STATE OF UTAH
OFFICE OF THE GOVERNOR
SALT LAKE CITY
84114-0601

MICHAEL O. LEAVITT
GOVERNOR

OLENE S. WALKER
LIEUTENANT GOVERNOR

12-17-01

Dear Steve,

I've attached two documents detailing a proposed road policy. Thank you for being so helpful. Matt has been very responsive. When you have reviewed them, I'll call so we can discuss a process for resolving details on specific roads.

Mike

PROPOSED DOI POLICY December 11, 2001

Text of Statute.

Section 8 of the Act of July 26, 1866, provided:

> [T]he right of way for the construction of highways over public lands, nr reserved for public uses, is hereby granted.

43 U.S.C. § 932 (formerly § 2477 of the Revised Statutes of the United States) (. VII of the Federal Land Policy and Management Act of October 21, 1976, 90 Stat. 2/- (FLPMA), which expressly recognized the validity of R.S. 2477 rights-of-way perfected be. e October 21, 1976).

Governing Regulations as of October 21, 1976.

Federal regulations for R.S. 2477 rights-of-way existed in substantially the same form from 1938 (43 C.F.R. § 244.55 (1939)) through July 1, 1980 (45 Fed. Reg. 44537 – deleting Subpart 2822 or part 2820). These Regulations were perpetuated in 51 Fed. Reg. No. 37, page 6542, (February 25, 1986), and continue to govern R.S. 2477 rights-of-way. Inasmuch as R.S. 2477 was repealed in 1976 by FLPMA and any R.S. 2477 right-of-way vested as of that date or not at all, no later agency interpretation of R.S. 2477 by regulation or otherwise that is inconsistent with the regulations that obtained to the time of their repeal is valid.

The regulations in effect as of 1976, which still govern, provided in pertinent part as follows:

> No application should be filed, as no action on the part of the Government is necessary.

43 C.F.R. § 2822 1-2 (1974).

> Grants of rights-of-way [under R.S. 2477] become effective upon the construction or establishment of highways, in accordance with the State laws, over public lands not reserved for public uses.

43 C.F.R. § 2822.2-1 (1974).

Revocation and Disavowal of Policy Statements Inconsistent with the Governing Statute and Regulations.

Any previous Departmental expressions inconsistent with R.S. 2477 as implemented by the above quoted regulations are inapplicable. Specifically, the Interim Departmental Policy on

Revised Statute 2477, dated January 22, 1997, is revoked and the letter of Mr. Frederick N. Ferguson regarding Standards to be applied in determining whether highways have been established across public lands under the repealed R.S. 2477 (43 U.S.C. § 932), dated April 28, 1980, is disavowed.

Acceptance by Grantee.

To constitute acceptance, all three of the following conditions must be met:

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

2. Construction or establishment of the highway in accordance with the law of the applicable State must have occurred.

3. The highway so constructed or established must be considered a public highway.

Public Lands, Not Reserved for Public Uses.

"Public lands, not reserved for public uses," were those lands of the United States that were open to the operation of the various public land laws enacted by Congress, and include those lands not intended by drafters of R.S. 2477 to be closed to the creation of R.S. 2477 highways.

The term "public lands, not reserved for public uses," does not include public lands reserved or dedicated by Act of Congress, Executive Order, Secretarial Order, or, in some cases, classification actions authorized by statute, during the existence of that reservation or dedication, intended to preclude creation of R.S. 2477 highways.

The term, "public lands, not reserved for public uses," does not include public lands pre-empted or entered by settlers under the public land laws or located under the mining laws which ceased to be public lands during the pendency of the entry, claim, or other.

The term "public lands, not reserved for public uses," does not exclude public lands subject to sub-surface withdrawals such as coal withdrawals.

Construction.

"Construction" necessary to satisfy R.S. 2477 must have occurred while the lands were public lands, not reserved for public uses.

As a matter of federal law, state law controls establishment and scope of an R.S. 2477 highway. If allowed under state law, the following definitions of "construction" apply.

"Construction" includes physical acts of readying the highway for use by the public according to the available or intended mode of transportation – foot, horse, vehicle, etc. More specifically, it includes removing vegetation, moving large rocks out of the way, filling low spots, creation or maintenance of the highway by grading or installing culverts, cattle guards, hardened crossings, bridges or other such activity. "Construction" also includes completed survey, planning or pronouncement by public authorities followed within one year by construction activity on the highway. "Construction" also includes passage by vehicular or other traffic over a time period required by state law for creation of a highway.

