United States Department of the Interior

June 1993

Report to Congress on R.S. 2477

The History and Management of R.S. 2477 Rights-of-Way Claims on Federal and Other Lands

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Introduction

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

Origin of R.S. 2477 Rights-of-Way

With this seemingly simple, 20-word federal statute Congress offered to grant rights-of-way to construct highways over unreserved public lands. Originally, the grant was Section 8 of a law entitled "An Act Granting Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes." The law was also known as the Mining Act of 1866. Several years after the Act was passed, this provision became Section 2477 of the Revised Statutes, hence the reference as R.S. 2477. Later still, the statute was recodified as 43 United States Code (U.S.C.) § 932.

Historic Importance

R.S. 2477 was passed during a period in our history when the federal government was aggressively promoting settlement of the West. Under the authority of R.S. 2477, thousands of miles of highways were established across the public domain. It was a primary authority under which many existing state and county highways were constructed and operated over federal lands in the Western United States. Highways were constructed without any approval from the federal government and with no documentation of the public land records, so there are few official records documenting the right-of-way or indicating that a highway was constructed on federal land under this authority.

Repealed

One hundred and ten years after its enactment, R.S. 2477 was repealed by the Federal Land Policy and Management Act (FLPMA) of 1976.

The Issue

Although this century-old provision was repealed over 16 years ago, its impact is still being felt, because highways established before October 21, 1976 (the effective date of FLPMA) were protected, as valid existing rights-of-way.

Grandfathered rights

In recent years, there has been growing debate and controversy over whether specific highways were constructed pursuant to R.S. 2477, and if so, the extent of the rights obtained under the grant.

Concerns

However, there is concern that public lands withdrawn for National Parks, National Forests, National Wildlife Refuges, and other special management areas may be subject to grandfathered R.S. 2477 rights-of-way. R.S. 2477 claims could affect federal land currently managed under various management objectives by the Bureau of Land Management (BLM), including areas either designated as, or under study for, wilderness.

Some commenters are concerned that historical public access to federal lands is being closed by private land owners. R.S. 2477 claims may also affect land previously in federal ownership that was conveyed to private entities subject to preexisting rights-of-way. This issue is important to some state and county governments and some federal land managers who value the rights-of-way as important to their infrastructure.

Evolution of Controversy

Prior to the late 1970s, there was little hint of the ensuing controversy over R.S. 2477. The Department of the Interior (DOI) did little to manage these rights-of-way, primarily deferring to state law and control.

Link to wilderness

The issue began to emerge with the initiation of the wilderness inventory process for BLM lands outside of Alaska in 1977. For purposes of wilderness inventory, (specifically for what constitutes a "roadless" area) the DOI followed FLPMA's legislative history and adopted a definition of a road that included a requirement for some type of construction by mechanical means. This definition allowed for inventory of large blocks of public land for wilderness consideration, but it also created confusion because the definition of what constituted a "road" over public lands could be seen as different from the definition of a "right-of-way."

State Differences

There have been few problems regarding R.S. 2477 rights-of-way in most public land states although states have handled the issue differently. This may be because of the differences among state laws, although a number of other factors also influence this situation.

Some states have no recognized R.S. 2477 highways and other states have hundreds. The number of recognized highways is, however, neither an indication of problems associated with R.S. 2477 nor of the potential for controversy in the future. Oregon currently has the greatest number of recognized R.S. 2477 highways, with 450, but few problems have resulted from these recognized claims. On the other hand, a state with a large number of recently asserted claims may be an

indication of potential controversy. At the present time, Utah has the greatest number of assertions, with over 5,000, while only 10 R.S. 2477 highways have been recognized.

R.S. 2477 in Utah

To date, Utah has been the focal point for most of the controversy. The issue erupted in 1987 over a popular Southern Utah back-country road called the Burr Trail that borders BLM Wilderness Study Areas (WSAs) and passes through two units in the National Park System. With recognition of the Burr Trail as an R.S. 2477 highway, the local county holder of the right-of-way initiated maintenance and upgrading of the existing road. Plans for road realignment and resurfacing led to extensive litigation in Federal District Court and ultimately in the 10th Circuit Court of Appeals. Issues in contention included the scope of the R.S. 2477 grant and what rights, if any, the county had to improve the road and the federal government's ability to impose mitigation of impacts to WSAs and National Parks and Recreation Areas.

Burr Trail litigation

The R.S. 2477 controversy soon spread to other parts of the state. For several years, citizen groups have proposed that there be additional public lands, beyond BLM recommendations, considered for wilderness designation. In response, some counties began asserting R.S. 2477 rights-of-way on federal lands managed by BLM and the National Park Service. Many of these claims, if deemed valid, could potentially disqualify areas in citizen wilderness proposals.

Controversy spreads

R.S. 2477 in Alaska

Prior to 1959, nearly all of Alaska was public domain under federal control. This, along with the great size of the state, its sparse population, few constructed roads, and dependence upon nontraditional means of transportation, complicates the issue of access in Alaska.

R.S. 2477 emerged as an issue in Alaska in the mid-1980s when the U.S. Fish and Wildlife Service and National Park Service began to prepare their land-use plans for Refuges and Parks in Alaska. This federal action precipitated the State of Alaska's interest in using R.S. 2477 to obtain rights-of-way over federal lands as state and local governments in the Lower 48 States had during their own early developmental periods. The state began to identify historical access routes across federal lands (including Conservation System Units which are areas designated for special protection by the Alaska National Interest Lands Conservation Act (ANILCA) that potentially qualified as R.S. 2477 highways. These access routes were identified under Alaska state law in 1961 in the AS §19.45.001(9) Act. This law included seasonal trails, footpaths, and traditional roads and trails used by wheeled and tracked vehicles.

Access an issue

Trails and footpaths included

Secretarial policy defines construction

In 1985, representatives from diverse Alaska interests began a concerted effort to deal with the R.S. 2477 issue. Responding to this intense interest, the Secretary of the Interior issued in 1988 new policy on R.S. 2477 in the form of a policy statement that applied to all public land states using criteria contained in the 1986 BLM Rights-Of-Way manual and expanded to include criteria defined under Alaska state law. The policy statement included a definition of construction that in certain instances accepted mere use or passage as proof of the existence of a highway. As might be expected, the policy is viewed quite differently among competing public interests. Some view the current policy as extremely important to the economic and social development of Alaska because it maximizes access options over federal and possibly even private lands. Others view the policy as a new threat to federal lands, particularly the newly established National Forests, Refuges, Park Units, and other specially designated areas.

Congress Debates the Issue and Directs This Report

The growing number of road assertions in Utah and Alaska and the growing controversy over the issue between states and counties and interest groups caught the attention of Congress. In 1991, the House of Representatives passed H.R. 1096. This bill would have imposed a cutoff date for claims and specified how the DOI would handle future claims. The Senate adjourned without acting on H.R. 1096.

Moratorium proposed and dropped

In addition, the House-passed fiscal year 1993 appropriations bill for the DOI and related agencies provided for a moratorium on further processing of claims by the DOI, pending completion of legislation. There were no comparable provisions in the Senate version. In conference, the House's moratorium provision was dropped from the appropriations bill, but the conference report did direct the DOI to conduct a study of the history and management of R.S. 2477 rights-of-way. (Appendix I, Exhibit A.)

Report to be prepared

The DOI was directed to prepare a report to Congress on a number of aspects of R.S. 2477. The directive to prepare the report requested that the following information be addressed:

Included in the report

- The history of rights-of-way claimed under R.S. 2477.
- The likely impacts of current and potential claims of such rights-of-way on the management of the federal lands.
- The likely impacts of current and potential claims of such rights-of-way on the access to federal lands, state lands, private lands, Indian and Native lands.
- The likely impacts of current and potential claims of such rights-of-way on multiple-use activities.
- The current status of such claims.

- Possible alternatives for assessing the validity of such claims.
- Alternatives to obtaining rights-of-way.
- Sound recommendations for assessing the validity of claims, consonant with the intent of Congress in enacting R.S. 2477 and FLPMA, that mandated policies of retention and efficient management of the public lands.

BLM Defers Processing Most Claims Pending Completion of Report

Until completion of the report, the DOI has deferred processing of pending claims unless there is an immediate and compelling need to recognize or deny claims. (Appendix II, Exhibit A.)

CRS Report

The Library of Congress Congressional Research Service (CRS) has also prepared a report for Congress entitled, *Highway Rights Of Way: The Controversy Over Claims Under R.S. 2477*, issued January 15, 1993 and updated April 28, 1993. The CRS Report was one of many sources reviewed by DOI in preparation of this report.

The Department of the Interior Study Process

Interagency task force

The DOI was directed to consult with Western Public Land States and other affected interests in preparing the report. This report was prepared in consultation with the BLM Washington Office and other federal offices. To address this important public land issue in a manner that responds to Congressional direction, the DOI assembled a study task force comprised of representative(s) from each BLM state organization, the BLM Headquarters Office, the Office of the Solicitor, the National Park Service, the Bureau of Indian Affairs, and the U.S. Fish and Wildlife Service. The BLM was given the responsibility to lead the Departmental team. The U.S. Forest Service, part of the Department of Agriculture, was consulted in this process.

Public involvement

The active involvement of affected interests from the Western Public Land States has been an essential element of this study. On November 18, 1992, several hundred letters and "scoping" packages were mailed to state and local governments, land-use organizations, and other affected interests. Notification of the study was published in the December 15, 1992 *Federal Register*. News releases were distributed to national, regional, and statewide media outlets announcing the initiation of the study and requesting information from the public.

In addition, several public meetings were held to gain input during November and December 1992 and January 1993. Meetings were conducted in Alaska, California, Idaho, Oregon, Montana, Nevada, and Utah.

Approximately 300 individuals and organizations responded to the task force with several thousand pages of written information, which was helpful in preparing the draft report. See Appendix III, Exhibit A.

Beginning in March of 1993, nearly 4,000 copies of the Draft Report were mailed to interested parties. Seven public meetings were held in western states and attended by approximately 400 persons. In addition, approximately 1000 pages of written comments were received. The information derived from the public meetings and written comments have been considered in the preparation of this final report.

Constituency Positions

Some members of the public view remaining R.S. 2477 rights-of-way as important components of state and local infrastructure, essential to the economic growth and social well-being of the rural West. Some State and local governments argue that existing R.S. 2477 rights-of-way are interests in property for which they should be compensated if lost.

Others see the potential recognition of additional R.S. 2477 roads as conflicting with the goals of the FLPMA and a severe threat to federal lands, including many areas either currently designated or under study for designation as part of the National Wilderness Preservation System. They stress that R.S. 2477 was repealed in 1976 and that pre-existing rights should be construed narrowly.

Some users of public land are concerned that historical and traditional access to federal lands might be limited. A related issue is the growing movement to use the R.S. 2477 right-of-way authority as a means to continue or reopen historical access through private lands to adjacent public lands. In cooperation with local citizens groups, this has been actively pursued in Colorado, Idaho, Montana, and Nevada.

The Federal Interest

Federal agencies have several major areas of concern regarding the R.S. 2477 issue. The first arises out of the open-ended, inchoate character of these claims. R.S. 2477 rights-of-way that existed pre-FLPMA are protected, but there are currently no provisions for inventorying these claims or bringing finality to this issue. This creates a continuing cloud on Federal agencies' ability to manage federal lands, including their power to manage or to control improvements to state or county rights-of-way. The ability to manage natural resource values, consider appropriate contemporary legislation in day-to-day management, and manage for special values like wilderness or areas of critical environmental concern can be compromised by this uncertainty.

A second area of concern arises out of the unique terms used in R.S. 2477. What is the definition of a highway? What constitutes construction? Which public lands are "not reserved for public uses"? What law, state or federal, should answer these questions? This confusion can result in inconsistency, unfairness, and difficulty in wise planning.

A third area involves defining the rights and responsibilities of both the federal agency and the holder of the right-of-way, especially in relation to federal responsibilities to manage federal lands and resources under contemporary laws, and the federal mandate to manage some areas for special values, such as Congressionally-designated National Parks, National Forests, National Wildlife Refuges, National Wilderness Areas, and areas established pursuant to Congressional authority, such as National Monuments, Wilderness Study Areas, and Areas of Critical Environmental Concern.

