Questions & Answers
on Interior Secretary Gale Norton's
March 22, 2006 R.S. 2477 Policy Directive

What is R.S. 2477?

Enacted in 1866, R.S. 2477 simply provided: "the right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Congress repealed R.S. 2477 in 1976, but rights-of-way already perfected under the law were not affected. Unfortunately, neither the 1866 law nor the 1976 law repealing it contained any mechanism for identifying or registering perfected rights-of-way and did not establish a time limit on their assertion.

This has left the door open to claim that particular rights of way had been perfected before the statute was repealed. In the years since its repeal, some Western states, counties and off-road vehicle groups have alleged that primitive tracks and trails, wash bottoms and streambeds through otherwise undeveloped areas meet the standard for a "constructed highway" under the law. In the process, R.S. 2477 has been transformed from its original purpose of meeting legitimate transportation needs into a weapon that development interests use to fight against protecting wildlife habitat, non-motorized recreation opportunities, and wilderness preservation . R.S. 2477 claimants and the government regard R.S. 2477 highways as a form of "property right" that cannot be extinguished without compensation, and thus can constrain the ability of federal land managers to conserve important resources on these lands. R.S. 2477 claims can also directly threaten private property rights, because in many cases primitive tracks and trails on public land also cross intermingled private land.

What policy did Interior Secretary Gale Norton release on March 22, 2006?

Less than ten days before she was to leave office, Department of the Interior (DOI) Secretary Norton issued a new policy directive concerning R.S. 2477 rights-of-way that lowers the bar for those seeking to claim tracks as highways across some of the most sensitive and valuable public land across the West, including National Parks.[1] Specifically, the Norton policy:

(1) revokes the 1997 Babbitt policy that said Interior Department agencies (the Bureau of Land Management (BLM), National Park Service (NPS), and the Fish and Wildlife Service (FWS) which manages National Wildlife Refuges, and the Bureau of Reclamation (BuRec) which manages some land adjacent to reservoirs) would determine the validity of claims of R.S. 2477 highways only where there was a compelling need.

(2) directs the BLM, NPS, and FWS to "revise any existing policies on R.S. 2477 consistent with" the legal principles established in a recent appeals court case, *Southern Utah Wilderness Alliance v. BLM*, 425 F.3d 735 (10th Cir. 2005). That case held, however, that the Interior Department did not have authority to recognize the

[1] The policy is available at http://www.suwa.org/library/001_NortonPolicy.pdf.

validity of R.S. 2477 claims; only the federal courts did. The Norton policy sidestepped this admonition by saying that the Department's determinations would be "non-binding." This is sleight of hand. The Department's determinations bind the Department and constrain how it will manage lands under its jurisdiction. In other words, any R.S. 2477 highway claims the Department approves in so-called "non-binding determinations" will require the Department to manage the land just as if a court determined that it was such a highway. Policy at page 4. As a practical matter, the Norton policy bestows an enormous gift on R.S. 2477 claimants: If they can persuade the Department to recognize their claims, they don't have to go to court. If the Department rejects their claims, they still can go to court. Furthermore, the Department is now taking the position in federal court that recreational users, conservation interests, adjacent private property owners and others are not proper parties in any federal court litigation over the validity of R.S. 2477 claims. Thus the Norton policy seeks to establish a closed and, to R.S. 2477 claimants, friendly framework for resolving these claims. .

The Norton policy contains a number of statements that suggest the on-the ground impact of the policy will be limited. For example, the policy

- "directs all … bureaus to ensure that their administration of claimed and recognized rights of way upholds the Department's right and obligation to protect the underlying and surrounding Federal land it manages" including such areas as NPS units, Refuges, and congressionally-designated wilderness or WSAs. *Id*.

- directs all bureaus to "develop safeguards to ensure that their implementation of these principles does not infringe on the rights of private landowners or Indian tribes whose land may be crossed or abutted by claimed rights-of-way." *Id*.