Public Highway.

If consistent with State law, the following conditions apply:

1. A public highway is a definitive route or way that is freely open for all to use. It need not necessarily be open to vehicular traffic, for a pedestrian or pack animal trail may qualify. A toll road or trail is still a public highway if the only limitation is the payment of the toll by all users. Multiple ways through a general area presumably will not qualify as a definite route. However, evidence may show that one or more than one of the ways qualifies.

2. A road need not have termini that are some kind of landmarks distinguishable from any other points along the road. The road need only accommodate travelers from a place along the road to other points as often as they found it convenient or necessary.

3. The inclusion of a highway in a State, county, or municipal road system establishes the route as a public highway.

4. Expenditure of construction or maintenance money by an appropriate public body is evidence of a highway being a public highway.

5. Absent evidence to the contrary, a statement by an appropriate public body that the highway was and still is considered a public highway will be accepted as establishing the route as a public highway.

Ancillary Uses or Facilities Usual to Public Highways.

1. If consistent with State law, facilities such as road drainage ditches, back and front slopes, turnouts, rest areas, and the like, that facilitate use of the highway by the public are considered part of the public highway right-of-way grant.

2. Other facilities such as telephone lines, electric lines, etc., that were often placed along highways do not facilitate use of the highway and are not considered part of the public highway right-of-way grant. An exception is the placement of such facilities along such right-of-way grants on lands administered by the Bureau of Land Management prior to November 7, 1974.

Prior to this date, the requirement of filing an application for such facilities was waived. Any new facility, addition, modification of route, etc., after that date requires the filing of an application/permit for such facility. Facilities that were constructed, with permission of the right-of-way holder, between November 7, 1974, and the effective date of this policy, should, except in rare and unusual circumstances, be accommodated by issuance of a right-of-way or permit authorizing the continuance of such facility.

Width and Maintenance Level.

For a highway right-of-way in the State, county, or municipal road system, i.e., the right-of-way is held and subject to maintenance by the appropriate government body, the width and maintenance level of the right-of-way is as specified for type of highway under State law, including common law, if any, in force at the time the grant could be accepted.

Where the highway right-of-way is not held by a government body or there is no governing State law, the width and maintenance level are determined from the area, including appropriate back slopes, drainage ditches, etc., actually in use for the highway at the later of (1) acceptance of the grant or (2) loss of grant authority under R.S. 2477, e.g., repeal of R.S. 2477 on October 21, 1979, or an earlier removal of the land from the status of public lands not reserved for public uses.

Abandonment.

Abandonment, including relinquishment by proper authority, occurs in accordance with State or local statutory or common law.

Burden of Proof.

Inasmuch as the granting Act and related regulations established a system of self-executing grants and have not purported to require applications for or recordation of R.S. 2477 rights-of-way, a right-of-way now publicly used that the State or local government or entity asserts was established in the requisite time period as a public highway over public lands not reserved for public uses, in accordance with State laws, together with informal presentation of some reasonable indicia of support, is presumed to be a valid R.S. 2477 highway. This is rebuttable by clear and convincing evidence to the contrary.

Department Acknowledgment of Acceptance.

As a self-executing grant that needs no application, an R.S. 2477 right-of-way will be acknowledged by the Department by quitclaim deed or other appropriate means under its power to administer a congressionally created program by policy, upon assertion of such a right-of-way under conditions stated in the preceding section on burden of proof.

Responsibilities of Agency and Right-of-Way Owner.

Under the grant offered by R.S. 2477 and validly accepted, the interests of the Department are that of owner of the servient estate and adjacent lands and resources. In this context, the Department has no management control over an R.S. 2477 highway under FLPMA to prevent "impairment" or to require compliance with any term of any other Act passed after perfection of the R.S. 2477 highway that is inconsistent with R.S. 2477 highway ownership – only to prevent unnecessary and undue degradation of the servient estate.

Activities within the highway right-of-way are presumed to be within the jurisdiction of the owner of the dominant estate. The Department has no authority under R.S. 2477 to review and/or approve such activities, except to prevent undue and unnecessary degradation of the servient estate.