The History of R.S. 2477 Claims

This section examines the history of R.S. 2477 from legislative, administrative, and legal perspectives.

As noted earlier, R.S. 2477 was one section of a law entitled "An Act Granting Right of Way To Ditch and Canal Owners Over The Public Land, and For Other Purposes." The law was more commonly known as the Mining Act of 1866.

Historical perspective

This legislation was passed during a period when the federal government was aggressively promoting the settlement of the 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 undertakings. 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 but was ignored when it came to the handling of private and individual access. These important but smaller access matters were generally left to local customs or state law. The Mining Act of 1866 not only established the first system for the patenting of lode mining claims, but it also provided for access.

Legislative Setting

A brief look at how Congress passed this legislation provides some clues as to how right-of-way provisions for highways and canals were assembled into a mining law.

The Mining Act of 1866 was enacted in the midst of a major dispute among factions of Congress over the handling of federal mineral deposits. Some, led by California, favored a do-nothing approach as mining, unrestricted by the federal government, continued. Others favored the sale of the mineral lands for paying off the federal debt incurred by the Civil War and other federal activities. There was also continued movement to encourage people to use their War scrip and settle the Western Territories.

The House of Representatives enacted a bill authorizing the sale of mineral lands (H.R. 322). The Senate countered with a bill providing for preemption of lode minerals (S. 257). The Senate bill was bottled up by the House Committee on Public Lands, so the Senate amended a House-

passed ditch and canal right-of-way Bill (H.R. 365) with a revised version of S. 257 in order to keep the legislation out of the hands of the House Committee on Public Lands. This last version was then approved by the House and enacted into law on July 26, 1866. When the Senate amended H.R. 365 with its mining bill (S. 257), there were a number of differences with or revisions to S. 257. Most of the differences or revisions appear to be either technical changes or additions, possibly suggested by the California mining interests. One significant revision was the addition of Section 8, the grant of right-of-way for highways.

Reenacted, Later Repealed

Section 8 of the Mining Act was reenacted and codified as part of the Revised Statutes in 1873. This was the result of recommendations from the Public Land Review Commission, authorized in 1866 to review existing legislation affecting public lands and to suggest codification into related groups. The designation "R.S. 2477" thus replaced "Section 8 of the Mining Act."

In 1938, as part of the recodification of the statutes, R.S. 2477 became 43 U.S.C. §932 until its repeal in 1976 by FLPMA.

The significance of Congressional reenactment of this right-of-way provision is a subject of debate. Some view the Congressional action as a conscious move to retain a broad right-of-way authority. Others see this as an oversight by Congress that has allowed the language of R.S. 2477 to take on a meaning that was probably unintended in the 1866 Act.

What Does R.S. 2477 Grant?

A search of its legislative history reveals little hard evidence of what Congress was thinking when it included Section 8 in the Mining Act of 1866. The Congressional Record offers few clues to the answer.

Issues and questions

The words in the statute are straightforward. R.S. 2477 is a grant of a right-of-way for the construction of highways across unreserved public lands. One hundred and twenty seven years after enactment, however, the intent and scope of this statute remains elusive.

Core "intent" questions

Several historical and legal questions remain. What did Congress grant and to whom? If a grant was established, to what extent were rights conveyed? How and when should these rights be applied? Who has jurisdiction over these rights?

The Department has considered these questions carefully and reviewed the wide range of public input supplied. The legal and policy issues are

complex and must be interpreted according to sound and coherent principles. The Department will examine these questions comprehensively at a later date. The parameters of the issues are outlined below.

Positions of affected interests

While a wide variety of interpretations was offered to answer these and other questions, most of the discussion can be grouped into two, very general, opposing viewpoints.

Many state and local governments and access groups

Some argue that the Congressional grant and its application are very broad--a blanket authority, to be accepted by state and local governments, to build access across the public domain. They argue that the right was without reservation or limitation.

Environmental organizations

Others argue that Congress viewed R.S. 2477 in much narrower terms, with specific limitations to the establishment and application of rights. These groups take the position that R.S. 2477 rights-of-way over federal lands should be narrowly defined and limited to their original use and scope.

Statutory terms

Similar differences of interpretation exist regarding many key elements of the statute. Congress' possible intentions in the definitions of the statutory terms "highway," "construction," and "unreserved public lands," not surprisingly, can be imagined to support whichever position is being advocated.

What is a highway?

For example, many voiced support of the inclusive definition of "highway" citing historically broad uses of the term. Under this view, an R.S. 2477 highway embraces any avenue of travel open to the public, including trails, pathways, traces, and similar public travel corridors. Under this expansive definition, these types of ways should be included along with more substantial roads in the definition of an R.S. 2477 highway.

Others argue that Congress intended only to recognize major roads that were mechanically constructed as R.S. 2477 rights-of-way . This position relies on the plain meaning of the term "construction" and on a narrower definition of "highway." Some advance the position that most potential R.S. 2477 highways were originally established by individuals and were private roads with private purposes and, therefore, ineligible as highways under R.S. 2477.

The CRS report addresses the issue of what Congress intended to grant as a public highway. In their report, the definitions of road and highway are compared in modern and historic contexts. The CRS report found

that the most likely interpretation of the statute is that a highway was intended to mean a significant type of road, that is: "one that was open for public passage, received a significant amount of public use, had some degree of construction or improvement, and that connected cities, towns, or other significant places, rather than simply two places."

What is construction?

The intended meaning of the term "construction" is debated as well. Some believe "construction" requires improvement by mechanical means. Others argue that mere passage may constitute construction. The CRS report found that some construction or improvement is a necessary element of the grant of an R.S. 2477 highway.

What are unreserved Public Lands?

What "unreserved public lands" was intended to mean is also a subject of disagreement and ambiguity. Federal land was withdrawn and dedicated for a wide range of federal purposes and subject to different levels of protection. This allows interest groups to construe the ambiguity and complexity to support their own positions. Some argue that because of broad federal withdrawals there was little or no unreserved public land during the effective life of R.S. 2477. They interpret the term reserved land to include all types of federal actions to classify land. Those who support this viewpoint often cite the establishment of grazing districts under the Taylor Grazing Act as an example of a type of federal classification action that constitutes reserved public land, thus disqualifying any subsequent R.S. 2477 highways. Others argue that reserved lands are those that have been withdrawn or dedicated for a more particular purpose, such as a National Park or Indian Reservation.

Does state or federal law control?

Another important question about the intent of Congress in enacting R.S. 2477 focuses upon whether state or federal law should govern. Some look to the 1866 Mining Act's recognition of state law and local customs pertaining to mineral rights, and its reliance on state law to fill in many of the details for implementation, as ample evidence that state law should govern this grant. Others believe that federal law must control the issue without regard to state law because the statute does not expressly incorporate or even refer to state law.

The CRS Report characterized the proper role of state law in defining R.S. 2477 as one of the "most fundamental and thorniest of issues." It notes: "state law may play some role, but may not contradict the express statutory granting language."

The Department believes that both state and federal law are relevant to a discussion of R.S. 2477. State law cannot override federal law, or accept more than was offered under a federal statute. However, a state can limit or clarify the nature of a grant it accepts, at least for its own

purposes. The Department will explore the proper relationship of state and federal law at a later date.

The Federal Land Policy and Management Act and R.S. 2477

With enactment of FLPMA on October 21, 1976, Congress clearly set forth its intentions for public land management. FLPMA provided for multiple-use management, a presumption that public lands should be retained and definitive processes for granting rights over public lands. For example, FLPMA repealed R.S. 2477 and substituted its own process for issuance of rights-of-way over public lands. With this repeal, subject to valid existing rights, Congress signaled that it intends to provide continued, but managed, access to federal lands.

Many of the commenters to this report misunderstand this relationship. Some perceive no relationship whatsoever, stating that FLPMA is irrelevant to R.S. 2477. Others take the position that FLPMA, being more recent legislation, should supersede whenever a case of conflict arises. Still others indicate that there must be a balance, although conflicting policies, procedures, and judicial interpretations make it difficult to determine where the balance lies.

BLM Position

The BLM manual attempts to follow the mandates of FLPMA while respecting pre-existing rights. It directs the BLM to manage R.S. 2477 rights-of-way using FLPMA as long as the federal manager does not diminish the rights of the holder. Using this approach the holder is authorized to do what is reasonable and necessary within the confines of the right-of-way to maintain the type of use to which it was originally put. At the same time, the federal manager has an express duty to prevent unnecessary and undue degradation of public lands.

Protect existing rights or prevent degradation?

With regard to FLPMA, the relationship between the saving provisions that retain preexisting rights and the statutory mandate to regulate public lands to prevent unnecessary and undue degradation is the central issue.

Other Legal Issues

In addition to the principal legal issues identified above, there are many other important legal questions. A brief discussion of the taking issue, abandonment, the use of R.S. 2477 to gain access over private land, and other questions follow.

The "Taking" Issue

The R.S. 2477 grant authority was repealed in 1976. Some parties claim that holders of R.S. 2477 rights-of-way may lose some of their rights if substantial regulatory burdens are imposed. However, subsequent attempts to clarify and confirm rights that existed before 1976 will not necessarily deprive anyone of the use of their property. Courts have long upheld the power of the state and federal governments to reasonably regulate private property for significant public purposes. Compensation is required when government regulation accomplishes a "total taking" of all economically viable uses or results in a physical invasion of property. Many options exist for clarifying R.S. 2477 issues that do not involved taking of property rights.

Abandonment and Statute of Limitations

Current policy and case law do not recognize any form of federal provision for abandonment of R.S. 2477 rights-of-way. This issue needs further consideration.

In the absence of a waiver of sovereign immunity, no one, including state and local governments, may challenge the title of the United States to federal property. In recognition of this, Congress passed a quiet-title statute that now appears at 28 U.S.C. § 2409a. It allows those who have been put on notice that the United States has a claim adverse to their property interest to file a law suit to quiet-title within 12 years of the date the affected party discovers the adverse federal claim. R.S. 2477 rights-of-way are easements and, therefore, interests in land subject to the quiet title statute. If title is not confirmed within 12 years of the date the federal government takes action inconsistent with their existence, then the right to contest the title expires. An adverse interest to a right-of-way can be shown in many ways including where Congress established a wilderness area, where BLM designated an area as a WSA, or where the U.S. Forest Service blocked off a former way and no one had acted on it for over 12 years. The key question is, what action by the federal government is sufficient to put others on notice that the Government claims an interest that may defeat the potential R.S. 2477 right-of-way claim and trigger the 12-year period? The Department will further consider the merits of this issue.

Assertions by the Federal Government of R.S. 2477 Rights-of-Way Over Private Lands

This issue is quite important to the U.S. Forest Service. It involves the ability of the federal government to assert R.S. 2477 rights-of-way across private land to regain historic public access to federal land. A related issue is whether federal agencies may be able to assert that such access has been established by prescription under state law whether R.S. 2477 is involved or not.

Role of State Law

R.S. 2477 is generally construed as an offer by Congress to state and local governments to construct highways. DOI has looked to state law to determine what constitutes a public highway under R.S. 2477. Federal highway law may also be relevant to this issue and will be explored at a later date.

A legal opinion issued by the Deputy Solicitor to the Assistant U.S. Attorney General on April 28, 1980, agreed that state law may govern how these roads were established, but only to the extent that it is not inconsistent with federal law. (Appendix II, Exhibit J.) Major points of contention among various public interests are the issues of federal versus state control and whose role it is to establish criteria for highway acceptance and define the scope of rights.

Few state laws address R.S. 2477

The majority of state laws concerning public highways do not expressly refer to the R.S. 2477 grant. Most state highway laws focus on what constitutes a public highway, how a public highway is created, and who has the authority to create a public highway.

Some state statutes contain language that is very broad, while others specifically lay out definitions and formal procedures. In other states, only formal petitions through public officials are sufficient to establish a highway. Some statutes declare that public use of a road over time can establish a highway. Other statutes set forth definitions of highways that are open to interpretation. Many states have enacted multiple statutes providing for several factors that may operate to establish a highway. Some state statutes refer to undocumented roads.

