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Office of the General Counsel

B-277719

August 20, 1997

Congressional Requesters

This responds to your July 29, 1997, letter asking whether section 108 of the Department of the Interior and Related Agencies Appropriations Act, 1997, is permanent law or expires at the end of fiscal year 1997.<sup>1</sup> Section 108 of the Interior Appropriations Act states that:

"No final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to Revised Statute 2477 (43 U.S.C. 932) shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act." 110 Stat. 3009-200.

For the reasons discussed below, we believe section 108 is permanent law.

Discussion

Since an appropriation act is made for a particular fiscal year, the starting presumption is that everything contained in the act is effective only for the year covered. 31 U.S.C § 1301(c)(2)(1994). For this reason, a provision in an appropriation act will be considered to be permanent only if the statutory language or the nature of the provision makes it clear that Congress intended the provision to be permanent. 65 Comp. Gen. 588, 589 (1986).

Permanency is indicated most clearly when the provision in the appropriation act uses words of futurity. While "hereafter" is a common "word of futurity," we have afforded language such as "after the date of approval of this act" the same treatment. E.g., 36 Comp. Gen 434, 436 (1956). The language "subsequent to the date of enactment of this Act" found in section 108 of the fiscal year 1997 Interior Appropriations Act is of the same character.

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<sup>1</sup> The Department of the Interior and Related Agencies Appropriations Act, 1997, is contained in section 101(d) of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-181(1996).

The precise location of the words of futurity can be important and can determine whether or not a provision is permanent. Cf. B-228838, Sept. 16, 1987 (words of futurity in a proviso of a section did not make the entire section permanent). In the case of section 108, the location of the phrase "subsequent to the date of enactment of this Act" presents two possible interpretations. On the one hand, "subsequent to the date of enactment of this Act" could apply only to the immediately preceding phrase "Act of Congress" and thereby describe only the period of enactment for the authorizing "Act of Congress" that must occur for an agency rule or regulation on R.S. 2477 rights-of-way to take effect.<sup>2</sup> Under this reading, the phrase "subsequent to the date of enactment" means that the agency rule can become effective only if it is expressly authorized by a new, not a previous, Act of Congress. This limitation on agency rulemaking would expire at the end of fiscal year 1997.

Alternatively, "subsequent to the date of enactment of this Act" could apply to all of section 108 and thereby describe the time period applicable to the limitation on agency rulemaking on R.S. 2477 rights-of-way. Under this reading, the phrase "subsequent to the date of enactment of this Act" means that the requirement for an express authorization by an Act of Congress before the agency rule can become effective is a permanent requirement beginning with the enactment of the fiscal year 1997 appropriation. We believe the latter interpretation is the meaning best ascribed to section 108 based on its legislative history and purpose.

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<sup>2</sup>Section 8 of the Mining Act of 1866 stated that "the right of way for the construction of highways over public lands, not reserved for public uses is hereby granted." That section was codified as section 2477 of the Revised Statutes, and has been commonly referred to since then as "R.S. 2477." Section 706 of the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, 90 Stat. 2793, repealed R.S. 2477 but section 701 provided that FLPMA did not terminate any land use, including rights-of-way, existing on October 21, 1976. FLPMA did not provide a time limitation on filing claims for pre-1976 rights-of-way. The rules and regulations that are the subject of section 108 are proposals to change how R.S. 2477 claims are processed.

Language similar to that found in section 108 first appeared as section 349(a)(1) of the National Highway System Designation Act of 1995, Pub. L. No. 104-59, 109 Stat. 568, 617-618 (1995). Section 349(a)(1) states:

"(a) MORATORIUM. -

"(1) IN GENERAL. - Notwithstanding any other provision of law, no agency of the Federal Government may take any action to prepare, promulgate, or implement any rule or regulation addressing rights-of-way authorized pursuant to section 2477 of the Revised Statutes (43 U.S.C. 932), as such section was in effect before October 21, 1976."

As indicated by the heading of subsection (a) of section 349, paragraph (1) was a moratorium on agency actions on rules and regulations regarding R.S. 2477 rights-of-way. Paragraph (2) provided that the moratorium would be effective through September 30, 1996.<sup>3</sup> The purpose of the moratorium was to delay regulations proposed by the Secretary of the Interior so that the Congress and the states could address concerns over proposed changes to the process for recognizing state and local government claims for rights-of-way across federal lands granted pursuant to R.S. 2477. 141 Cong. Rec. S8924-8925 (daily ed. June 22, 1995)(statements of Sens. Stevens and Murkowski).<sup>4</sup>

Before the moratorium expired, the Senate Committee on Energy and Natural Resources considered S. 1425, a bill to "recognize the validity of rights-of-way

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<sup>3</sup>Your letter refers to another restriction running through fiscal year 1996. Section 110 of the Department of the Interior and Related Agencies Appropriations Act, 1996, as contained in section 101(c) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-156, provided that none of the funds appropriated or otherwise made available by the Act could be used by the Secretary of the Interior to develop, promulgate, and implement a rule concerning R.S. 2477 rights-of-way. 110 Stat. 1321-177. This provision was in H.R. 1977, the Department of Interior and Related Agencies Appropriations Bill, 1996, when it was reported from the House Committee on Appropriations on June 30, 1995. It remained intact through the enactment of Pub. L. No. 104-134 on April 26, 1996, and is narrower in scope than the moratorium enacted by section 349 of Pub. L. No. 104-59 five months earlier.