- identifies agency authority that may permit agencies to limit damage to public lands should a right-of-way be granted. Policy Attachment at 6-7.

As discussed below, many of these apparent safeguards are ill-defined, weak, or illusory.

What is so bad about the process the Norton policy creates for making these so-called "non-binding determinations"?

The Norton policy's "non-binding administrative determinations" drastically lower the bar for those claiming rights-of-way and rig the process in their favor. Prior to the adoption of the Norton policy, then, DOI agencies required those seeking highway rights-of-way to make their case in federal court, with its exacting evidentiary standards and statutes of limitations. By contrast:

- The Norton policy directs Interior agencies to essentially validate R.S. 2477 claims across their lands, using a (so far) ill-defined, but streamlined process. As compared to the burden claimants face in court, the non-binding administrative determination process will involve:

-- different, more relaxed, evidentiary standards;
-- less formality;
-- no testimony under oath;
-- no ability to cross-examine witnesses or those making statements to determine whether they are likely telling the truth;
-- no way for the public or DOI to require the claimant to disclose relevant information in the claimants' hands.

In other words, the non-binding administrative determination process lowers the bar for those seeking to turn dirt tracks into highways across some of America's most prozed public lands. And by lowering the bar to claims, the policy will make it more difficult for National Park Service and other agencies to have the maximum flexibility to protect its lands for future generations.

- The Norton policy does not appear to require claimants to meet a statute of limitations, a strong bar limiting some state and county claims, that a claimant otherwise must meet if claimants were required to sue the federal land management agency under the Quiet Title Act. Thus, the Norton policy may permit claimants to gain recognition of rights from DOI that they never could have achieved from a federal court.

What is so bad about the Norton policy's direction that DOI agencies can use "road maintenance agreements" to address conflicts regarding R.S. 2477 claims?

The Norton policy states that agencies should use "road maintenance agreements" (RMAs) "[w]here a county seeks only to preserve the status quo on a road." Policy Attachment at 1. These agreements could effectively permit counties to maintain and use routes, in effect treating them as though they were valid rights-of-way. This appears to be a new use of road maintenance agreements. Previously, BLM has used RMAs to divide up maintenance duties between a BLM field office or County on major routes that traversed public lands; the agreements were not used as proxies for granting rights to counties for routes claimed as rights-of-way.

What is the impact of treating a route as if it were an R.S. 2477 right-of-way?

If an R.S. 2477 highway exists, the federal agency, whether it is the BLM, NPS or FWS, may not have the authority to close the route to vehicle travel to protect important public values such as water quality, wildlife habitat, or archeological treasures. Some states and counties allege that DOI cannot limit the use or maintenance of rights-of-way under any circumstance, and that the DOI has only limited power to restrict the expansion of jeep trails into two-lane paved roads.

Does the *SUWA v. BLM* decision require this policy?

No. DOI – as a matter of choice and not of law – appears to be allowing agencies to undermine their mandates to protect federal lands in order to implement this new policy guidance.

First, DOI argues that the Tenth Circuit decision requires the revision of existing policy. However, while the opinion states that DOI has the authority to review and recognize claims for internal purposes, nothing in the opinion requires the agency to do so. DOI could use its authority to protect (for example) National Parks by requiring those seeking to claim trails as public highways to prove their case in a court of law (as Secretary Norton's policy on processing disclaimer applications did), which would require right-of-way claimants to meet the court's exacting standards of evidence and other limitations on filing potentially bogus claims. Secretary Norton, in this policy, has taken the opposite approach, choosing to make it easy.

Second, the Tenth Circuit decision is binding law in only six western states (New Mexico, Colorado, Wyoming, Utah, Kansas and Oklahoma). Secretary Norton could choose not to apply the decision in other states, where appeals courts have not adopted the Tenth Circuit's nonsensical conclusion that rights-of-way need not be "constructed" to become R.S. 2477 rights-of-way for constructed highways. The Norton policy essentially throws in the towel on setting more reasonable, conservative standards for defining R.S. 2477 rights-of-way. The federal government routinely decides it will narrowly construe court decisions from a circuit if it disagrees with the outcome. Again, Secretary Norton is choosing to use the opinion to undermine the protection of public lands, rather than trying to limit the decision's impact.