Section line dedications

Several states have dedicated all section lines as public roads. If section lines could be accepted as R.S. 2477 highways an extensive cross-hatching grid of rights-of-way would be established over the existing road network. Rights-of-way would be established at one-mile intervals (north and south, east and west) across federal lands.

Was R.S. 2477 Retrospective or Prospective?

The argument has been raised that the grant was only retrospective; i.e., it validated existing roads when the Act was passed. Those who claim that the grant was retrospective cite court cases which support this. The alternative argument is that R.S. 2477 provided authority for the future granting of rights-of-way. The majority of state and federal courts have taken the latter view.

Does R.S. 2477 Apply Only to Roads for Mining or Homesteading Purposes?

The argument has been raised that R.S. 2477 provides a right of access only to homestead or to mine. The vast majority of cases have found that highway rights-of-way are not limited to the mining and homestead context. The common logic of these cases is that Section 8 of the 1866 Act has been reenacted, in a distinct and independent statute, Revised Statute 2477, separate from the other provisions of the 1866 Mining Act.

Federal Case Law Summaries

A great many state cases deal with the establishment of highways pursuant to R.S. 2477. Almost all state cases predating FLPMA typically involve only non-federal litigants and are, therefore, not dispositive on federal R.S. 2477 issues.

There are a few federal cases that deal with R.S. 2477. However, these cases have established no clear judicial precedents. While existing judicial interpretation of R.S. 2477 has been inconsistent, it is still instructive to take a brief look at some of the key federal cases.

Federal Case Law

U.S. Supreme Court Cases

Kleppe v. New Mexico, 426 U.S. 529 (1976)

The U.S. Supreme Court dealt with the plenary power of the Congress over the public lands arising from the Property Clause of the U.S. Constitution, Article IV, Section 3. The Court noted its earlier 1925 decision in Colorado v. Toll, infra, and stated, "Congress had not purported to assume jurisdiction over highways within the Rocky Mountain National Park, not that it lacked the power to do so under the Property Clause." 426 U.S. at 544.

Central P.R. v. Alameda County, 284 U.S. 463 (1932).

The Supreme Court held that a railroad right-of-way accepted by the Central Pacific in 1868 was subject to the highway right-of-way laid out by Alameda County in 1859 and subsequently established by the passage of wagons. This was approved by Congress with the passage of R.S. 2477 in 1866.

Colorado v. Toll, 268 U.S. 228 (1925).

The Supreme Court held that the creation of Rocky Mountain National Park by Congress did not take jurisdiction away from the State of Colorado over existing roads within the Park. The Park Service had tried to assert exclusive control over the roads within the Park.

U.S. v. Vogler, 859 F.2d 638, (9th Cir. 1988), cert. denied, 488 U.S. 1006 (1989).

U.S. Court of Appeals Cases

The Ninth Circuit dealt with an assertion of an R.S. 2477 highway as access to a mining claim within a National Park. The court declined to rule on the R.S. 2477 issue but did hold that the Park Service had authority to regulate access reasonably pursuant to legislation passed by Congress pursuant to Article IV, Sec. 3 of the U.S. Constitution.

Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988), See also Sierra Club v. Lujan, 949 F.2d 362 (10th Cir. 1991).

This case involved attempts by Garfield County to improve the Burr Trail in Utah. The Tenth Circuit held that the scope of an R.S. 2477 right-of-way was determined under state law and the law in Utah was that the road was what was reasonable and necessary for the kind of road that existed as of the repeal of R.S. 2477 in 1976. The federal land manager determines what is reasonable and necessary. The Court also ruled that because of the strong interest expressed by Congress in preserving WSAs, the requirements of the National Environmental Policy Act (NEPA) were triggered by the county's desire to improve the road next to WSAs and, therefore, the BLM was required to prepare an Environmental Assessment to determine whether or not an Environmental Impact Statement was required. The question of the impact of Taylor Grazing Act withdrawals on R.S. 2477 was raised in this case, but it was not addressed because the Burr Trail was found to have been established prior to 1934.

U.S. v. Gates of the Mountains Lakeshore Homes, 732 F.2d 1411 (9th Cir. 1984).

The Ninth Circuit held that R.S. 2477 did not provide for legal construction of the grant under State law and State law could not allow for power lines to be placed within an R.S. 2477 right-of-way without the permission of the U.S. Forest Service.

Humboldt County v. U.S., 684 F.2d 1276 (9th Cir. 1982).

The Ninth Circuit enforced the 12-year statute of limitations contained in the quiet title statute, 28 U.S.C. §2409a. The court also raised but did not resolve the issue of whether the Taylor Grazing Act of 1934 itself, or by withdrawals issued pursuant to it, withdrew the public lands from the operation of R.S. 2477.

Park County, Montana v. U.S., 626 F.2d 618 (9th Cir. 1980), cert. denied, 449 U.S. 1112 (1981).

The Ninth Circuit held that a county was precluded from asserting an R.S. 2477 within a National Forest because the road had been closed more than 12 years, and, therefore, the waiver of sovereign immunity in the quiet-title statute, 28 U.S.C. § 2409a, had expired.

Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973), cert. denied, 411 U.S. 917 (1973).

The D.C. Circuit held that the construction of a highway by a third party on the behalf of the state is sufficient to establish an R.S. 2477 right-of-way.

U.S. v. Dunn, 478 F.2d 443 (9th Cir. 1973).

The Ninth Circuit, citing as authority Central Pac. RR. v. Alameda, supra, reiterated that R.S. 2477 was passed to protect those who had previously encroached on the public domain but had been allowed to remain there with the knowledge and acquiescence of the United States. Accordingly, the statute was not intended to grant any future rights.

U.S. v. Jenks, 804 F. Supp 232 (D. N.M. 1992).

U.S. District Court Cases

The court found that the issue of whether an R.S. 2477 right-of-way has been established is a question of state law.

Wilkinson v. Department of the Interior, 634 F. Supp. 1265 (D. Colo. 1986).

This case involved a road that entered and then exited the Colorado National Monument. The Court held that the Park Service could not charge an entrance fee for those using the road through the Monument because this was an invalid restriction on the right-of-way, and the attempt to prohibit all commercial traffic was also contrary to the right-of-way. The court also held that reasonable regulation of commercial traffic was authorized by legislation enacted by Congress pursuant to the property clause of the U.S. Constitution.

U.S. v. 9,947.71 Acres of Land, 220 F. Supp 328 (D. Nev. 1963).

The court held that mining claimants acquired title to a right-of-way pursuant to R.S. 2477 to access a valid mining claim, even though the court recognized that the county involved had disclaimed the road and the court recognized that it was not a public highway.

U.S. v. Emery County, Utah, in the U.S. District for the District of Utah, Civil No. 92-C-106S. (D. Utah)

U.S. District Court Consent Decree

In 1990, Emery County filed applications for FLPMA rights-of-way and consulted with BLM for authorization to realign and improve the Buckhorn Road which has been administratively recognized as an R.S. 2477 highway. Rather than complete the process, Emery County proceeded with the realignments and improvements. In the process, an archaeological site was impacted, and other resource damage occurred. Emery County argued that it did not need permission to improve the road or deviate from the existing alignment. BLM issued three trespass notices and a cease and desist order.

The matter was ultimately resolved by a Consent Decree approved by the U.S. District Court which provided that the county was required to have approval from BLM for any improvement or realignment of any acknowledged R.S. 2477 highway. The county agreed they would notify BLM before it undertook any on-the-ground activity, other than routine maintenance. (Appendix IV, Exhibit A.)

Department of the Interior Position on R.S. 2477--Pre-FLPMA

Prior to the passage of FLPMA, BLM (and before it the General Land Office) had a very limited Congressional mandate to manage the public domain. Its primary purpose was disposition of these lands. Long-term retention and management of the public lands became more important over the years and led to the passage of FLPMA in 1976. Much greater attention was then given to multiple use management when land-use planning was Congressionally mandated for public lands.

Early Department of the Interior Guidance

After review of DOI records no indication has been found of any guidance or policy about R.S. 2477 rights from 1866 until 1898. In 1898, the Secretary of the Interior held that an attempt by a county to accept R.S. 2477 grants along all section lines in the county was ineffective (26 L.D. 446). (Appendix II, Exhibit B.)

In 1938, an early Interior regulation was published dealing with R.S. 2477 rights-of-way (43 CFR part 244.55). The guidance read as follows: "This grant becomes effective upon the construction or establishing of highways, in accordance with the state laws, over public lands not reserved for public uses. No application should be filed under the act, as no action on the part of the Federal Government is necessary." (56 I.D. 533, 551 (1938). Circular 1237a.) (Appendix II, Exhibit C.) This same position was maintained over the years. In 1955, (62 I.D. 158) a decision by the DOI shows that R.S. 2477 was considered an authority by which a highway could be established across public lands. (Appendix II, Exhibit D.)

Regulations in effect at the time of FLPMA's enactment had been published in 1970 and amended in 1974. (Appendix II, Exhibit E.) (43 CFR 2822.2-2 (FR 9646 June 13, 1970 as amended at FR 39440, November 7, 1974.)) They addressed the management of these rights in greater detail than previous guidance but maintained the same general position--that grants became effective upon construction or establishment of highways in accordance with state law across unreserved public land.

These same 1974 regulations also clarified that a right-of-way pursuant to R.S. 2477 was limited to highway purposes. Prior to these regulations, some holders of R.S. 2477 rights-of-way authorized third parties to ancillary uses within the right-of-way, such as power or telephone lines. This regulation stipulated that separate applications were required under other regulations to use lands within R.S. 2477 rights-of-way for other purposes.

Department of the Interior Position on R.S. 2477--Post-FLPMA

Section 706(a) of FLPMA repealed the right-of-way authority for R.S. 2477. Section 509(a), however, preserved valid, existing rights-of-way acquired under former public land laws. This means that while rights-of-way established pursuant to R.S. 2477 prior to its repeal remain valid, no new rights-of-way could be acquired after its repeal.

Proposed Rulemaking to Sunset R.S. 2477

After the 1976 repeal of R.S. 2477, there was a growing awareness of the need to identify and recognize the rights that had been established prior to 1976. Proposed regulations published in 1979 (43 CFR 2802.3-6; 44 FR 58118, proposed October 9, 1979) would have required persons or state or local governments to file maps within three years with BLM showing the locations of public highways constructed under the authority of R.S. 2477. (Appendix II, Exhibit F.) The submission of this information was not intended to be conclusive evidence as to the existence of an R.S. 2477 right-of-way, but an opportunity for BLM to be able to note the public land records. However, when final regulations were published, they simply stated opportunity to file within three years. (43 CFR 2802.3-6; 45 FR 44518, 44531, July 1, 1980). (Appendix II, Exhibit G.)

In 1981, regulations were proposed to streamline the existing regulations. (43 CFR 2802.3; 46 FR 39968-69, proposed Aug. 5, 1981). (Appendix II, Exhibit H.) When final regulations to streamline were published on March 23, 1982 (43 CFR 2802.5; 47 FR 12568-70), the three-year window was removed. (Appendix II, Exhibit I.)

1980 Solicitor's Office Interpretation

Section 603 of FLPMA mandated that BLM review, for wilderness characteristics, roadless areas of 5,000 acres or more. Much discussion ensued at DOI over the definitions of road and roadless area.

The Solicitor's Office concluded in 1980 that the numerous and conflicting state and federal court rulings on R.S. 2477 were not helpful in clarifying these terms. Instead, it turned to the statutes, both R.S. 2477 and Section 603 of FLPMA, to define the terms "highway" and "road." Within the legislative history of FLPMA, a road must be more than a jeep track, requiring some evidence of mechanical improvement or maintenance through mechanical means.

In looking at R.S. 2477, a Solicitor's letter stated that the term "construction" also required the use of some modicum of mechanical means beyond the mere passage of vehicles. In a 1980 letter from Frederick Ferguson, Deputy Solicitor, to James Moorman, Assistant Attorney General, the DOI interpreted the reference to construction in R.S. 2477

to mean that a track across the public lands not subject to mechanical maintenance or improvement was only a "way" in the context of wilderness. This meant that a "way" could not be an R.S. 2477 highway, thus eliminating a potential conflict between R.S. 2477 and FLPMA with regard to roadless areas. (Appendix II, Exhibit J.).

