

**QUESTIONS AND ANSWERS TO HELP EXPLAIN THE PROPOSED RS 2477
RULEMAKING**

Part I - WHAT'S THIS ALL ABOUT?

What is RS 2477?

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

The sentence above comprises the complete text of Revised Statute (RS) 2477, a law enacted in 1866 to grant rights-of-way (ROWS) for constructing highways across unreserved public lands. The law was repealed in 1976 with the passage of the Federal Land Policy and Management Act (FLPMA), but public highways validly acquired before 1976 were not terminated. This has resulted in confusion over how to plan for and manage highways and Federal lands.

Why is the Department of the Interior proposing new regulations concerning a law that was repealed 18 years ago?

No one knows how many valid RS 2477 rights-of-way exist or where they are. There is no complete inventory of these claims. This complicates the ability of Federal agencies to properly regulate the adjacent and underlying Federal lands, to plan for resource management, or to protect valuable public resources.

State and local governments have important responsibilities for operating validly acquired rights-of-way. These responsibilities are also complicated by the uncertainty surrounding RS 2477 claims. The only way to establish rights under RS 2477 prior to this proposal has been expensive court action. These regulations will provide an easier, cheaper, administrative process for validly acquired rights-of-way to be confirmed.

By the early 1990s, a growing number of right-of-way assertions in Utah and Alaska and growing controversy over the issue captured the attention of Congress. The conference report on the Department of the Interior's (DOI) Fiscal Year 1993 Appropriations Act directed the DOI to conduct a study of the history and management of RS 2477 rights-of-way. The Secretary's June 1993 report to Congress concluded that regulations were needed to provide a "regularized process for exploring and resolving the many legal and policy questions inherent in this issue."

Since RS 2477 ROWs pre-date FLPMA, how can the DOI assert any authority over these highways?

FLPMA directed the Federal Government not to terminate or close any RS 2477 rights-of-way that were already in existence when RS 2477 was repealed, but the Act did not limit the Federal agency's management responsibilities for lands crossed by ROWs. Each agency is required by existing law to manage and protect the lands under its jurisdiction. Courts have determined that such rights-of-way are subject to reasonable regulation for these purposes.

Part II - WHAT WILL THE PROPOSED RULE DO?

Do these proposed regulations replace the Dec. 7, 1988, Secretarial Policy on RS 2477?

Yes. It is intended that these regulations, when final, will replace the 1988 RS 2477 policy.

What lands and what Federal agencies are covered by the proposed regulations?

This rulemaking applies to lands administered by three DOI agencies: the Bureau of Land Management (BLM), U.S. Fish and Wildlife Service (FWS), and the National Park Service (NPS). These rules do not apply to lands administered by any other Federal agency, any State or local agency, Alaskan Natives, American Indians, or any other entity.

After evaluating public comments on this proposal and after further consultation, the U.S. Forest Service will consider whether to issue regulations on RS 2477 rights-of-way that cross Forest Service lands.

Do these proposed regulations require Federal land managers to inventory all roads that might be eligible as RS 2477 ROWs?

No. These regulations provide a process for others to claim routes that they believe might be RS 2477 ROWs. Provisions of other laws and regulations require Federal land managers to inventory Federal lands under their jurisdiction as part of Federal land use planning.

Do these proposed regulations uphold previous administrative acknowledgments made by BLM for RS 2477 ROWs?

A regulation published in 1980 requested information about the location of possible claims, but by its own terms did not confirm or deny the existence of a validly acquired right-of-way. Previous administrative "acknowledgments" of RS 2477 assertions based on this regulation therefore had no legal effect, and filing under these regulations with the appropriate DOI officer is necessary to preserve the claim. If a ROW was previously "acknowledged" by BLM, the acknowledgment should be included or referenced in the claim, so that the authorized officer can consider it as evidence under these regulations.

Do these proposed regulations uphold previous determinations made by courts about the validity of an RS 2477 ROW?

All Federal court decisions that determine the validity of an RS 2477 ROW will be followed under this proposal. Although the Federal government is not bound by State court decisions regarding RS 2477 ROWs to which it is not a party, claimants are encouraged to provide any relevant State case law to the authorized DOI officer at the time of filing of a related claim.

