be obtained without application to, or approval by, the federal government." *Sierra Club v. Hodel*, 848 F.2d 1068, 1078 (10th Cir. 1988). *See, also,* 43 C.F.R. § 2822.1-1 (1979); 43 C.F.R. § 244.55 (1939). But the historical regulations in effect at the time a grant of an R.S. 2477 right-of-way could be perfected and the applicable judicial decisions demonstrate that all three of the following conditions must have been met to constitute the acceptance by the grantee of the federal grant of an R.S. 2477 right-of-way:

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

2. Construction or, alternatively, establishment of the "highway" followed by construction within a reasonable period of time, must have occurred no later than the earlier of the date the underlying lands were reserved for public uses or October 21, 1976 (hereinafter "cut-off date"). The "construction" of the "highway" must have occurred pursuant to the State law in effect on the cut-off date.

3. The highway so constructed must be considered a public highway according to the definition of "highway" set out below.

R.S. 2477 includes a number of important terms and phrases like "construction," "highway,"and "public lands, not reserved for public uses." Historical regulations and judicial decisions incorporate the concept of "establishment" into R.S. 2477 determinations. While R.S. 2477, itself, does not define these terms and phrases, the definitions below are intended to provide consistency in their application.

Public Lands, Not Reserved for Public Uses

"Public lands, not reserved for public uses" were surface lands of the United States that were open to operation of the various public land laws enacted by Congress and those public lands, not reserved by Act of Congress, Executive Order, Proclamation, Secretarial Order, or other classification actions authorized by statute.

Construction

"Construction" necessary to satisfy R.S. 2477 must have occurred while the lands were public lands, not reserved for public uses. As a matter of federal law, State law in effect on the cut-off date controls the existence and scope of an R.S. 2477 right-of-way. If allowed under State law on the cut-off date, the term "construction" includes physical acts of readying the highway for use by the public according to the available or intended mode of transportation - foot, horse, vehicle, etc. More specifically, it may include removing vegetation, moving large rocks out of the way, filling low spots, creation or maintenance of the highway by grading or installing culverts, cattle guards, hardened crossings, bridges or other such activity. The existence of a highway in a condition suitable for public use may constitute evidence of construction sufficient to conclude that a grant under R.S. 2477 has taken place, if consistent with applicable state law.

Establishment

"Establishment" includes a completed survey, planning or pronouncement by public authorities prior to the cut-off date, followed by construction activity within a reasonable time on the highway.

Highway

The evaluation of a route for eligibility as a "highway" for purposes of R.S. 2477 must be evaluated in a manner that is consistent with Congressional intent in 1866 when the self-executing grant of rights-of-way were originally made. A "highway" is a definitive route or way that is freely open for all to use. It need not necessarily be open to vehicular traffic because a pedestrian or pack animal trail may qualify. A toll road or trail is a highway if the only limitation is the payment of the toll by all users. Multiple ways through a general area presumably will not qualify as a definite route. However, evidence may show that one or more of the ways may be a highway. A highway need not have termini that are some kind of landmarks distinguishable from other points along the highway - the highway need only accommodate travelers from a place along the road to other points as often as convenient or necessary.

If consistent with State law in effect as of the cut-off date, the following additional factors may be considered to determine the existence of a highway:

1. The inclusion of a right-of-way in a state, county, or municipal road system prior