Alaska Drives a New Policy

When Alaska became a state in 1959, approximately 98 percent of its land was in federal ownership, primarily (297 million acres) under BLM management.

Different types of transportation

This vast area contained few roads. Miners, trappers, and Natives traveled by foot, dogsled, or pack animal, using existing game trails or creating new trails. A few roads were constructed by the Bureau of Public Roads. In more recent years, access has also been gained by snowmobiles and tracked vehicles. Access by aircraft is common in many areas because of the cost-effectiveness of building airstrips compared to the cost of building roads.

In recent years, Congress specifically recognized Alaska's unique problems with the passage of Alaska legislation. In 1971, the Alaska Native Claims Settlement Act (ANCSA) mandated the reservation of access for public use across Native lands. This legislation and subsequent regulations established categories of easements, with different widths corresponding to different types of use, to apply to lands conveyed to Native corporations.

Alaska legislation

In 1980, the Alaska National Interest Lands Conservation Act (ANILCA) was passed, including Title XI, Transportation and Utility Systems In and Across and Access into, Conservation System Units. This legislation provided a process for acquiring rights-of-way for transportation and utility systems, recognizing that most of Alaska's transportation and utility network is undeveloped. Strict guidelines and timeframes are imposed upon applicants in this process. To date, nearly 13 years since enactment, only a few applications have been filed under this act, presumably because potential applicants fear the high costs and cumbersome process.

Because the state believes that access would play a critical role in the future development of Alaska's natural resources, there has been a major effort since the 1970s to identify existing roads and trails. Many Alaska interests voiced the concern that they need and should have the opportunity to use R.S. 2477 rights-of-way in much the same manner state and local governments in the Lower 48 States had during their own early developmental stages.

In 1985, an interagency task force was formed within the DOI to work with the state of Alaska on policy, process, and procedures for assertions of R.S. 2477 rights-of-way. This effort ultimately led to the development of the DOI policy for the administrative recognition of asserted R.S. 2477 rights-of-way, signed by then Secretary Hodel on December 7, 1988. The Hodel policy was based on and expanded the existing (1986) BLM Rights-of-Way Manual. The Hodel Policy was not published in the *Federal Register* for public comment.

1988 Policy

The 1988 Hodel policy, attempting to account for the perceived uniqueness of Alaska, put forward loose criteria for R.S. 2477 claims and applied these criteria to all federal lands under DOI jurisdiction in all 30 public land states.

The Hodel policy addresses the three statutory requirements that must be met for acceptance of an R.S. 2477 right-of-way. It also addresses ancillary uses, the width of highways, abandonment, and to some extent, the responsibilities of the agency and the right-of-way holder. (Appendix II, Exhibit K.)

The statutory requirements were interpreted by the Hodel policy as follows:

- Unreserved public lands means those federal lands open to the operation of the public land laws. That excludes lands reserved or dedicated by Act of Congress, Executive Order, Secretarial Order, and some classifications authorized by statute. Also excluded are public lands preempted or entered by settlers under the public land laws or located under the mining laws during the pendency of the entry or claim.

- Construction must have occurred while the lands were unreserved public land. Construction is defined in broad terms. It must involve a physical act of readying the highway for its intended method of transportation, which could include foot, horse, pack animal, or vehicle. Construction could be accomplished by such simple means as the removal of vegetation or rocks, road maintenance over several years, or the mere passage of vehicles. Survey, planning, or dedication alone do not constitute construction.

- The route must be a public highway that is freely open for its intended use but could potentially be a toll road or trail. The inclusion of a highway in a state, county, or municipal road

system or the expenditure of public funds for construction or maintenance constitutes adequate evidence of this criterion. A statement by an appropriate public body that the highway was and still is considered a public highway is acceptable, barring evidence to the contrary.

Other Provisions

The 1988 Hodel policy also provided guidance on several other aspects of R.S. 2477 rights-of-way. It confirmed that ancillary uses required separate authorizations under the 1974 BLM regulations.

Highway widths

Widths of highway rights-of-way were to be in accordance with state law wherever possible, or established based on the width of the disturbed area of the highway, including back slopes and drainage ditches.

Abandonment

Abandonment is to be accomplished within the procedures established by state, local, or common law or judicial precedent.

Reasonable activities allowed

The policy stated that under R.S. 2477, the DOI has no management control over proper uses of a highway right-of-way unless undue or unnecessary degradation of the servient estate can be demonstrated. The policy disavowed jurisdiction of reasonable activities of the right-of-way holder, while not precluding the applicability of other federal, state, or local laws that are relevant to the use of the right-of-way.

The Current Status

The first part of this section examines the recent BLM administrative determination process. The second part describes current R.S. 2477 claims, both those that have been recognized by administrative or judicial means and those that are pending. The third part addresses potential R.S. 2477 claims, including a discussion of factors that influence the likelihood of future claims being asserted to agencies.

Agencies Directed to Develop Administrative Procedures for R.S. 2477 Claims

No formal process for either asserting or recognizing R.S. 2477 rights-of-way currently is provided in law, regulations, or DOI policy. The 1988 Hodel policy directed all land management agencies within the DOI to develop appropriate procedures for administratively recognizing and to record this information on the land status records. Administrative recognitions are not intended to be binding, or a final agency action. Rather, they are recognitions of "claims" and are useful only for limited purposes. Courts must ultimately dertermine the validity of such claims.

Federal land management agencies, and even units within a particular agency, have been confronted with the R.S. 2477 issue to different degrees.. As might be expected, the need to deal with this issue has influenced the pace and extent to which agencies have developed their own internal procedures for making administrative determinations on R.S. 2477 right-of-way claims.

The U.S. Forest Service, while not an agency of the DOI, has adopted the 1988 policy. (Forest Service Manual 2734.51)

Neither the Bureau of Indian Affairs, nor the Bureau of Reclamation, nor the U.S. Fish and Wildlife Service has developed administrative procedures.

Park Service interim guidance

The National Park Service, with pending claims in both Alaska and the Lower 48 States, has begun initial work to develop supplemental guidance. The Rocky Mountain Regional Office of the National Park Service has issued interim guidance (Appendix II, Exhibit L.).

BLM Manual guidance

The Bureau of Land Management, the recipient of the majority of R.S. 2477 claims so far, has developed the most detailed process for handling assertions. In 1989, the BLM published guidance on R.S. 2477 in its manual which established procedures to evaluate and process right-of-way claims. (Appendix II, Exhibit M.)

Acknowledgments are only an internal Administrative Determination

The manual elaborates on several points. It lists Acts of Congress, Executive Orders, and other federal activities which are recognized to remove public land from unreserved status. It reiterates that acknowledgments of R.S. 2477 claims are strictly administrative actions and not subject to administrative appeal. It describes the minimum information required to accompany an R.S. 2477 application to BLM. It also addresses BLM management responsibilities with regard to maintenance, realignment, and upgrading of existing R.S. 2477 highways.

Some BLM State Offices have also issued field-level guidance to assist the managers who typically make the administrative determination onsite. BLM Offices in Alaska and Utah have developed the most comprehensive guidance within the agency. (Appendix II, Exhibit N. and O.)

What is An Administrative Determination?

An administrative determination is an agency recognition that an R.S. 2477 right-of-way probably exists. The process used to make an administrative determination has been developed in response to claims filed and provides an administrative alternative to litigating each and every potential right-of-way. Its is not intended to be binding or final agency action, but simply a "recognition" of "claims" for land–use planning purposes.

An Overview of the Process

While procedures vary somewhat due to differing agency mandates, administrative determinations currently follow the general guidelines of the 1988 Hodel policy to determine the validity of an asserted right-of-way.

As an example, typical steps BLM takes to make a determination under the 1988 policy are as follows:

Evidence is submitted

- The process begins when a party presents a claim to the agency. Usually some form of supporting evidence, old maps, photographs, etc., accompanies the initial claim for highway recognition.

Cannot have been constructed by the Federal Government

- The first level of agency review includes a check into the status of the road being claimed. For example, the road in question is checked to determine if the road was constructed by or for the federal government. If so, it would not qualify as an R.S. 2477 highway. Public notification of the pending assertion is normally made at this initial stage. Information either to support or refute the asserted claim is solicited from the public.

Next, the agency checks to see if the statutory requirements to perfect a grant were met in a timely manner.

Unreserved Public Land?

- Historical records are examined to determine whether or not the highway was constructed on public lands which were not reserved at the time for other purposes.

Construction?

- It is determined whether some form of construction occurred. This question is reviewed both in accordance with state law and DOI policy. If state law does not require a higher standard of construction than set forth in the 1988 Hodel Policy, then this definition of construction applies.

Public highway?

- Was the asserted right-of-way considered a public highway? In general, a declaration by the asserter confirmed by a state or local government that the asserted road is and has been a public highway is sufficient to meet the test.

Was the right-of-way established prior to 1976?

All three of the above conditions must have been met prior to the repeal of R.S. 2477 by FLPMA in 1976.

Letter of acknowledgment

Where conditions exist on public lands to support recognition of an R.S. 2477 right-of-way Congressional grant, the Authorized Officer issues a letter of acknowledgment and treats the highway as a valid use of the public lands. When evidence does not support the assertion, the Authorized Officer will inform the asserter that the federal land management agency does not recognize a highway.

If the asserted right-of-way is acknowledged by the federal land management agency, the agency may then determine the scope of the right-of-way and the terms and conditions applicable to the acknowledgment, in accordance with agency guidance.

If the review process finds that the R.S. 2477 did not validate some or all of the asserted highway, an applicant has other options for securing access. Issuance of a right-of-way under more contemporary authorities such as Title V of FLPMA is one option typically considered by the BLM. The procedures and abilities to issue rights-of-way vary widely among land management agencies.

Controversy Over the Process

Like most aspects of R.S. 2477, the process outlined above has been quite controversial. Areas of contention among various members of the public include:

- Historic and record evidence required by the agency to substantiate a claim.
- Public notification procedures.
- Disagreement regarding the definitions of public highway, construction, and unreserved public lands.
- R.S. 2477 claims being determined valid over some but not all segments of the same highway.
- The lack of an administrative appeals process for administrative determinations.
- The issue of trying to assert R.S. 2477 claims over private property.

Current R.S. 2477 Claims

There are three different types of R.S. 2477 claims: recognized claims that have already been acknowledged through either an administrative or judicial process, pending claims that have been filed with an agency but not processed, and yet unfiled or asserted claims. The number of pending claims has increased by thousands since 1988 when awareness of this issue peaked.

Recognized Claims

As was mentioned earlier, thousands of highways have been established across the Western United States under the authority of R.S. 2477--most without any documentation on the public land record. The status of these rights-of-way has changed little over the years. After the repeal of the statute in 1976, the BLM attempted to identify and recognize grants that had been previously accepted. State and local governments that had constructed highways under the grant were encouraged to file maps with the BLM for notation on the public land records. The request stated that such information would neither be conclusive evidence as to the existence of an R.S. 2477 right-of-way nor would the failure to provide such information preclude a later finding as to its existence. Most jurisdictions failed to reply.

Existing public land records indicate that approximately 1,453 R.S. 2477 rights-of-way have been administratively recognized or judicially decreed to exist to date across BLM lands. At least two R.S. 2477 highways have been recognized in National Park Units--the Burr Trail located in both Capitol Reef National Park and Glen Canyon National Recreation Area in Utah and the Glade Park Road in the Colorado National Monument.

Information regarding other federal land management agencies was not available for this report. Few recognized claims are thought to exist across other agency lands.

Pending Claims

To date, no claims for R.S. 2477 rights-of-way have been asserted to either the Bureau of Indian Affairs or the Bureau of Reclamation. The National Park Service has six pending claims, three in Alaska and three in Utah.

Currently, there are approximately 5,600 pending claims on file with the BLM nationwide, mostly in Utah, with 5,000. Other states have very few claims pending. Many new assertions have been filed with various federal agencies since the initiation of this study. Few assertions are pending with federal land management agencies overall other than for Utah BLM.

Potential R.S. 2477 Claims

The number of R.S. 2477 rights-of-way that may have been in existence prior to 1976 but have not been confirmed is unknown and highly speculative.