Do these proposed regulations declare all unclaimed routes as null and void under RS 2477?

No. These regulations provide for the review of claimed routes under a set of uniform criteria.

Do these proposed regulations provide for RS 2477 ROWs to be expanded or realigned?

The rule does not allow for expansion or realignment of the ROW based solely on the authority of RS 2477. The scope of an RS 2477 ROW is what was constructed as of 1976 (or the latest date that the land was not reserved for public uses, whichever was earlier). If changes are needed beyond the scope of the RS 2477 ROW, the claimant can apply under other existing authorities, such as Title V of FLPMA.

If RS 2477 ROWs have been converted to FLPMA ROWs, will they still have to be claimed and documented under these regulations?

No. If FLPMA ROWs have been issued, there is no need to file under these regulations.

Will these proposed regulations cancel all RS 2477 ROWs and replace them with FLPMA Title V ROWs?

No. These regulations will provide a mechanism for determining the validity of claims of RS 2477 ROWs. Claimants with claims that cross lands managed by BLM can, alternatively, apply for a FLPMA Title V ROW.

Will these proposed regulations recognize roads identified by the U.S. Geological Survey (USGS) before 1976?

USGS maps may be a part of the record claimants submit to document their claims. The final determination of whether a right-of-way was validly acquired will be based on all available information.

Do these proposed regulations require compliance with other applicable laws, such as the National Environmental Policy Act and the Endangered Species Act, in the process of determining the validity of RS 2477 claims?

Other applicable laws must be complied with in the management and operation of all rights-of-way. These laws are not triggered, however, simply by the filing and processing of claims to determine whether a preexisting claim is valid.

Do these proposed regulations recognize State law?

State laws that were in effect on the latest available date (see below for an explanation of this term) will be referred to, and any legal requirements of State law, not in conflict with Federal law and RS 2477, will be applied. These regulations will not recognize State laws that are not in accord with the terms of RS 2477; i.e., that do not require construction of a highway across public lands not reserved for public uses.

Do these proposed regulations recognize State statutes, passed after the repeal of RS 2477 in 1976, concerning RS 2477 ROWs.

No. State laws passed after the repeal of RS 2477 cannot broaden the rights obtained under RS 2477.

Do these proposed regulations recognize local history, State policies, and the critical importance of RS 2477 on local economies?

Yes, to the extent that validly acquired RS 2477 ROWs serve these policies and needs. These regulations merely establish a uniform, predictable, and objective

process for confirming existing validly acquired RS 2477 ROWs on Federal land. RS 2477, prior to its repeal, provided a right-of-way for the construction of a highway across unreserved public lands. To the extent that current or future local and State needs and policies exceed these limits, RS 2477—because it has been repealed—cannot be relied on to meet those needs. Congress has provided other means of securing needed access.

Do these proposed regulations recognize the importance of access for mining, grazing, and other historical uses of public land?

These regulations provide for the recognition of validly acquired RS 2477 ROWs, which may in some cases support such uses. However, numerous other authorities exist that provide access for these uses, including mining claims (operation plans), grazing (Taylor Grazing Act), and "casual use" provisions of FLPMA, as well as access authorities of FLPMA and the Mineral Leasing Act.

Do these proposed regulations provide for the continued general access of the public to Federal lands?

Not specifically. Since RS 2477 was repealed in 1976, it cannot authorize the creation of new or expanded access routes across public lands. The proposed regulations provide a process for determining whether certain historic highways were validly acquired rights-of-way under the specific terms of RS 2477. Generally, however, public access over most public lands is allowed as "casual use" and is provided for by other laws, such as FLPMA.

Do these proposed regulations recognize any special needs of off-road vehicle (ORV) users for access to and on public land?

These regulations do not deal with ORV use. The regulations will not close any public land. The availability of public land for ORV use is carried out under other regulations that provide for full public involvement. That process is not a function of administrative recognition of claimed RS 2477 ROWs.

Will existing public roads on public land be closed as a result of these proposed regulations?

No. These proposed regulations will not close any existing public roads or public land; they provide a process for determining whether a right-of-way for a

public highway exists under one specific (now repealed) statute. There are numerous other ways in which a public road can be authorized and operated. So if a claimed route is determined not to be a validly acquired RS 2477 right-of-way, under final regulations, the claimant may be able to apply for authorization under other statutory provisions, such as Title V of FLPMA.

