

# PROPOSED DOI POLICY

PRE-DECISIONAL

DRAFT

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## Secretarial Policy Guidance and Criteria for R.S. 2477 Rights of Way

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

It is long past time to bring some finality to an issue that has created unnecessary conflict between federal land managers and state and local governments since R.S. 2477 was repealed by the Federal Land Policy and Management Act (FLPMA) nearly thirty years ago. In order to move forward with a cooperative approach to the management of federal land, it is necessary to develop uniform policy guidance with identifiable criteria, consistent with historic regulation prior to October 21, 1976, for any analysis of R.S. 2477 rights of way that the

Department might be called upon to make. A crucial element of this policy guidance and criteria is the explicit acknowledgment and understanding of the history of R.S. 2477 right of way disputes.

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

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

Under the authority granted by R.S. 2477, thousands of miles of highways were

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

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

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

subject of dispute.

On December 7, 1988, then-Secretary Hodel issued "Departmental Policy on Section 8 of the Act of July 26, 1866, Revised Statute 2477 (Repealed), Grant of Right-of-Way for Public Highways (RS 2477)." The "Hodel Policy" established criteria for recognizing already existing R.S. 2477 rights of way and instructed Interior Bureaus to "develop, as appropriate, internal procedures for administratively recognizing those highways." Interior bureaus subsequently followed the general guidelines of the "Hodel Policy" to develop procedures for determining the validity of an asserted R.S. 2477 right of way. The Department used the "Hodel Policy" and the procedures implemented pursuant to the Policy to review R.S. 2477 right of way claims until 1993.

In 1992, Congress sought to find a resolution to the deepening conflict between Western States and federal land managers over R.S. 2477 right of way disputes by ordering the Department of the Interior to prepare a status report as part of the 1993 appropriations process.

The Conference Report accompanying the 1993 Interior Appropriations Bill states:

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

The Conference Report admonished the Department of Interior to find some method of resolving the conflicts: "[t]he managers expect sound recommendations for assessing the validity of claims

to result from the study, consonant with the intent of Congress both in enacting R.S. 2477 and FLPMA." Finally, the Conference Reports states that any "validity criteria" developed by the Department of the Interior "should be drawn from the intent of R.S. 2477 and FLPMA," and that "any proposed changes in use of a valid right of way shall be processed in accordance with the requirements of applicable law."

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

Nearly ten years later, very little progress has been made toward accomplishing the Congressional charge to develop "sound recommendations for assessing the validity" of R.S. 2477 claims. However, the need to bring this issue to resolution is even more urgent than it was in 1993, when the Department explained the challenge in its Report to Congress:

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 . . ."

The "continuing cloud" presented by the myriad of unresolved R.S. 2477 claims is a constant impediment to effective land use planning decisions. The Department is poised to revise a

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

The purpose of this memorandum is to establish uniform policy guidance with identifiable criteria, consistent with historic regulation prior to October 21, 1976, for any analysis of R.S. 2477 rights of way that the Department might be called upon to make. Issuing this uniform policy and criteria is consistent with the 1993 Congressional directive to develop "validity criteria" that are based on the "intent of R.S. 2477 and FLPMA." In order to ensure consistency, all previous policy and criteria developed by the Department on this matter is hereby revoked.

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

#### Acceptance by Grantee

Consistent with the historic regulations in effect at the time a grant of an R.S. 2477 right of way could be perfected, all three of the following conditions must have been met to constitute the "acceptance of the grant":

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

time of acceptance.

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

3. The "highway" so constructed or, alternatively, established must have been considered a means for public passage.

#### Public Lands, Not Reserved for Public Uses

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

#### Construction

"Construction" necessary to satisfy R.S. 2477 must have occurred while the lands were public lands, not reserved for public uses. As a matter of federal law, State law in effect on the cut-off date controls the existence and scope of an R.S. 2477 right-of-way. If allowed under State law on the cut-off date, the term "construction" includes physical acts of readying the highway for use by the public according to the available or intended mode of transportation - foot, horse, vehicle, etc. More specifically, it may include removing vegetation, moving large rocks out of the way, filling low spots, creation or maintenance of the highway by grading or

installing culverts, cattle guards, hardened crossings, bridges or other such activity. The existence of a highway in a condition suitable for public use may constitute evidence of construction sufficient to conclude that a grant under R.S. 2477 has taken place, if consistent with applicable state law.

### Establishment

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

### Highway

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

If consistent with State law in effect as of the cut-off date, the following additional factors



may be considered to determine the existence of a highway:

1. The inclusion of a right-of-way in a state, county, or municipal road system prior to the cut-off date establishes the route as a highway.
2. Expenditure of money for construction or maintenance on the right-of-way by an appropriate public body prior to the cut-off date is evidence of a highway.
3. Absent evidence to the contrary, a statement by an appropriate public body prior to the cut-off date that the right-of-way was and still is considered a highway will be accepted as establishing the route as a highway.

#### Burden of Proof

The proponent of the right-of-way has the burden of proof to demonstrate by a preponderance of the evidence the validity of an asserted R.S. 2477 right-of-way. The Department shall make available to the proponent all information in its possession that is relevant to the determination of the R.S. 2477 right-of-way in question.

#### Ancillary Uses or Facilities Usual to Public Highways

If consistent with State law in existence as of the cut-off date, facilities such as road drainage ditches, back and front slopes, turnouts, rest areas, and similar features that facilitate use of the highway by the public are considered part of the right-of-way grant.

#### Width and Ongoing Maintenance Level

Width and ongoing maintenance level is an essential aspect of the management of an R.S.

2477 right-of-way. The Department shall work with the proponents of an R.S. 2477 right-of-way to include the width and maintenance level in any R.S. 2477 right-of-way determination that the Department may be called upon to make.

#### Abandonment

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