Factors that Determine the Likelihood of Future R.S. 2477 Claims

Several factors have influenced where and how access routes developed across the Western United States prior to 1976. Historical development patterns and associated access needs surely influenced the potential number of qualifying highways. Topography, terrain, and climate have helped and hindered development of access. Travel across public lands in the arid Southwest and the Northern Tundra Region necessitated different methods of travel and different access needs.

Several other factors contribute to the number of potential R.S. 2477 highway assertions. Obviously, future DOI policy and judicial decisions are important factors. The willingness of a state or local government to assert rights-of-way routes is another obvious factor to potential routes.

A reference list of state statutes used to define what constitutes a state highway and a list of case law are contained in Appendix V, Exhibits A through Q.

In summation, there are many different factors that influence the likelihood of potential asserted claims. The potential for a great number of R.S. 2477 rights-of-way on lands managed by many federal agencies is minor, due to the fact the lands were withdrawn from the public domain before the establishment of highways. The significant exception to this generality is Alaska.

The Henry Mountains-- A Case Study

Currently, little hard, quantifiable information exists regarding potential R.S. 2477 highways. BLM in Utah, following its 1991 policy, (Appendix II Exhibit N) inventoried existing roads and trails on public land within its Henry Mountains Resource Area. Since the issuance of the 1988 Hodel policy, this is the first, and to date the only, BLM Resource Area where such an inventory has been completed and where counties have indicated which roads and trails they are asserting pursuant to R.S. 2477. This BLM unit provides an example of how various factors could influence the number of potential claims in a given area. Several commenters suggested other areas that could provide useful case studies, but information could not be gathered or verified in time for this report.

The following discussion of the Henry Mountain Resource Area may or may not be representative. Lack of information prevents any firm conclusions. It is offered in order to clarify the information previously discussed in this section on how different factors effect the potential for R.S. 2477 claims being asserted.

The BLM's Henry Mountain Resource Area encompasses 2.6 million acres of private, state, and BLM-administered lands within Garfield and Wayne counties in Southeastern Utah. It is bordered to the east by the Horseshoe Canyon Division of Canyonlands National Park and to the east and south by Glen Canyon National Recreation Area.

Inventory of R.S. 2477 Claims

In the Spring of 1991, the BLM began an inventory of potential R.S. 2477 highways in preparation for completing the transportation plan component to a new land-use plan for the Resource Area. Ascertaining the existence or lack of highway grants under R.S. 2477 was deemed necessary for preplanning purposes and in order to respond to the county assertions that they were the holder of valid existing rights-of-way on many routes that cross public lands. Claims for approximately 320 roads have been filed with the BLM by Garfield County. All of these claims are located on BLM-administered land except for a few that extend into

either Glen Canyon National Recreation Area or Capitol Reef National Park, administered by the National Park Service.

The development of access routes in the Henry Mountains

Several factors mentioned previously in this section have contributed to the development of access routes in the Henry Mountain Resource Area that may qualify for R.S. 2477 highways. Large blocks of unreserved public lands are found in the Resource Area. Both Capitol Reef and Glen Canyon are fairly recent additions to the National Park System, created from public domain that may have underlying R.S. 2477 rights-of-way. Past mining, ranching, and recreational use has led to development of a fairly extensive access system in many portions of the Resource Area. Topography has influenced the development of either well-established or very primitive access routes.

The Utah context

Utah state law is another factor. State law has established very broad criteria for the acceptance of a public highway. No formal acceptance of a highway is necessary, public use is accepted, and no specific road standards are necessary to establish a highway. A final factor is that Garfield and Wayne counties are two of several Southern Utah counties with a keen interest in establishing what they deem as valid R.S. 2477 highway rights.

Many types of potential R.S. 2477's claimed

The routes asserted range in character from well-established gravel or paved roads to the less distinct jeep trails maintained solely by the passage of motor vehicles. The approximately 320 routes currently asserted cover about 1,450 miles. About 120 roads, spanning 800 miles, are termed Class B roads under the Utah State highway system. All of these roads are periodically maintained by county highway departments. Another approximately 200 roads, covering about 650 miles, are termed Class D roads. These are the most primitive classifications within the State system. They are not in the county maintenance program. A rough estimate indicates that about half of these Class D roads were constructed by some type of mechanical means; the others, by mere passage of motor vehicles.

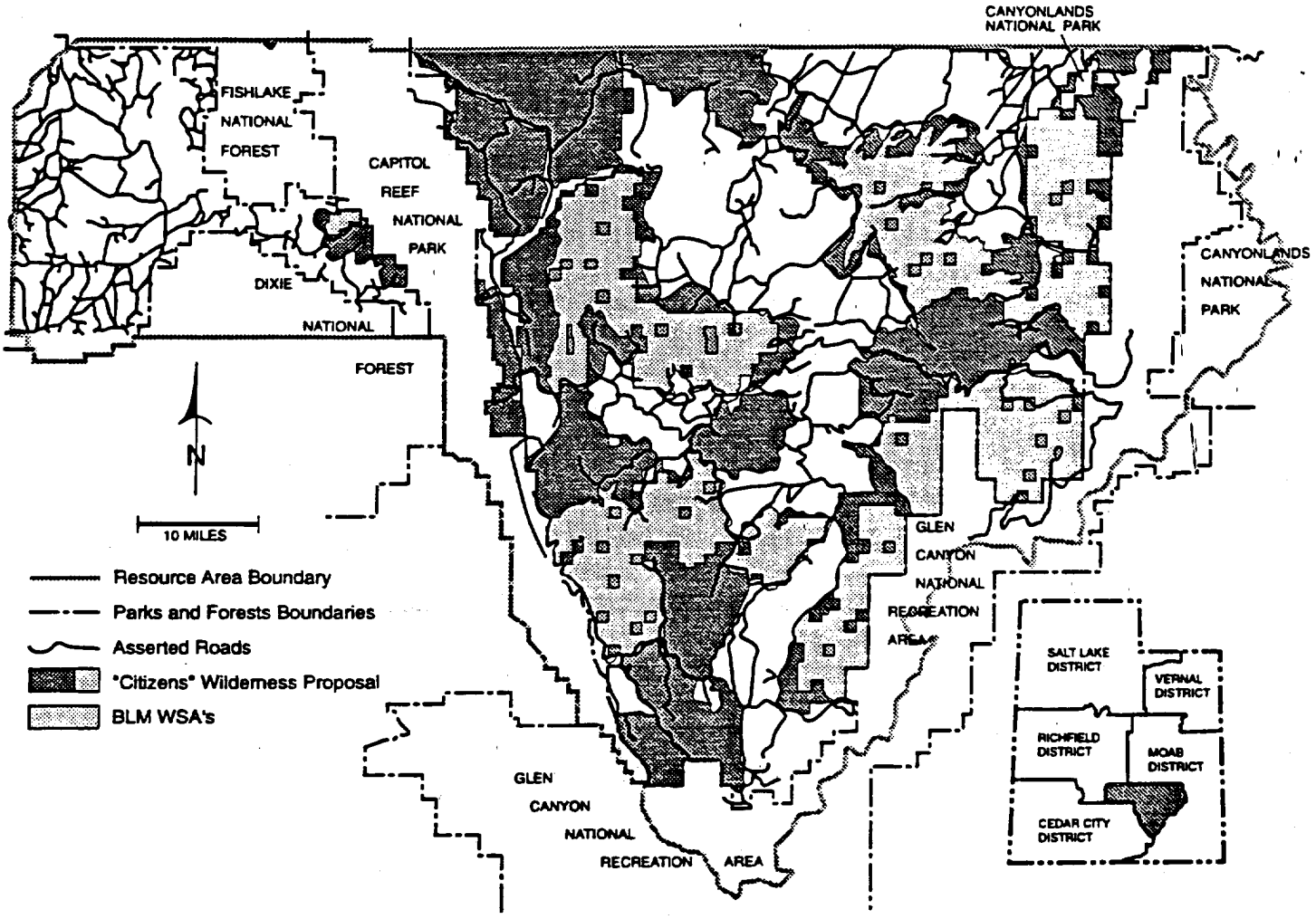
Mostly on BLM land, a few involve the Park Service

Except for the six roads that extend into National Park Service units (35 miles), all are on BLM land. Most do not traverse areas specially designated by the BLM. However, a citizen group's wilderness proposal is overlain by approximately 200 miles of asserted roads.

Some within wilderness study areas

Several roads, covering approximately 16 miles, within BLM WSAs have been asserted for agency acknowledgment. The BLM has informed Utah counties that all BLM WSAs have been previously inventoried and found to be roadless. It is the BLM's position that no R.S. 2477 public highways exist in WSAs in Utah.

ROADS ASSERTED TO THE BLM FOR ACKNOWLEDGMENT
Henry Mountain Resource Area Planning Unit



Impacts of Current and Potential R.S. 2477 Claims

Congress has instructed the DOI to address impacts of current and potential R.S. 2477 claims from three different perspectives in this Report. These are: (1) impacts on the management of federal lands, (2) impacts to multiple-use activities, and (3) impacts on access to federal, state, private, Indian, and Native lands. These will be addressed individually. Additionally, numerous comments were received that addressed impacts to state and local governments. These impacts will be considered in the last part of this section.

Broad perspective -- all agencies

The impacts on management discussed in this section are addressed from the broad standpoint of all federal land management agencies affected by the R.S. 2477 issue. No attempt has been made to split out the discussion among the various agencies, although reference to a particular agency or agencies will be made when appropriate.

This approach has been used for two reasons.

1. A lack of specific information and the difficulty in predicting the number of potential R.S. 2477 claims make the precise assessment of impacts on an agency or regional basis impossible.

2. An examination of impacts on management of federal lands as a whole is more appropriate to the scope of this nationwide study. Also, the identification and discussion of the central-management issues and concerns that may affect federal lands in the West due to R.S. 2477 are more in keeping with the information needs of Congress, federal land managers, and affected interests at this time.

Impacts on the Management of Federal Lands

Valid R.S. 2477 rights-of-way are recognized and important means of access to and across federal lands. In most instances they have not presented problems to land managers. However, the recent onslaught of assertions, so long after termination of the statute, the potential problems of proof, and the growing contentiousness of the issue do create problems for resource management. The uncertainty attending this issue makes planning and development difficult, compromises an agency's mission, and undermines the relationship between federal officials and the people they serve. The actual impact of use of current and potential

R.S. 2477 rights-of-way depends on the number of claims recognized, the type of resources affected, and how the right-of-way is used. Current and potential R.S. 2477 rights-of-way can pose significant adverse impacts to federal land management in many situations depending on the extent to which an agency is able to manage an R.S. 2477 grant.

Higher level of impacts than with other authorities

Recognized R.S. 2477 rights-of-way historically have been managed only to prevent unnecessary and undue degradation of resources, to the extent that the holder of the right-of-way is not denied reasonable use. R.S. 2477s are sought by many because they perceive R.S. 2477s as virtually unregulated. If this were the case, R.S. 2477 claims could permit a higher level of impact to resources than would occur with issuance of rights-of-way pursuant to other authorities. Under FLMPA, for example, federal managers have authority to review changes in use and to require appropriate mitigation of impacts. Therefore, indefinite recognition of R.S. 2477 rights-of-way could prevent the federal government from providing full protection to important geographic features and biological, cultural, and physical resources. This would pose a particularly significant threat to resource values in National Parks, Wildlife Refuges, Wilderness and WSAs, Wild and Scenic River corridors, Areas of Critical Environmental Concern, or other areas that require special-management practices to protect important resources. Some federal land managing bureaus have and do regulate R.S. 2477s The Department will explore the extent of its regulatory authority over these right-of-way.

Under this heading, impacts from R.S. 2477 highways on the manageability of federal lands are discussed first. This part addresses the topic of converting use along a right-of-way as a result of the holder's extending rights and concludes with a brief overview of agency concerns regarding costs associated with future R.S. 2477 highway claims. Possible impacts related to wilderness follow.

The Ability to Manage According to Agency Mission

The federal agencies that manage substantial acreages of federal land and are the most likely to be affected by recognition and use of R.S. 2477 rights-of-way are the BLM, National Park Service, U.S. Fish and Wildlife Service, and the Department of Agriculture's U.S. Forest Service.