How do these proposed regulations deal with highway claims over private land?

They don't. These regulations deal only with claimed RS 2477 ROWs over public land administered by the DOI.

How do these proposed regulations affect private roads?

They don't. A "highway" is a public thoroughfare. In most cases RS 2477 rights-of-way will be held by and claimed by State or local government agencies that have authority for the management of public highways.

Do these proposed regulations take away private property owners' rights of access to their land?

These regulations do not specifically deal with access to private property. There are other Federal laws that provide for reasonable access to private lands across Federal land.

Will these proposed regulations change the wilderness study area inventory to reflect historical roads?

No, these proposed regulations will have no impact on wilderness study areas under consideration by Congress. Those areas that were determined to be roadless in the wilderness inventory will continue to be managed under the interim management policy.

Will these proposed regulations harm the grazing industry?

No, these proposed regulations do not affect the grazing industry. The regulations create a process for determining the existence of RS 2477 ROWs. Access to public land for grazing users is authorized under the grazing lease or license and is not necessarily affected by RS 2477 ROW determinations.

Do these proposed regulations have public notification provisions to inform interested parties when a route is claimed?

Yes. The proposed regulations call for the appropriate agency to publish a notice of receipt of RS 2477 claims in local newspapers.

Do these proposed regulations recognize RS 2477 as an important access tool for maintaining access to public and National Forest system lands?

These proposed regulations will provide for review of claimed routes across Federal land managed by the Bureau of Land Management, the National Park Service, or the U.S. Fish and Wildlife Service. If the claimed route was constructed as a highway across unreserved public land before RS 2477 was repealed, these regulations provide a process for establishing its validity. RS 2477 is not a currently valid method of acquiring new access to or across Federal lands, because it was repealed in 1976.

Do these proposed regulations set a filing deadline for RS 2477 claims?

Yes. If claims are not filed with the authorized officer of the appropriate DOI land management agency within two years of publication of the final rule, they will be treated for administrative purposes as routes that were not accepted pursuant to RS 2477.

Have these proposed regulations been subject to an environmental impact statement?

These proposed regulations have been analyzed under the National Environmental Policy Act. An environmental assessment prepared by BLM, the FWS, and the NPS determined that the proposed regulations will not have a significant environmental impact since they will create a process for recognizing existing rights-of-way, not for allowing creation of new ones.

Do these proposed regulations recognize ditches and canals as public highways?

No. Ditches and canals have never been regarded as public highways for purposes of RS 2477. These proposed regulations will not change this longstanding position.

Do these proposed regulations increase State or county liability or shift liability to the Federal Government?

These proposed regulations will not take roads from counties' control and management. The regulations do not provide for new liability provisions. If existing routes are claimed and found not to be RS 2477 ROWs, there are other authorities under which counties may apply for ROWs.

Will these regulations require litigation over every RS 2477 claim?

A major purpose of the proposed regulations is to create an administrative process that will save claimants and the Federal Government the expense of litigation in court.

Will these proposed regulations close public land to rock hounding?

No. These proposed regulations will not close any public land. That process involves full public participation and is separate and distinct from RS 2477.

How will these proposed regulations affect National Forests?

These regulations deal only with Federal land managed by three of the DOI's land managing bureaus (BLM, FWS, and NPS). The Forest Service has been consulted on the development of these regulations but is not subject to them. The Forest Service may choose to issue similar regulations affecting lands under its jurisdiction in the future.

Do these proposed regulations address Department of Defense (DOD) lands?

No. These regulations deal only with Federal land under the jurisdiction of the BLM, FWS, and NPS.

Did the Department rely heavily on the Congressional Research Service report to prepare these proposed regulations?

These regulations were drafted after considering all comments on the draft report to Congress, including the Congressional Research Service report and hundreds of others, as well as the input of various field offices of the three land managing bureaus of the DOI.

Explain the definition of the term "construction."

RS 2477 explicitly required construction of a highway for the right-of-way grant to have been completed. The definition in the proposed regulations is intended to recognize that standards of highway construction technology changed between the time when RS 2477 was passed and when it was repealed. The definition also recognizes that Congress intended in RS 2477 to authorize a fairly specific activity—the construction of highways—and did not intend, and would not have needed, to authorize less durable forms of access. The proposed regulations, therefore, require that intentional physical acts be performed with the achieved purpose of preparing a durable, observable, physical modification of land and that this modification be suitable for highway traffic.