Will the policy impact National Parks, National Wildlife Refuges, and wilderness?

Yes. The policy applies to the NPS and FWS as well as the BLM, and authorizes them to issue the same "non-binding" determinations by similar relaxed, non-judicial processes. The policy's assurance that the agencies must "protect the underlying and surrounding federal lands it manages" rings hollow. The very purpose of the Norton policy is to ease the recognition of claims of R.S. 2477 highways – non-federal property interests on federal lands – by those bent on developing those lands. Soothing words cannot paper over that fact.

Significantly, through this policy, Secretary Norton abandoned her previous approach of forcing claimants seeking routes through National Parks, Wildlife Refuges, wilderness study areas and designated wilderness to do so in federal court, and of working with states and counties to resolve claims administratively only to those "indisputable" roads that all would agree were true "highways." (*See* further discussion below.) The Norton policy will instead make it easier for those pressing claims to dirt tracks across Parks, Refuges, and wilderness.

Are there specific claims to rights-of-way within National Parks. National Wildlife Refuges, and wilderness?

Yes. The threats to these lands are not hypothetical. The NPS in 1993 identified nearly 3,000 miles of claims across national parks in Alaska, including 400 miles across Denali National Park. The NPS concluded that the impact on park resources of recognizing these claims "could be devastating."[2] San Bernardino County has claimed more than 2,500 miles of claims across the Mojave National Preserve and scores of miles across designated wilderness.[3] Moffat County ,

[2] *See* http://www.rs2477.com/documents/Alaska_NP_Units.pdf.

[3] *See* http://www.calwild.org/resources/pubs/rs2477.pdf.

Colorado has claimed 240 miles of routes in Dinosaur National Monument, 50 miles inside Browns Park National Wildlife Refuge, and other routes through wilderness study areas and proposed wilderness.[4] The State of Utah has claimed 100,000 roads, routes, and trails across the state, including every hiking trail in Zion National Park, and through every designated wilderness, military reservation, and tribal reservation.[5]

Does the policy weaken prior Bush Administration policy concerning National Parks and National Wildlife Refuges?

Yes. As discussed above, in 2003, the Interior Department signed a Gale Norton signed a memorandum of understanding (MOU) with the State of Utah that permitted the BLM to process R.S. 2477 claims under 2003 amendments to the "Disclaimer Rule." In the agreement, the State and DOI stipulated that the State could not seek claims that crossed Wilderness Study Areas, Wilderness, National Parks or National Wildlife Refuges. Secretary Norton's press release at the time stated: "Recognizing the special nature of national parks, refuges and wilderness, the MOU acknowledgment process does not apply to these areas."[6] In her talking points, obtained through FOIA, she said that the MOU "establishes a process for dispute resolution process while protecting environmentally sensitive areas like refuges and wilderness areas."[7] The March 22, 2006 policy firmly puts these sensitive lands at risk, where Secretary Norton herself previously concluded that they should not be.

Could the policy impact private lands?

Yes. Making it easier for claimants to turn two-tracks into public highways may result in real damage to private property. Federal and private lands are often interspersed across the West. A decision that a right-of-way exists on federal land may result in a conclusion that a route the ends at, abuts, or crosses public lands is now a public highway not subject to federal agency control. The Norton policy again provides soothing words, directing all bureaus to "develop safeguards to ensure that their implementation of these principles does not infringe on the rights of private landowners or Indian tribes whose land may be crossed or abutted by claimed rights-of-way." Once again, the policy's assurance is hollow. If the federal agency recognizes an R.S. 2477 highway on public land under this policy, and that same track crosses adjacent private land, the federal agency determination will likely make it very difficult for the adjacent landowner to argue against the validity of the claim as it crosses his or her land.