The missions of these agencies are summarized briefly below.

National Park Service--preservation of natural values in National Parks, National Monuments, National Recreation Areas, Wild and Scenic Rivers, trails, etc., while providing for public use and enjoyment. No activity can be authorized which is in derogation of Park values and purposes.

U.S. Fish and Wildlife Service--management of National Wildlife Refuges for protection of migratory waterfowl and consultation under the Endangered Species Act and other protective legislation.

U.S. Forest Service--management of the National Forest System, including many National Recreation Areas and National Forest Monuments, according to the principles of multiple use and sustained yield. R.S. 2477 rights-of-way affect substantial National Forest areas. While some R.S. 2477 rights-of-way do limit the agency's management discretion, other such rights-of-way provide important public access to the National Forests. The Forest Service endeavors to retain historic public access.

BLM--management of the public lands, including National Conservation Areas and Areas of Critical Environmental Concern according to principles of multiple-use and sustained yield.

Common mandate for protection could be compromised

Every federal agency shares a common mandate for use and protection of federal lands and resources within a framework of long-term stewardship. Recognition and use of R.S. 2477 rights-of-way could interfere with and prevent effective management of the individual and common objectives of the affected agencies in some cases. The ability of federal managers to implement management plans and meet the requirements of federal laws, such as the Wilderness Act, Endangered Species Act, Clean Water Act, Archaeological Resources Protection Act, National Historic Preservation Act, etc., would be compromised if they are required to continue indefinitely recognizing R.S. 2477 rights-of-way.

Change of use could cause impacts

Changing the use or status of individual R.S. 2477 highways in conflict with federal purposes could cause localized impacts. For example, road-widening may directly impact natural resources contiguous to the right-of-way. Converting a rough, four-wheel-drive road into a paved thoroughfare could lead to direct impacts resulting from better access to, and increased use of, sensitive locations.

Resource management plans compromised

The recognition of additional R.S. 2477 rights-of-way within a federal unit could lead to more substantial problems. Without the ability to manage access, the ability of federal managers to implement short- and long-term resource management plans could be seriously compromised.

New claims continue to be filed

This potential problem of impact on management due to R.S. 2477 is aggravated due to the inchoate nature of the grant. New claims for rights may surface at any time, frustrating a manager's ability to plan. Related to this is the concern that as more time elapses between 1976 (the date the statute was repealed) and new R.S. 2477 claims, it will become harder to trace the evidence needed to make an accurate validation determination.

Impacts on wilderness designations

Federal agencies manage designated wilderness areas and proposed wilderness according to principles outlined in the Wilderness Act of 1964. It is argued that the assertion of R.S. 2477 rights-of-way in proposed wilderness areas could be used as a tool to defeat wilderness designation because by definition the area must be roadless.

Concern over the ability to manage according to agency mandate is also a particularly sensitive issue in National Parks, Wildlife Refuges, and other similar federal reservations. These areas have been set aside for preservation rather than multiple use purposes. R.S. 2477s within the boundaries of these areas could compromise the specific purposes and values these areas were established to protect.

These issues are of great interest in Alaska, where concerns over both access and the conservation of environmental values are intense. The large number of more recently established federal parks, refuges, etc., in Alaska create special access and management issues.

Degree of Impact Depends on Scope of Right-of-Way

Assessing the extent of impacts of R.S. 2477 claims on the management of federal lands is difficult. Confusion over the law and its application further clouds this evaluation. However, an important correlation can be made in many cases between the types of rights-of-way that may qualify as R.S. 2477 highways and the extent of impacts that could occur.

Significant roads normally a benefit rather than a problem

Generally, existing significant roads pose limited potential for conflict with federal management purposes. In many cases, these roads are major travel corridors providing access for commercial and recreational activities. As some members of the public have commented, these R.S. 2477 highways benefit both the federal managing agency and the public in a number of ways. This is particularly true in situations where state or local governments provide maintenance or other services to facilitate access.

Conversely, there is greater potential for adverse impacts to the management of federal lands if primitive roads--normally characterized as jeep trails, constructed through use only--are asserted and deemed valid R.S. 2477 highways.

Concern over primitive roads

If primitive roads are recognized as valid R.S. 2477 highways, there is greater opportunity for conflict because this type of access and associated use poses more potential for negative impacts to resources and sensitive locations. Without the option to regulate vehicle access, federal managers may not be able to mitigate adverse impacts or manage for nonmotorized types of experiences.

Conversion of Rights from Unimproved Road to Improved Road

The issue of impacts related to a change in use when a holder decides to develop or extend rights on an R.S. 2477 highway is addressed next under this heading.

Quite often, continued use of an R.S. 2477 highway has minimal impact on the management of federal lands as long as that use continues in the same manner and degree. However, should there be a change in use to recognized R.S. 2477 highways, the potential for adverse impacts increases. If recognized rights-of-way are substantially improved or if the scope and use are significantly changed, the ability of federal land managers to protect important resources is reduced.

Reduced ability to protect resources

For example, simple road maintenance may improve access and benefit all. But, road widening or realignment could potentially cause damage to adjacent resources that a federal manager may have difficulty controlling. Converting a jeep trail to accommodate heavy commercial traffic is another example of a situation that could impose various impacts on federal lands.

Under current policy, federal managers have no effective mechanism to review an R.S. 2477 highway holder's plans for maintenance or improvement to identify mitigation measures necessary to meet legislative mandates, including protection of cultural properties, management of habitat for sensitive plant and animal species, and management of federal land for wilderness values. Furthermore, due to conflicting interpretations of the statute and the lack of precise DOI procedures, federally imposed limitations or mitigation requirements have been challenged, making it difficult for land managers to meet legislative obligations. The DOI intends to further explore its legal authority and obligation to manage R.S. 2477 on federal land.

The extent of the ability to require mitigation is unclear

Agency Costs

Agency costs regarding R.S. 2477 can be broken down into two general categories--personnel costs relating to the administration of claims, and costs associated with litigation. Administrative costs include the cost of making administrative determinations and the cost of managing rights-of-way once they are recognized. Administrative determinations include costs of processing claims, reviewing historical records to determine unreserved status, and field examinations of claimed rights-of-way. Agency costs have been estimated to be between $1,000 and $5,000 per claim. The cost of managing recognized R.S. 2477 rights-of-way primarily involves working with the holder of the right-of-way when changes are planned. This cost is extremely variable based on a number of factors, and is not reflected in the figures above.

In addition, agency litigation costs are extremely difficult to estimate, but experience has shown that R.S. 2477 litigation can be protracted and expensive. Litigation costs are expected to remain high until administrative, legislative or judicial action clarifies the R.S. 2477 controversy.

Wilderness

Wilderness areas and Wilderness Study Areas (WSAs) are roadless by definition and preclude any recognition of R.S. 2477 rights-of-way. BLM has been informed by two Utah counties that they intend to pursue quiet-title actions on a road in an existing WSA.

The effect of recognition and use of R.S. 2477 rights-of-way on manageability of wilderness areas and WSAs is a special concern. It is this topic that elevated the R.S. 2477 issue to Congressional attention.

Wilderness manageability compromised

If Federal managers cannot prevent improvement and use of recognized R.S. 2477 rights-of-way, protection of wilderness values, such as naturalness and outstanding opportunities for solitude and primitive recreation in wilderness areas and WSAs, could not be ensured. The manageability of the area for protection of wilderness values would be compromised.

Wilderness proposals

If primitive access routes are recognized as R.S. 2477 highways, large areas of public land in some areas currently proposed for wilderness designation by various public-interest groups may be disqualified. Citizen wilderness proposals on BLM lands in Utah and in the California Desert Conservation Area are two examples of this situation.

Mechanically constructed vs. primitive roads

When assessing the extent of impacts of R.S. 2477 on wilderness management and potential designations, one can again make a distinction between well-established, significant roads and primitive roads. Well-established roads that have been constructed through some type of mechanical means pose no threat either to existing or potential wilderness. However, there is great concern over potential impacts to areas under consideration for future designations if primitive routes constructed by the mere passage of vehicles are deemed valid existing R.S. 2477 highways.

Responses from public scoping echoed the impacts addressed above in many instances and in some cases expressed very different perspectives on impacts of R.S. 2477 on management of Federal lands. The impacts identified by the public are listed below:

Constituency Concerns

- BLM has been informed that Millard County, Utah, intends to file suit for quiet-title to a road in the King Top WSA.
- Public lands cannot be managed by BLM as Congress intends when the lands are covered with a "spaghetti plate" of rights-of-way.
- It should be recognized by federal land managers that their activities on the land are made possible largely because counties have exercised their rights pursuant to R.S. 2477. An extensive network of roads has been built and maintained at the expense of local government and taxpayers and to the benefit of the nontaxpaying federal agency managing the land.
- Current and potential R.S. 2477 roads disrupt management of federal lands and threaten resources and public purposes and values of public land.
- Incomplete records and confusion over the law and its application make it difficult to inventory, thus assess, impacts of potential R.S. 2477 claims.
- It does not serve the public interest to allow abandoned rights-of-way to be converted to other purposes that may be incompatible with current purposes.
- Denial of R.S. 2477 rights-of-way does not mean that access has been eliminated; it merely leaves access under the management and jurisdiction of BLM or other federal agencies. This is precisely what Congress intended in the passage of FLPMA.
- There is the potential to misuse this law greatly in a way that would destroy so much important wildlife and recreational lands and corresponding local and regional economies.
- Congress did not designate National Parks, Refuges, and Forests in Alaska to protect wilderness and wildlife values with the notion that an ancient claim could be upgraded, reconstructed, or converted to uses that are incompatible with the conservation purposes established by law.
- Confirmation of pending or potential R.S. 2477 assertions would degrade or disqualify areas of public lands designated or proposed for designation as wilderness.

- The original intent of R.S. 2477 was to open the West. The BLM is abusing the original intent of the law by using it to increase their control over some roads.

Impacts on Multiple-Use Activities

General comments and information regarding impacts of R.S. 2477 claims on multiple-use activities will be discussed first under this general heading. Specific discussions relating to recreation, the mineral industry, grazing, and the forestry industry will follow.

The U.S. Forest Service and the BLM are the principal multiple-use land management agencies of the Nation. The public lands under the jurisdiction of these two agencies provide for a wide variety of consumptive and nonconsumptive uses, including mining, ranching, forestry, and recreation, to name a few.

Most of these activities have taken place on the public domain since the settlement days of the West. As these uses developed, so did an infrastructure of roads to support these activities. This historical network of roads, largely still in use today, was created in a number of different ways and by a number of different interests. Most roads were developed by users of the public lands; a few were developed by federal management agencies; and others were established by State and local governments. Access to federal lands that may be provided by these roads may be very important to multiple use activities.

A portion of this road system was developed under the authority of the R.S. 2477 grant. These R.S. 2477 highways continue to provide significant benefits not only to public land users but also to the managing federal agency as well. For example, the U.S. Forest Service encourages the use of R.S. 2477 to keep open historical public access to federal lands across lands now in private ownership. Many of these R.S. 2477 highways provide essential access, facilitating public land uses, protection, and management. This system has been developed at little or no cost to federal agencies or to taxpayers at large. The costs of acquiring access by other means can be high.

R.S. 2477 was neither the only, nor perhaps even the dominant, method by which citizens gained access to their public lands. A great deal of access has been and continues to be developed through casual use. The public lands and the roads across them are largely open and available to use without the need of a right-of-way or other formal authorization. Access for some multiple-use activities is allowed because of implicit authorities within related legislation. For example, the Taylor Grazing

Act and the Mining Act of 1872 have been interpreted as providing reasonable access for individuals engaged in those activities on the public land.

Access in support of multiple-use activities is an integral part of agency planning. Access related to grazing, mining, forestry, recreation, etc., is a key element of Forest Service and BLM management plans.

While R.S. 2477 played an important part in building the road infrastructure system on the public lands, its role should not be overstated, for at least two important reasons:

1. R.S. 2477 is only one of several different ways that access has been developed, and other viable alternatives continue to provide access to and across federal lands.

2. For numerous reasons detailed earlier in this draft report, it is not clear what percentage of the existing road infrastructure system on the public lands is attributable to the R.S. 2477 grant.