COMMENTS ON PROPOSED DOI POLICY December 11, 2001

Legal support of various portions of the proposed DOI Policy on R.S. 2477 rights-of-way is supplied below and in Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988)

Governing Regulations as of October 21, 1976. Hodel.

4&b

Public Lands, Not Reserved for Public Uses.

Construction. "The grant referred to in [R.S. 2477] [became] effective upon [illegible] on or establishing of highways, in accordance with the State laws." 43 C.F.R. § 244.55 (1939). "Under R.S. 2477, a right of way could be established by public use under terms provided by State law." Sierra Club v. Hodel, 675 F. Supp. 594, 604 (D. Utah 1987) (citing cases). The Tenth Circuit held that a certain 1980 BLM opinion letter should be construed as concluding that "as a matter of federal law, state law has been designated as controlling" on the scope of an R.S. 2477 highway. Sierra Club v. Hodel, 848 F. 2d 1068, 1081 (10th Cir. 1988). Also, mere "use was effective to accept and dedicate the road to the public use as a highway." Hodel, 675 F. Supp. at 604. It should be noted that a recent Utah District Court decision, generally referred to as the "Campbell case," rejected "use" as being within "construction." That case is on appeal to the Tenth Circuit. Further, that the road was "maintained" was sufficient. Sierra Club v. Lujan, 949 F. 2d 362, 364 (10th Cir. 1991). "Road maintenance or the passage of vehicles by users over time" constitutes "construction". See BLM Manual § 2801.41B1b. "When the history of a road is unknown or questionable, its existence in a condition suitable for public use is evidence of construction sufficient to cause a grant under R.S. 2477 has taken place." BLM Manual, Rel. 2-229 June 30, 1986.

"Initially, these [R.S. 2477] roads were mere wagon tracks"; blade graders did not even appear until 1878. Federal Highway Administration, U.S. Dept. of Transp., America's Highways, 1776-1976, Washington, D.C.: GPO 37 (1977). By 1904 only about 7% of the roads in the United States had been improved at all. Christy Borth, Mankind on the Move, the Story of Highways, Washington, D.C.: Automotive Safety Foundation 177 (1969). Thus, the drafters of R.S. 2477 could not possibly have meant to require, in their use of the term "construction," the type of mechanical construction common now. Construction in the western United States in 1866 occurred almost wholly only by use or repeated passage. And statutes should be interpreted as understood by their drafters. See Amoco Prod. Co. v. Southern Ute Indian Tribe, 526 U.S. 865, 874 (1999); United States v. Gradwell 243 U.S. 476, 488-89 (1917).

It is typical under laws of the states that use is sufficient to create an R.S. 2477 highway. See, e.g., Lovelace v. Hightower, 168 P. 2d 864, 873 (N.M. 1946) ("a public highway can be established by use alone"); Lindsay Land and Livestock Co. v. Churnos, 75 Utah 384, 385 P. 646 (1929) (citing cases to this effect in Oregon, Montana, Wyoming and Colorado). See also, Central Pac. Ry. Co. v. Alameda County, 284 U.S. 463, 467 (1932) ("highways" under R.S. 2477

includes roads "formed by the passage of wagons, etc., over the natural soil"); Summerhill v. Shannon, 361 S.W.2d, 271 (Ark. 1962) ("highway" includes a carriage way, horse way, foot way, or a navigable river); Hamp v. Pend Oreille County 172 P. 869, 870 (Wash. 1918) (travel or transportation of goods by wheeled vehicles is not necessary to establish a highway; walking, riding by horseback, or transporting goods by pack horse is sufficient). To reject "use" as a means of creating an R.S. 2477 highway would run a dagger through the heart of the real R.S. 2477.

With regard to completed planning constituting construction where physical construction soon follows, there is an affidavit from a former BLM employee in Utah in which the man, Robert Turri, states as follows regarding Mancos Mesa Road in San Juan County:

> Portions of this road were constructed before 1976 and the planning for reconstruction of a portion of this road was completed prior to passage of FLPMA in 1976. We at the BLM, with authorization from the Solicitor, accommodated Gulf Resources in building some thirty-odd miles of the road in 1976. The Solicitor said you could not stop the building of this road even though FLPMA had just been passed, because FLPMA had not yet been interpreted and until it was, we should go by the regulations. BLM agreed to the building of the portion of the road planned by the early fall of 1976 and built after the passage of FLPMA.