<sup>4</sup>The provision for the moratorium was added to the Senate bill as a floor amendment and had a December 1, 1995 expiration date. The conference committee adopted the moratorium contained in the Senate bill and extended its application through the end of fiscal year 1996. H. Rep. Conf. Rep. No. 104-345 at 108 (Nov. 15, 1995), reprinted in 1995 U.S.C.C.A.N. 610.

granted under section 2477 of the Revised Statutes, and for other purposes." The bill, as reported from the Committee on May 9, 1996, consisted entirely of the language now found at section 108 of the fiscal year 1997 Interior Appropriations Act. The purpose of S. 1425 was to allow the Department of the Interior to develop new regulations while prohibiting their implementation until expressly approved by an Act of Congress. S. Rep. No. 104-261, at 2 (1996). There is no question that if it had been enacted into law, S. 1425 would have continued indefinitely the restriction against agency rules or regulations on R.S. 2477 rights-of-way becoming effective without an authorizing Act of Congress. See, id., at 3-4 (Letter from June E. O'Neill, Director, Congressional Budget Office, dated May 8, 1996). While no further action was taken on S. 1425, its language ultimately became section 108 of the fiscal year 1997 Interior Appropriations Act.

A little more than a month after the Senate Committee on Energy and Natural Resources reported S. 1425, the House of Representatives passed H.R. 3662, the Department of the Interior and Related Agencies Appropriations Bill, 1997. Section 109 of H.R. 3662 stated that

"None of the funds appropriated or otherwise made available by this Act may be obligated or expended by the Secretary of the Interior for developing, promulgating, and thereafter implementing a rule concerning right-of-way under section 2477 of the Revised Statutes."

This language was identical to language in the fiscal year 1996 appropriation act enacted two months before. See note 2 above. When the Senate Committee on Appropriations reported its version of the appropriations bill, it deleted the House language and substituted the language of S. 1425, stating that it was "identical to the bipartisan proposal reported by the Senate Energy and Natural Resources Committee (Senate bill 1475 [sic])." S. Rep. No. 104-319, at 56 (1996). This is the language ultimately enacted as section 108 of the fiscal year 1997 Interior Appropriations Act as contained in Pub. L. No. 104-208.

This history strongly supports the conclusion that Congress intended section 108 to be permanent. Section 108 was lifted verbatim from a bill that by virtue of its language and its character as general legislation would, if enacted, have continued indefinitely the restriction on implementing rules on R.S. 2477 rights-of-way. Also, the Senate and ultimately the Congress substituted the language of S. 1425 for the language of H.R. 3662, which like the identical language of Pub. L. No. 104-134 for fiscal year 1996, was clearly applicable only for a fiscal year. In revealing the origin of section 108, the applicable discussion in S. Rep. No. 104-319 and H. Conf. Rep. No. 104-863 contains nothing to suggest that Congress intended for the effect of the language from S. 1425, i.e., an indefinite restriction, to be different when included in the appropriation act.

Other reasons support the conclusion that the Congress intended section 108 to be permanent legislation. The language of section 108 is not a restriction on the use of appropriations. It is a substantive provision addressing when certain agency rules or regulations can take effect. Its language standing alone is permanent in nature. 36 Comp. Gen. at 436. Also, no real effect would be given to the phrase "subsequent to the date of enactment of this Act" if it were interpreted to only describe the time period when an authorizing "Act of Congress" must occur before an agency rule becomes effective. Section 108 could not have been designed to vitiate a prior Act of Congress expressly authorizing final agency rules or regulations on R.S. 2477 rights-of-way for the simple reason that there was and is none. Accordingly, any Act of Congress expressly authorizing a final rule or regulation on R.S. 2477 rights-of-way would be one enacted after enactment of the fiscal year 1997 Interior Appropriations Act. For the phrase "subsequent to the date of enactment of this Act" to have any effect, it must mean that the section 108 restriction on when a rule or regulation on R.S. 2477 rights-of-way takes effect is permanent law beginning with the date of enactment of the fiscal year 1997 Interior Appropriations Act.

For the reasons discussed above, we conclude that section 108 is permanent law. I trust the foregoing will be of assistance.

Sincerely yours,

Robert P. Murphy  
General Counsel

Enclosure

List of Requesters

The Honorable Robert F. Bennett  
The Honorable Conrad Burns  
The Honorable Larry E. Craig  
The Honorable Orrin G. Hatch  
The Honorable Frank H. Murkowski  
The Honorable Ted Stevens  
United States Senate

The Honorable Chris Cannon  
The Honorable Helen Chenoweth  
The Honorable Michael D. Crapo  
The Honorable Barbara Cubin  
The Honorable Randy "Duke" Cunningham  
The Honorable John T. Doolittle  
The Honorable John E. Ensign  
The Honorable Jim Gibbons  
The Honorable James V. Hansen  
The Honorable Doc Hastings  
The Honorable J.D. Hayworth  
The Honorable Wally Herger  
The Honorable Jim Kolbe  
The Honorable Jerry Lewis  
The Honorable George R. Nethercutt, Jr.  
The Honorable Ron Packard  
The Honorable Richard W. Pompo  
The Honorable George P. Radanovich  
The Honorable Bob Schaffer  
The Honorable Joe Skeen  
The Honorable Robert F. (Bob) Smith  
The Honorable Bob Stump  
The Honorable Charles H. Taylor  
The Honorable Don Young  
House of Representatives

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## **DIGEST**

The presumption is that everything in an appropriation act is effective only for the year covered, but the presumption can be overcome with "words of futurity" that reflect the Congress' intention for the provision to be permanent law. The location of the "words of futurity" in a restriction on agency rulemaking contained in the fiscal year 1997 Interior Appropriations Act created some ambiguity about what the words modified and, therefore, whether the restriction was permanent law or expired at the end of the fiscal year. An analysis of the provision's legislative history and purpose supported the conclusion that the restriction is permanent law.