Can mere passage of vehicles constitute construction?

No. Where a path or trail was created initially by the mere passage of vehicles, the construction requirement is met only if the path or trail has been subsequently maintained by acts that meet the requirements of construction, before the latest available date. Construction of a highway cannot be accomplished solely by any of the following activities: continual passage over a surface that has not previously been intentionally constructed, even if the continual passage eventually creates a defined route; clearing of vegetation; or removal of large rocks.

What is the latest available date?

October 21, 1976, or the date of reservation of the land, whichever came first. Lands could have been reserved for many purposes, including the creation of a National Park, National Wildlife Refuge, or Wilderness Area. In Alaska, all Federal land was reserved on December 14, 1968 until after the passage of FLPMA.

Explain the definition of the term "highway."

The proposed regulations define "highway" to mean an open public road that served public travel or commerce needs or connected places between which people or goods traveled. Congress presumably authorized the construction of a highway to make it possible for vehicles, including wagons, to travel them. It would not seem to have been necessary for Congress to authorize construction of a highway for foot or animal traffic. Similarly, Congress' use of the term

"highway" indicates that it meant to facilitate development of durable, needed public access from place to place, not merely to authorize casual passage.

Does this mean a "highway" must connect cities?

No. The proposal does not require that all rights-of-way run from city to city; as long as the route connects identifiable places to which the public travels, it may meet this requirement.

What if the claimed road was originally a private road used only for private purposes but was later used by the public?

This definition does not rule out the later adoption of a private road by a public entity, prior to repeal of the statute (or reservation of the land if this was earlier) and acquisition of the right-of-way under the authority of RS 2477.

Explain the definition of scope.

The scope of the ROW that the holder validly acquired is that which was actually in use for public highway purposes at the

latest available date. Until the repeal of RS 2477 (or the reservation of the land, if earlier), claimants could acquire new ROWs or expand the scope of already acquired rights-of-way by constructing additional highways or by widening, realigning, or otherwise expanding the existing highway. After the latest available date, however, no new rights under RS 2477 could be acquired. New ROWs and new uses of the public land require authorization under FLPMA or other statutory authorities.

What if the scope of the ROW was already changed after the latest available date?

The authorized officer will generally look to the current condition of the ROW as evidence of the validly acquired scope. However, any future expansions of scope or creation of new ROWs must be authorized under other statutory provisions. Some expansion of scope may have occurred after the repeal of RS 2477 in 1976 (or reservation of the land if earlier) on some rights-of-way. Generally, the Department does not intend to treat these activities as trespass, unless significant public values are threatened by the

expansion. In some cases, Department officials and courts authorized expansion of the scope of a particular ROW and these authorizations will be upheld.

Part III - WHAT ARE SOME STATE-SPECIFIC CONCERNS?

Alaska

Do these proposed regulations recognize the new State of Alaska administrative procedures for claiming RS 2477 rights-of-way?

No. These regulations establish a uniform Federal procedure. To claim RS 2477 ROWs, the State of Alaska would have to file claims containing the information called for in these proposed regulations. However, in many cases, State procedures will collect similar information and make filing under Federal regulations easier.

How will these proposed regulations affect the State of Alaska's regulations on RS 2477 ROWs?

In 1992, the State of Alaska adopted regulations on RS 2477. Under the State's regulations, the State can certify the validity of RS 2477 ROWs. Because the State has no authority to judge the validity of RS 2477 claims on Federal land, however, State certifications on Federal land have no effect. These regulations will provide a way for the State to submit claims to the BLM, the FWS, or the NPS.

Do these proposed regulations provide for reviewing claims of RS 2477 rights-of-way across Alaska Native lands?

No. These regulations apply only to lands administered by the BLM, FWS, and the NPS. The regulations do not provide for review of claimed RS 2477 ROWs on Alaska Native-owned land or on private or State land. The DOI agency involved will consult with the Bureau of Indian Affairs on any claims filed that purport to cross Native lands.