See also Hodel.

Public Highways.

Ancillary Uses or Facilities Usual to Public Highways. Hodel.

Width and Maintenance Levels. Hodel.

Burden of Proof.

Department Acknowledgment of Acceptance. It occasionally has been suggested that 43 U.S.C. § 1745, regarding disclaimer of interest in lands, might be a suitable means of federal acknowledgment of R.S. 2477 highways. Comparison of that statute with relevant R.S. 2477 authorities discloses, however, that 43 U.S.C. § 1745 is at odds with R.S. 2477 principles and will not function as a means of federal acknowledgment of R.S. 2477 rights. Rather, a quitclaim deed under terms of the proposed DOI policy would be an appropriate means of acknowledgment consistent with R.S. 2477.

Subsection (b) of Section 1745 deals with an "applicant" for R.S. 2477 ownership and requires the application to be published in the Federal Register for at least ninety days and

payment to the Secretary of the administrative costs of issuing a disclaimer of interest. That is fundamentally inconsistent with the long-standing federal regulations governing R.S. 2477 rights providing: "No application should be filed, as no action on the part of the Government is necessary." Numerous other substantial difficulties with use of a recordable disclaimer of interest have been identified in a Memorandum of a local DOI employee, dated July 23, 2001, a copy of which is attached. Not the least of these difficulties is a 12-year statute of limitations.

The quitclaim deed approach of the proposed DOI policy however, is not inconsistent with R.S. 2477 and, in view of disputations that have developed, would serve as a practical guide to all interested persons.

The Department's inherent power to administer R.S. 2477, as a congressionally created program, not only allows, but requires the Department to formulate policy that will fill any gaps left by Congress in order to implement Congressional intent. As stated by the Supreme Court, "[t]he power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy ... to fill any gap left, implicitly or explicitly by Congress." Morton v. Ruiz, 415 U.S. 199, 231 (1974) (quoted in Hodel at 1080 as quoted in Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). This provides ample support for the quit-claim deed approach proposed. We note our awareness of a 2001 settlement in a Nevada matter in USA v. Carpenter, in which the federal government agreed that it "will not now or in the future contest that Elko County has an R.S. 2477 right of way for a [certain] road." This is closely analogous to the execution of a quitclaim deed.

Responsibilities of Agency and Right-of-Way Owner. It would be highly useful if all the agencies of the federal government would supply assurances that would give states and localities confidence they could engage in normal maintenance activities and reasonable and necessary expansions or modifications of their R.S. 2477 roads without specific federal consent. This would conform to law. "[T]he supposition of the United States, that a preexisting use of an R.S. 2477 right-of-way may not be expanded or modified without BLM approval, is not supported by Hodel. See Hodel, 848 F.2d at 1083 (recognizing that 'under Utah common law, the road could be widened as necessary to meet the exigencies of increased travel, at least to the extent of a two-lane road)." Southern Utah Wilderness Alliance v. BLM, No. 2:26 CV 0836C, 19 (D. Utah Oct. 9, 1997). BLM's duty even in a sensitive area such as a WSA extends only to preventing unnecessary degradation, and does not extend to impairment of wilderness suitability. Hodel, 848 F.2d at 1091-92. NEPA does not apply unless the road in question was perfected as an R.S. 2477 highway after January 1, 1970, the date NEPA became effective.

Materials Supplied. In addition to the Proposed DOI Policy, the following materials are supplied for ease of reference: Hodel Policy of December 7, 1988 and related Instruction Memorandum of August 15, 1990; Babbit Policy of January 22, 1997; Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988); Letter of Frederick N. Ferguson of April 28, 1980; Memorandum of local DOI employee dated July 23, 2001 regarding reportable disclaimers of interest; Memorandum dated November 5, 2001, regarding Approach to Acknowledgment by the Federal

DEC-17-2001 MON 11:55 AM UTAH GOVERNORS OFFICE FAX NO. 8015381557 P. 05

Government of the State/Counties' 2477 Rights-of-Way. A more comprehensive presentation of legal support can be provided, if desired, upon request.