It is very clear, however, that the entire road system that developed across the public lands prior to 1976 was established and is in use today with very few R.S. 2477 right-of-way claims asserted or recognized by federal agencies or the court system.

Because of this, it is reasonable to assume that current and potential R.S. 2477 claims will continue to have little overall impact on multiple-use activities. Access for a wide variety of multiple-use activities has been available on the public lands and that situation will continue regardless of the recognition of R.S. 2477 rights-of-way. This is especially true for significant roads that were established by the grant. These well-established travel corridors will continue to support public land access and activities.

The potential effect of recognition and use of primitive roads as R.S. 2477 highways is greater than continued use of significant roads because of potential improvements to the primitive roads and increases in use. The nature of the related impacts is described below under individual activity headings.

Recreation Activities

Impacts to recreation vary depending on the type of recreational activity pursued. Some supporters of motorized recreation feel that current and potential R.S. 2477 claims could have a positive effect on their activities. This is because extending claims could maximize access options and perhaps provide an opportunity to maintain or even reopen areas currently closed by agencies.

Other recreationists feel that the proliferation of R.S. 2477 rights could adversely impact their enjoyment of wilderness and other uses of public lands that are not compatible with motor vehicle use.

Both types of impacts described above are more likely if primitive roads are recognized as R.S. 2477 highways.

Mineral Industry Activities

Overall impact to the mineral industry from recognition or use of R.S. 2477 rights-of-way would be minor. A number of public respondents did state that R.S. 2477 rights-of-way were essential because they help to maximize access options for exploration and development. Although this could be true in limited situations, particularly if primitive roads are deemed valid R.S. 2477 highways, the availability of access under casual use, provisions for access under the mining law, and alternative methods of obtaining a right-of-way under FLPMA and other laws combine to provide other means of ensuring continued access by miners.

Livestock Grazing

The overall impact of current and potential R.S. 2477 claims on grazing activities is also minimal. The availability of access under casual use, implicit provisions of the grazing regulations, and other alternative methods of obtaining access provide adequate means of ensuring continued access by livestock operators.

Forestry

The overall impact of current and potential R.S. 2477 claims on forestry uses of the public lands is minimal for the same general reasons stated above. Many National Forests are surrounded by private lands and securing access to them is more of a problem than controlling access across them. R.S. 2477, along with other access acquisition authorities, is valued by the U.S. Forest Service as a cost effective way of providing public access.

Constituency Concerns

Many respondents felt that multiple-use management objectives should be placed above the objectives of holders of R.S. 2477 rights-of-way. However, some felt that R.S. 2477 claims should mandate reconsideration of federal management objectives. Other concerns are listed as follows:

- BLM is violating the intent of both statutes by granting R.S. 2477 pro forma and by limiting the Secretary's ability to retain and manage public lands for multiple use and sustained yield with an emphasis on land-use planning, protection of the environment, and involvement of the public in decisionmaking.
- A conflict between management objectives and an R.S. 2477 claim is grounds for reconsidering the management objective.
- A functional R.S. 2477 will go a long way toward opening up our public lands for public use and enjoyment and curtailing exclusive use, commercialization for profit, and de facto management of public lands.
- The mineral industry depends on unimpeded access to remote areas of the public domain. Any attempt to restrict the scope of valid existing rights established under R.S. 2477 will directly hamper mineral exploration and development that is absolutely vital to this country's economy and national security.
- Access across public lands to private lands is of particular concern because of patented mining claims surrounded by public lands and the railroad checkerboard system of land ownership.
- Existing regulations pertaining to several multiple-use activities contain access provisions, such as the mining regulations under 43 CFR 3809, precluding the need for other authorizations such as FLPMA or R.S. 2477.

Impacts On Access

Impacts from current and potential R.S. 2477 claims on access to federal, private, state, Alaskan Native, and Indian lands will be discussed under this heading.

To Federal Lands

Access to significant areas of public lands is an important issue. As outlined in the Government Accounting Office report of April 1992 (Federal Lands--Reasons for and Effects of Inadequate Public Access), approximately 700 million acres are owned by the federal government.

This land contains many resources (both consumptive and nonconsumptive) of value to the American people. Intermingled with these lands are state, local government, tribal, corporate, private, and other lands. This fragmented pattern of ownership, especially in the West, makes it difficult in many instances for the public to access federal land easily or legally. Unless the federal, state, and local governments obtain additional access or identify and maintain existing legal public access routes, non-federal landowners can often control or deny public access to federal land.

In recent years, there has been more focus on and analysis of this situation by some federal agencies. What are now private and state lands may, in some cases, have included valid R.S. 2477 highways when they were conveyed out of federal ownership. When this historical access is closed by private land owners, the public may be deprived of access or may be charged a fee to access federal lands. Federal land managers have lacked adequate resources to gain legal access across these lands.

Recent actions to reopen or prevent closing of historical public highways pursuant to state law have been actively pursued by private citizens and by the federal government. The U.S. Forest Service and the BLM have entered into agreements with some private citizen groups to pursue reopening of closed historical access across private land where such routes may qualify as public highways under appropriate state law.

In addition, the BLM in Colorado, in conjunction with the DOI Regional Solicitor's Office, has been reviewing access needs across private lands. Where review finds that there is a valid public highway under Colorado state law, the private landowner is notified and BLM manages the public lands assuming there is legal public access. Other BLM State Offices are looking at this approach and are assessing its applicability to their access management.

To Private Lands

Inherent in private property ownership is a need for some sort of access to the property. Access also affects the value of private lands through the appraisal process. Many parcels of private land are reached by routes across federal lands. Management of motorized vehicle use over federal lands would directly affect use and enjoyment of the private lands, especially if the only access route is across federal lands. Some of those routes may be valid highways under appropriate state law.

When private landowners pursue formal authorization of access to their private property, the cost of access may be a prime consideration. There may be significant costs associated with formal authority to construct, operate, and maintain such access. If an access route exists that might be considered a public highway and thus not require a landowner to undertake these costs, this would probably be the preferred method of access. However, R.S. 2477 is clearly only a grant for a "public highway," and would not be applicable as authority for a strictly private road.

To State Lands

Many parcels of state land are reached by crossing federal land. Use of state lands by state leaseholders, other users, and the public can be significantly impacted by federal actions regarding management of access on federal land. State lands can consist of both trust and sovereign lands. Trust lands are generally managed by the respective states to maximize revenue generation in support of schools and other government services.

While a federal district court has addressed the right of access to state trust lands within WSAs in Utah and has stated that there is a right for such access, the question of the right of access to state lands in other states, as is reasonably necessary to the economic development of such lands, is not so clear.

R.S. 2477 highways are a valid method of securing historic access to State lands, but they are not available prospectively. The attractive feature for states and localities of R.S. 2477 is that, under current policy, no regulatory obligations are imposed, unlike other right-of-way authorities.

Access affects the value of state lands just as it does private land. The value of state lands may also be impacted based on the potential for R.S. 2477 rights-of-way across the land.

To Alaskan Native Lands

It was the intent of Congress to resolve aboriginal claim issues in Alaska with the Alaska Native Claims Settlement Act (ANCSA). Between this act and the Native Allotment Act of 1906, Native lands have taken on a unique and prominent aspect in Alaska. Native lands conveyed to Alaskan Natives have been not only used for the continuation of traditional culture, but also for the provision of economic development.

Access has been an important component of this issue. Access to and across Native lands is essential for the future economic development of Alaska, but there is a concern that uncontrolled access will impact the

traditional lifestyles of Alaskan Natives and lessen their ability to manage lands for their benefit. Important historical subsistence resources may exist on Native lands and on adjacent federal lands. Access to subsistence areas by contemporary access modes such as snowmobiles and all-terrain vehicles is considered by some Native peoples as critical to subsistence uses.

As discussed previously, the lack of development of a traditional access network in Alaska has resulted in unique access methods. Alaska Natives have depended on the use of traditional lands and access routes for subsistence. With the selection and conveyance of lands to for-profit corporations established by and for Alaskan Natives, the value of access has become an important issue.

Section 17(b) of ANCSA addressed the issue of reserving easements across Native lands conveyed to Native corporations. Physical access may exist to many Native lands, but formal authorizations over interspersed federal, state, and private lands generally do not exist. Costs associated with acquisition of other formal authorizations across federal and other lands may be a significant impact to Native landowners in Alaska or to the state of Alaska.

To Indian Lands

Most Indian Reservations in the Lower 48 States were established by Congress prior to the development of extensive infrastructure and road networks. Access to Indian lands is much the same as access to state and private lands, including Interstate, federal, state, and county roads. Access to Indian lands has not been identified as an issue through public comments, and little impact is anticipated to Indian lands as a result of existing or potential R.S. 2477 claims.

There could be impacts on access to Indian religious and cultural sites located outside Reservations. These sites have been determined by the courts in some cases to be Indian lands. Access to these areas could be impacted, but the extent of the impacts is not known. No comments were received that addressed this issue.

Many commenters on this study reiterated access concerns and suggested that Federal land managers take a more aggressive role, including the use of R.S. 2477, to lessen what they considered to be an access dilemma. These concerns include access to and across private lands.

Constituency Positions

Many comments stated that Alaska, for a variety of reasons, posed a special situation and that R.S. 2477 access is particularly critical to that state. Contributing factors include the state's large federal land base, coupled with the fact that much of the private, State, and local property has recently been established from federal lands.

Other typical comments included:

- R.S. 2477 maximizes access options.
- Federal, state, or private individuals should reestablish R.S. 2477 rights-of-way on roads currently blocked by private landowners in order to gain access to public lands.
- Maintaining R.S. 2477 rights-of-way across private lands ensures future access of the public to public lands.
- R.S. 2477 facilitates access to private lands. This is particularly important in the West, where land ownership patterns are often checkerboarded or where large areas of public lands surround private inholdings.
- R.S. 2477 may present an opportunity to gain access to areas currently closed, both public and private.
- Denial of R.S. 2477 does not eliminate access. It merely leaves access under the jurisdiction of the federal land manager.
- Access across public lands to private lands is of particular concern because of patented mining claims surrounded by public lands and railroad checkerboard.
- Average citizens will never see access with Title XI. There are too many loopholes; even major corporations won't use it.
- FLPMA and ANILCA are inadequate and do not provide the flexibility that R.S. 2477 provides to state and local government right-of-way needs.

Impacts to State and Local Governments

Some state and local governments view access pursuant to R.S. 2477 as a very significant issue. Their concern is not necessarily in maximizing public highways under their management, but preserving their ability to expand and upgrade their transportation systems to provide for road safety and future growth. Local interests fear that their economies and infrastructures may be limited or diminished if federal lands and resources are unavailable for development. Such limits will translate to lower tax bases for government services, loss of employment opportunities for present and future generations, and the potential loss of local control over their own destinies.

State and local governments also sometimes argue that R.S. 2477 is a blanket authority that was granted to local government to build access across the public domain for purposes of public convenience. They argue that the grant was without reservation, irrevocable, and that any taking of the right-of-way must involve compensation.

The following comments summarize many of the additional concerns expressed by or about state and local government entities.

Constituency Concerns

Because R.S. 2477 rights-of-way were historically available and stimulated road building, some state and local interests would like to retain its availability. Other right-of-way authorities are, of course, available, but are less desirable because they involve more federal control.

- R.S. 2477 has provided state and local governments greater flexibility in administering lands within their jurisdictions and provided access to neighboring public and private lands.
- Federal government is undoing policy that was made for the public.
- R.S. 2477 was a blanket authority granting the right to local government to build access across the public domain for the purposes of public conveyance and convenience. The right granted was total and without reservation.
- Once accepted, rights-of-way created under the R.S. 2477 grant are irrevocable. Any taking of the grant must involve some form of compensation to the affected state(s).
- The right granted by Congress in 1866 and the work and expense of local citizens pursuant to this right must not be treated casually by either federal managers or the U.S. Congress.

- The benefits accrue to all the people while the sacrifices made to create them were made by the few living in the local areas.

- Many counties in the Western States are not financed to fight the legal battles to get these rights-of-way reopened for use by public agencies and the general public.