How will these proposed regulations affect valid RS 2477 ROWs in Alaska National Park units?

These regulations will neither create nor abolish valid RS 2477 rights-of-way. Although RS 2477 rights-of-way may exist in Alaska national park units, none has been legally identified. Any ROWs in NPS units that are determined to be valid are subject to regulation under NPS authorities.

What effect does the recent 9th Circuit Court of Appeals case (Shultz v. Dept. of Army) have on the proposed regulations?

While this proposed rule was in preparation, a panel of the Ninth Circuit Court of Appeals issued a decision in the case of Schultz v. Department of the Army, 92-35197, 92-35580, 1993 U.S.App. Lexis 31037, (9th Cir., Nov. 30, 1993). The panel decision took a somewhat more lenient view of the criteria for establishing a valid RS 2477 right-of-way than does this proposed rule. The Federal Government believes the panel decision is not consistent with Congressional intent or practice under the statute, and the United States is seeking a rehearing of the panel's decision before the full Ninth Circuit Court of Appeals. The Department will, of course, take any final decision in the case into account when issuing a final rule.

Won't these regulations preclude the development of the necessary infrastructure in Alaska that the other 49 States have been allowed?

These regulations do not preclude Alaska's development. Congress has taken action in the Alaska Native Claims Settlement Act (ANCSA), Alaska National Interest Lands Conservation Act (ANILCA), and FLPMA to either provide for reservation of easements (ANCSA 17(b)), for a process for applying for access (Title XI ANILCA), or for granting ROWs (FLPMA Title V). RS 2477, was, after all, repealed 18 years ago. Therefore, it is not reasonable to now derive from the repealed statute an unqualified right to develop new infrastructure outside the requirements of existing law.

How will these regulations take Alaska's special conditions and history into account?

Surface transportation in Alaska has not been developed as it has been in most States due to Alaska's unique history and physical conditions. However, many of the territories and States affected by RS 2477 could cite distinct circumstances. Congress did not authorize special treatment for any State under RS 2477. Therefore, these proposed regulations will apply equally in all States.

Will dogsled routes and other historic trails qualify as valid RS 2477 ROWs?

Two criteria will be important when determining whether such routes created valid RS 2477 rights-of-way. First, a durable, observable, physically modified route

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must have been intentionally constructed. Second, the highway constructed must have been used for travel between public destinations by vehicles appropriate to the time and terrain.

How will these regulations affect pending quiet title actions by the State of Alaska for possible RS 2477 ROWs?

On December 12, 1993, the State of Alaska notified the Secretary of the Interior of an intent to quiet title to 11 routes claimed to be RS 2477 ROWs. The State can file these actions in court after June 10, 1994. Three of the routes affect national park units. Once the regulations are final, the Department hopes that the State will choose to pursue the administrative process rather than litigate its claims individually.

Utah

How will these proposed regulations affect pending quiet title actions by several counties in Utah for possible RS 2477 ROWs?

The Department has been sued recently by three Utah counties under the Quiet Title Act over claimed RS 2477 rights-of-way. The Department has received a notice of intent to sue in two additional cases. Once the regulations are final, the Department hopes that the counties will choose to pursue the administrative process rather than litigate its claims individually.

Do the proposed regulations defer to the Utah State law passed in 1993 that defines and claims all RS 2477 rights-of-way in the State?

No. While these regulations provide that State law has an important role to play for RS 2477, they recognize only State laws that were in effect prior to the provision's repeal in 1976.

Part IV - HOW WILL THE PROCESS WORK?

Who can submit a claim for an RS 2477 right-of-way?

Any person or entity asserting the existence of a right-of-way pursuant to RS 2477 across lands managed by the DOI can submit a claim under these regulations. The Department presumes that most claimants will be State or local government agencies with authority for public highway management. However, there may be rare

cases in which a private citizen has constructed and is operating a highway (which meets all other requirements) in such a manner as to have validly acquired a right-of-way pursuant to RS 2477. The Department will consider such claims subject to the same standards that must be met by State or local government agencies.

Will the agency make decisions on claims?

The land managing agency will make an administrative determination in writing. The final administrative determination will be sent to the claimant, and notice of the decision will be published in a local newspaper and in the *Federal Register*.

Who will make the administrative determination?

