MEMORANDUM

TO: Secretary

FROM: Matt McKeown

DATE: February 21, 2003

RE: Update for Secretary on Proposed R.S. 2477 Policy

Brian Waidmann asked me to prepare some analysis examining the practical effect of the proposed R.S. 2477 policy guidance that the Department is finalizing. Below, I have set out some of the differences between the 1997 R.S. 2477 policy guidance issued by Secretary Babbitt that is currently in effect and the proposed R.S. 2477 policy that would replace the 1997 guidance. In each case, I have provided an explanation of the practical effect of the individual differences.

1. The new R.S. 2477 policy guidance will lift the internal restrictions on considering R.S. 2477 claims.

The 1997 R.S. 2477 policy guidance instructs the "Bureau of Land Management 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." And any claim for the recognition of an R.S. 2477 right-of-way submitted under the 1997 policy guidance must be accompanied by "an explanation of why there is a compelling and immediate need such a determination." While a handful of R.S. 2477 claims have been considered under the 1997 policy, including those that are the subject of the "Road Wars" case currently being considered by the Tenth Circuit, the restraints imposed by the 1997 policy have generally brought consideration of R.S. 2477 right-of-way claims to a halt.

The proposed policy guidance would rescind the 1997 policy guidance's self-imposed restrictions on the consideration of R.S. 2477 right-of-way claims. In fact, the proposed policy specifically states that if a particular highway meets the criteria set out in the policy, then "Interior agencies should work cooperatively to recognize that highway as an R.S. 2477 right-of-way." This change produces two practical results.

First, a policy that commits to "work cooperatively" with R.S. 2477 right-of-way claimants is more consistent with the "4 Cs" than the 1997 policy's emphasis on avoiding action on potential claims. This cooperative approach will make it easier to resolve disputes over individual R.S. 2477 right-of-way claims.

Second, eliminating "compelling and immediate need" standard set out in the 1997 policy guidance will allow both claimants and Interior bureaus to avoid wasting the time and resources that are required to determine whether individual R.S. 2477 claims meet this standard. Under the proposed policy, both sides can focus on whether the facts accompanying a claim are sufficient to establish that an R.S. 2477 right-of-way exists.

2. The proposed policy provides consistent, meaningful, guidance regarding what activities constitute "construction" at that term was used in R.S. 2477.[1]

The 1997 policy guidance provides very little help for Interior bureaus that may try to determine what activity is sufficient to have constituted "construction" of an R.S. 2477 right-of-way. The 1997 policy simply states that Interior bureaus "shall examine all available documents and maps and perform an on-site examination to determine whether construction on the alleged right-of-way had occurred prior to the repeal of R.S. 2477." There is no definition of "construction." Since an analysis of the specific activity that allegedly constituted "construction" is typically a key part of any R.S. 2477 right-of-way determination, the 1997 policy guidance's failure to define "construction" makes it of very little use in resolving disputes.

By contrast, the proposed policy includes a very clear definition of the term "construction." That definition is consistent with historic regulations, prior policy and relevant case law. All Interior bureaus can apply the proposed policy's definition of "construction" to the facts of specific right-of-way claims. As a practical matter, it will be much easier for Interior bureaus to resolve R.S. 2477 claims if they have a consistent, and meaningful, definition of the term "construction."

Taking one example, the ongoing dispute involving the "road" running through Salt Creek in Canyonlands National Park in Utah revolves around whether sufficient "construction" has actually occurred such that the "road" is an R.S. 2477 right-of-way. If the proposed policy were in place now, the Park Service could likely rely its definition of "construction" to resolve this dispute. It is my personal opinion that the Salt Creek "road" probably does not satisfy the proposed policy's definition of "construction." Assuming that the Park Service agrees with this opinion, the proposed policy could be immediately be used to protect a conservation unit.

3. The proposed policy provide a legally defensible definition of the term "highway."

The 1997 policy guidance defines "highway," another statutory term, as "a thoroughfare used prior to October 21, 1976, by the public for the passage of vehicles carrying people or goods from place to place." Many state and local governments object to limiting the definition of "highway" with the term "vehicles." They argue, correctly, that there were no modern vehicles in 1866 when R.S. 2477 was enacted. Thus, they assert that the definition is inconsistent with

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[1] For reference, R.S. 2477, in its entirety, stated that "[t]he right of way for construction of highways over public lands, not reserved for public uses, is hereby granted."

the statute itself. State and local governments also believe that the "from place to place" requirement is another limitation that is inconsistent with the original statutory grant established by R.S. 2477.

The proposed policy responds to these objections by adopting a descriptive definition of "highway." It is descriptive in that it lists a number of factors that may, under the proper circumstances, demonstrate that a particular access route is a "highway" for purposes of R.S. 2477. No particular factor is deemed mandatory. And the definition specifically states that the "evaluation of an access route for eligibility as a 'highway' for purposes of R.S. 2477 must be performed in a manner that is consistent with Congressional intent in 1866 when the self-executing grant of rights-of-way were originally made."

The practical effect of this change is significant. Since the evaluation of an R.S. 2477 right-of-way claim is highly fact specific, "bright line" rules are difficult to apply. For example, there are certainly many roads that may have been subject to vehicle traffic prior to October 21, 1976, but have been subsequently abandoned pursuant to state law. Those roads should not be deemed valid R.S. 2477 rights-of-way. But they could be under the 1997 policy guidance.

By contrast, the descriptive definition of "highway" in the proposed policy allows claimants to present all their evidence without being forced to satisfy threshold inquiries about prior vehicle use or any other specific issue. State and county governments are eager for the chance to present their evidence and have Interior evaluate it. Right now, the 1997 policy guidance's definition of "highway" is an obstacle in the way of that collaborative exchange of information.

4. The proposed policy pays appropriate deference to state law.

The 1997 policy states that Interior bureaus "shall apply state law in effect on October 21, 1976, to the extent it is consistent with federal law" when making R.S. 2477 right-of-way determinations. By limiting the application of state law to situations where it is "consistent" with federal law, the 1997 policy guidance deviates from long-established Interior policy. In the *Burr Trail* decision, the Tenth Circuit observed that "[a]t least since 1938, the Secretary of Interior has interpreted R.S. 2477 as effecting the grant of a right-of-way 'upon the construction or establishing of highways in accordance with State laws . . ..'" *Sierra Club v. Hodel*, 848 F.2d 1068, 1080 (10th Cir. 1988), *quoting* 43 C.F.R. § 244.55 (1939).

The proposed policy would restore the consideration of state law to its proper role. Instead of requiring "consistency" with federal law, the proposed policy states that as "a matter of federal law, State law in effect on the cut-off date may control the existence and scope of an R.S. 2477 right-of-way." This approach is best because, in the early 1900's, when many of these roads were built, there was no federal law governing road construction, maintenance and abandonment. In many instances, there is still no applicable federal law.

As a matter of practicality, the proposed policy's treatment of state law will avoid counterproductive disputes between claimants and Interior regarding whether a particular element of state law is "consistent" with federal law. Indeed, the debate over the relationship between federal and state law has been prominent in most of the recent litigation involving R.S. 2477. Eliminating this point of contention will make it easier for claimants to place all of their evidence before Interior. And it make it easier for Interior to evaluate that evidence in order to resolve the claim.

Please feel free to contact me at any of the contact numbers below if you have questions.

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