- The ability to assert rights-of-way is an important land management component that allows county and local governments the flexibility to administer lands within their jurisdiction and ensure access to citizens as deemed necessary. To repeal, limit, or diminish this statute would cause undue hardship on local governments and small rural communities.

- Counties have expended large sums of money for construction and maintenance--money, or some portion thereof, that would otherwise have been shouldered by the federal government.

- R.S. 2477 rights-of-way must be recognized as inseparable from other essential rights vital to the interests and stability of local economies and cultures.

- Federal agencies should coordinate with local government and document existing standards in land-use and resource-management plans.

- A confirmation process should be established whereby all individuals and State and local governments with unresolved R.S. 2477 claims would be required to submit proof of the validity of their claims to the DOI for confirmation.

- An extensive network of roads has been built and maintained at the expense of local government and local taxpayers and to the benefit of the nontaxpaying federal agency managing the land.

- State and local governments view R.S. 2477 rights-of-way as property assets. Loss or reduction of use may constitute a taking necessitating compensation.

- States owning trust lands requiring that the lands be used for the support of the common schools and other specified institutions are concerned that federal actions not preempt or limit their

ability to fulfill their trust responsibilities to act for the sole benefit of their beneficiaries.

- Denial of R.S. 2477 claims may result in heavy legal costs to federal agencies and the federal treasury as affected parties seek compensation.

Currently Available Access Authorities

Although R.S. 2477 was repealed in 1976, it is perceived by many to be the only method of obtaining access to federal lands. This misperception has inflamed some users of public lands. Access is a key component of federal land management. Federal lands are currently managed to provide access in a variety of ways under several provisions of law.

Most access occurs without any special authorities or privileges extended. Refuge and park visitors or public land users travel under the terms of casual use or other implied rights that do not require a right-of-way or other authorization.

Additionally, there are current right-of-way authorities that provide access on federal lands other than R.S. 2477, such as Title V of FLPMA.

This section describes these access alternatives. First, alternative methods of obtaining access are discussed. Second, the legal authorities to grant rights-of-way on public land which are available to different agencies are described.

Alternatives to Rights-of-Way

The access methods described below are not a complete list of all available means of access. They indicate the types of access that exist.

Access for Casual Use

"Casual use" means activities that do not ordinarily cause any appreciable disturbance or damage to public lands, resources, or improvements; those types of activities do not require a right-of-way grant or temporary-use permit pursuant to regulations. Casual use of public lands is provided for under a number of different regulations, for mining, leases and permits, and rights-of-way and other activities. The regulations at 43 CFR 2800 define casual use on lands managed by BLM in terms of right-of-way uses. For the most part, this policy also applies to National Forest lands.

Casual use generally includes foot traffic and the use of horses or pack animals, although in a few instances, such traffic is prohibited to protect resources. Off-highway vehicle use is also recognized by BLM and the

Forest Service as casual use except where areas are designated as open only to the use of existing roads and trails, or closed to off-highway vehicle use. Casual use of NPS lands generally does not allow for off-highway vehicle use.

Implicit Authority

A right of reasonable access can be implied for those engaged in valid uses of the public lands. For mining claims, for mineral leasing, livestock grazing, and other uses, access is available across federal lands to reach the allotment or permit area. Courts have found that federal agencies must provide reasonable access to unpatented mining claims when requested.

Sections 1323(a) and 1323(b) of ANILCA provide for reasonable access to inholdings within National Forests and within blocks of public land managed by BLM.

Acquisition of Access Routes

There are several methods by which local, state, and federal agencies and other entities can acquire access to federal land across non-federal land by acquiring either easements or title to non-federal land. When this is accomplished, access can be managed as part of the adjacent federal lands by the managing federal agency.

Road and trail easements

Road or trail easements are acquired by federal agencies across private or state land when access is needed. This method involves negotiations with the landowner(s) and the compensation of fair market value for the easement acquired. This a commonly used method of acquiring needed access to federal lands.

Purchase of land

Acquisition of title to non-federal lands is very similar to the acquisition of easements by federal agencies. This method of acquisition differs in that federal agencies acquire (purchase at fair market value) title to property that has been identified as needed for federal-agency management and use. Acquisition of title to non-federal land that is contiguous to federal land allows the federal agency to provide access via existing routes that may cross the acquired land or to develop new access routes, if needed.

Land exchange

Acquisition of land or interest in land, including easements, can also be accomplished through the consummation of a land exchange with the non-federal party. Exchanges of land may be made if there is a finding that the public interest is well served and that the values of the non-federal lands or interests are greater than the values and objectives of the federal lands to be conveyed. Federal agencies may then manage the lands acquired through exchange in a manner that provides reasonable access to the agency, public land users, and the public.

Reciprocal Access Agreements

Access is sometimes obtained through reciprocal road agreements between a federal agency and parties seeking access across federal land. Reciprocal agreements can be developed that give each party the access desired. This authority is contained at 43 CFR 2801.1-2.1.

Alternative Right-of-Way Authorities

R.S. 2477 is not the only right-of-way authority available for roads, and because it was repealed in 1976, it cannot be used to establish rights-of-way that were not yet in existence at that time. However, land managing agencies are authorized to grant rights-of-way under other legal provisions. Resolution of the R.S. 2477 issue does not affect these other provisions. The following brief descriptions are offered as alternative right-of-way authorities. Any right-of-way sought that cannot be proven to have existed before 1976 and any future rights-of-way must use these authorities.

Title 23 of the Federal-Aid Highway Act

The U.S. Department of Transportation can appropriate highway rights-of-way under Title 23 of the Federal-Aid Highway Act. The appropriation is subject to conditions deemed necessary by the Secretary of the Interior and the Secretary of Agriculture to protect the federal land and public interest.

FLPMA Title V Right-of-Way

FLPMA Title V replaced R.S. 2477. It authorizes the granting of rights-of-way, to any qualified public land user. It incorporates the provisions of the National Environmental Policy Act and other applicable legislation into the right-of-way process. Impacts to public lands can be mitigated through terms and conditions of the right-of-way grant. Agency regulations and manuals clearly define the process. In some states, counties are relinquishing R.S. 2477 rights-of-way in favor of FLPMA rights-of-way.

Agency Authorities

Several federal agencies have specific authorities unique to the agency. A brief discussion follows.

U.S. Fish and Wildlife Service

The U.S. Fish and Wildlife Service has right-of-way authority (50 CFR 29) promulgated pursuant to the National Wildlife Refuge System Administration Act (16 U.S.C. 668 dd(d)). Under these regulations, a right-of-way must be certified to be compatible with the purposes for which the refuge was established or cannot granted without explicit authorization by Congress. Additionally, the U.S. Fish and Wildlife Service is authorized to issue special-use permits for uses that existed at the time of the creation of the Refuge. These permits contain stipulations and conditions to protect Refuge values.

U.S. Forest Service

The Enabling Act for the National Forest System was passed in 1891, thus creating a movement for separate forests and additions to forest reservations to be created by Acts of Congress and Presidential Proclamations. Except for entries under the mining laws and water right appropriations,

this closed the national forests to any more unilateral appropriation of public land for roads and trails. The method of creating rights-of-way for roads and trails on the national forest under state law stopped. Management of those existing public roads and trails on the national forests continued to be under the jurisdiction of the counties unless abandoned under state law provisions.

In addition, the U.S. Forest Service has authority to issue rights-of-way under FLPMA and the Forest Road and Trail Act (FRTA; 16 U.S.C. §533). The Forest Service may grant rights-of-way where parties show a need consistent with the planned uses of the forest.

NPS

The National Park Service lacks general authority to issue rights-of-way across units of the National Park System for roads, with certain exceptions on a unit-by-unit basis.

Special Alaskan Right-Of-Way Authorities

There are some unique legal authorities to issue rights-of-way in Alaska. These include easements reserved under the authority of Section 17(b) of the Alaska Native Claims Settlement Act (ANCSA) and the Transportation and Utility Corridor system process under Title XI of (ANILCA) (43 CFR Part 36).

17(b) Provision of ANCSA

Section 17(b) easements provide limited access over lands conveyed to native Alaskans. These easements are very limited in width and use. The regulations governing Section 17(b) easements are found at 43 CFR 2650.4-7. The following criteria must be met to permit a reservation of an easement: no other reasonable alternative route of transportation across publicly owned land can exist; they must be limited in number and not be duplicative; they must be limited in use and size; and must follow existing routes of travel unless otherwise justified.

Title XI of ANILCA

Title XI of ANILCA provides a process for establishing rights-of-way over, across, and through designated Conservation System Units and the National Conservation and National Recreation Areas. Title XI rights-of-way are available for new roads, pipelines, and other transportation and utility systems.

The process is perceived to be very burdensome, because it requires compliance with the National Environmental Policy Act and approval of each (possibly several) affected agencies. Several small scale single agency Title XI rights-of-ways have been processed by the U.S. Fish and Wildlife Service and the National Park Service in Alaska. Two major Title XI right-of-way applications have been filed by the state of Alaska with the Alaska Region of the National Park Service.

Recommendations--R.S. 2477

In the Fiscal Year 1993 House Appropriations Committee Conference Report, 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 sound recommendations for assessing claims. The Department understands that its recommendations must take into account the intent of R.S. 2477 and the Federal Land Policy and Management Act (FLPMA), and that any proposed changes in use of valid rights-of-way must be in accordance with applicable law.

The Department directed the Bureau of Land Management, Utah State office, to take the lead in investigating this issue and preparing a report to congress. Public participation was obtained in two stages. Preliminary "scoping" meetings were held in December 1992 and January 1993 in eight western cities. Over 6000 pages of public comments were received and reviewed. These comments were instrumental in preparing the March 1993 draft report, which was circulated to approximately 4000 interested parties. Seven additional public meetings were held on the draft report and attended by nearly 400 people. Approximately 1000 pages of further comments were provided to the Department. All comments received before May 7 were reviewed in preparation of the final report, even if received after the public comment period closed.

The Department's draft report outlined five general alternatives for addressing R.S. 2477. These alternatives were intended to generate comment and discussion that would aid the Department in making recommendations in the final report. The comments received were beneficial in development of the recommendations that follow.

Although R.S. 2477 was repealed in 1976 by FLPMA, a law that charted new directions for public land management, valid existing rights under R.S. 2477 at the time of repeal were protected. The final report contains extensive information about the history, status, impacts, and alternatives to R.S. 2477. It is intended to help congress and the public, as well as the Department, to understand this often misunderstood issue and put it in perspective.

To provide sound recommendations, the Department must move beyond description and discussion. It must grapple with unresolved conflicts and must help provide answers to several important questions, including: what are valid existing rights, what are the proper roles of holders of those rights and the managers of the land they traverse, and what is the

relationship between R.S. 2477 and the modern legislation that dictates current federal responsibilities.

Some of these answers must ultimately and finally be provided by the courts. But the Department of the Interior should be engaged in these questions, to bring its expertise to bear on them. To this end, the appropriate officials of the Department have been directed to begin work immediately on a formal rulemaking on R.S. 2477, and to publish proposed regulations promptly. The process of rulemaking will furnish a regularized process for exploring and resolving the many legal and policy questions inherent in this issue, providing ample opportunity for the public, affected states, other federal agencies, and congress to participate.

Questions including the following will be addressed in a future rulemaking:

- Appropriate definitions of the statutory terms construction, highways, and public lands not reserved for public purposes.
- The respective roles of, and relationships between, federal and state law in defining key terms and resolving other issues.
- The extent of the Department's authority and obligation to manage R.S. 2477 rights-of-way on federal lands, including whether some of the processes in FLPMA Title V might be used to channel the Department's management.
- Recordation requirements.
- The elements of proof for an R.S. 2477 claim.
- Public notification and administrative appeals processes.

The Secretary of the Interior has broad authority to regulate the management of the public lands, but the Department will consult with congress on whether, and the extent to which, further congressional action is needed.

Until final rules are effective, 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 determinations.

The U.S.D.A. Forest Service suggests consideration of options that would preserve R.S. 2477 as a tool to maintain historic public access to federal lands across private lands. For example, congress could provide mechanisms for assuring that R.S. 2477 rights-of-way continue to provide important public access where such access is necessary and appropriate. Such mechanisms might include federal assumption of management under temporary leaseholds or cooperative agreements.