The person authorized to make this determination (authorized officer) is the appropriate State Director of the BLM, the Regional Director of the FWS, or the Regional Director of the NPS who has jurisdiction over the lands crossed by the claim.

When will claimants have to file for an administrative determination?

Claimants must file a request for an administrative determination of the validity and/or scope of each RS 2477 claim by within 2 years of the effective date of the final rule.

Will there be a special form for filing a claim?

No. There is no special form for filing a claim, but a claim must include specific types of information, which are outlined in the proposed regulations.

If the claimed ROW crosses land under the jurisdiction of more than one of the three DOI agencies, does the claimant have to submit a claim to each agency?

No. A claimant can submit its claim to the lead agency only, and that agency will coordinate with other affected agencies.

How is the determination made as to which agency has the lead?

If NPS land is involved, NPS will always be the lead agency. If NPS land is not involved, but both the FWS and the BLM have jurisdiction, the FWS has the lead.

If an asserted RS 2477 ROW crosses mostly through BLM-managed lands but also briefly crosses an area of an NPS park, which is the lead agency?

The NPS. If any part of the claim crosses lands administered by the NPS, the claimant must file with the appropriate NPS Regional Office.

What kind of information or evidence is needed to support a claim?

The information submitted with the claim must contain information in sufficient detail to allow the agency to determine that all requirements of RS 2477—construction of a highway across unreserved public lands prior to repeal of the statute or withdrawal of the land—are met.

What if a claim is found to have insufficient evidence? Will it be rejected?

No. The authorized officer will notify the claimant and allow the claimant the opportunity to correct the problem.

What will be the effect of failure to file a claim by a claimant?

The Department is requiring claimants to file claims within two years of publication of the final rule. Under the proposed rule, failure to file a claim by this date will constitute a relinquishment of any rights purported to have been acquired under RS 2477. Any claims filed after the cutoff date will not be accepted or processed by the Department.

Anyone who fails to file a claim within this period, but who wishes to assert the existence of a right-of-way can seek authorization for the use of the rights-of-way under other existing statutory authority, such as Title V of FLPMA, or can seek to have the courts establish the validity of the claim.

The Department believes that the process provided in these proposed regulations provides legitimate claimants with a reasonable method of obtaining an administrative determination of their claims without undertaking the expense and time of litigation. However, some claimants may find the existing procedures under the Title V of FLPMA, or other statutory authorities, to be a more familiar and speedy process for resolving their right-of-way claims.

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How long will it take the agencies to process an

administrative determination?

At this time, the DOI has no official estimates on how long it will take to process an RS 2477 claim.

Can an agency determination be appealed?

Yes. The regulations provide for an administrative appeals process to the Director of the land managing bureau making the administrative determination. If an affected party is not satisfied with the Director's decision, the party may seek relief in Federal court.

Who can appeal the administrative determination that an RS 2477 ROW does or does not exist?

Anyone who can show that he or she is adversely affected by the decision can appeal.

How long does an appellant have to file an appeal?

Appeals must be filed with the authorized officer within 30 days after the date of publication of the administrative determination.

What activities can a claimant conduct on a road before the final administrative determination is issued or while appeals are pending?

The proposed rules will allow claimants to perform routine maintenance on the claimed roads. The claimants will have to notify the managing agency at least 3 business days in advance of the date the work is to be performed. The routine maintenance will be subject to approval by the land managing agency and will be limited to roads currently maintained by the claimant.

Do the proposed regulations allow for interim maintenance of a claimed ROW?

Yes. Upon the filing of a claim, and prior to a final administrative determination, a claimant may perform routine maintenance.

What is the general NPS policy regarding the management of RS 2477 activities?

The authorization and regulation of activities in areas of the National Park System must be construed and conducted in light of the high public value and

integrity of the National Park System. Attachment 2-16
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activities shall not be exercised in derogation of the values and purposes for which the various park areas have been established, or in such a manner as would be inconsistent with the general purposes of all park areas. These purposes are to

conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of these resources and areas in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

What happens once the Department approves or rejects an RS 2477 claim?

If the Department approves an RS 2477 claim under these regulations, it may also determine the scope of the RS 2477 right-of-way. Determinations to either approve or reject RS 2477 claims may be appealed to the Director of the appropriate bureau.