How does the policy fit in with Secretary Norton's commitment to "communication, consultation, cooperation, all in the service of conservation?"

It does not. There is no evidence that the Secretary made any attempt to consult with the public, Congress, private property owners, county commissioners or others in developing the policy.

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4 *See* http://www.rs2477.com/lands/colorado1.htm#Cattle.

5 *See* http://www.rs2477.com/lands/utah.htm.

6 *See* http://www.doi.gov/news/030409a.htm.

7 *See* http://www.rs2477.com/documents/Norton_Talking_Points.pdf.

Further, opportunities for public involvement in the new "administrative determination" process are ill-defined. While the public "should be given notice and an opportunity to comment" on a draft agency administrative determination, nothing provides that the public be notified once a decision is made, and the policy does not provide for the public to be able to challenge a poor agency decision adopting a right-of-way. Policy Attachment at 2.

Does the Interior Department policy conflict with Forest Service policy?

Yes. The Norton policy will permit BLM, NPS, and FWS to determine the validity of rights-of-way as a part of management planning for the areas. By contrast, U.S. Forest Service travel management regulations issued in November 2005 (after the *SUWA v. BLM* decision was issued) clearly provided that the agency would recognize only those R.S. 2477 highways "that have been adjudicated through the Federal court system or otherwise formally established." 70 Fed. Reg. 68,276 (Nov. 9, 2005).

Could the policy impact Defense Department lands?

Yes, in the same way private property owners could be affected. Department of Defense lands abut DOI-managed public lands in many Western states, and R.S. 2477 highway claims have been made against some of these lands. The State of Utah, for example, has claimed more than 1,000 miles of routes across lands managed by DOD. Many routes cross from DOD land to BLM land. The Norton policy provides only that other agencies should be notified and have an opportunity to comment if the R.S. 2477 claim being considered "crosses or abuts … land managed by another government agency." Policy Attachment at 2. .

Does the policy invite claimants to claim primitive tracks as "public highways" under R.S. 2477 regardless of whether they're actually being used by vehicles?

Yes. It states that "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." Policy Attachment at 2. This goes beyond the definition established by the Tenth Circuit Court of Appeals, which specifically declined to determine whether a foot-path could be a highway under R.S. 2477. *SUWA v. BLM*, 425 F.3d at 783. In fact, DOI leaves the door open to primitive trails and little-used and never-built and never-maintained "ways" to become "public highways" despite the fact that the *SUWA v. BLM* decision expressed skepticism that there could be the requisite sustained "substantial use" by the general public to meet the test for an R.S. 2477 right-of-way without some maintenance or actual construction. *Id*. at 781. The Norton policy opens the door to recognizing rough tracks, stream beds and other rough and primitive routes as R.S. 2477 highways.

The policy's reference to "ways" is particularly troubling. In enacting the Federal Land Policy and Management Act in 1976, Congress considered a "way" to be something other than a constructed highway, and thus not a route that could disqualify an area of federal land from congressional designation as wilderness. Thus many wilderness study areas being managed by BLM to preserve for Congress the decision whether to permanently protect them as wilderness are crossed by "ways." The Norton policy opens the door to recognizing these ways as

constructed highways under R.S. 2477, which could make it less likely that such areas would be considered for wilderness designation.

When can a county perform maintenance and what are the standards?

The Norton policy allows "the holder of an R.S. 2477 right of way across federal land who wished simply to conduct routine maintenance or to use the right of way in the same manner it was used on October 21, 1976, or an earlier date of reservation . . . [to] do so **without consultation with the Department**." Policy Attachment at 5 (emphasis added). DOI will apparently not require that a claimant demonstrate that it is a valid "holder" of a right-of-way before permitting unsupervised "maintenance" to occur on federal public lands, and could make it difficult for the agency to fulfill its legal duties to protect natural and cultural resources. The policy may also allow claimants to use the guise of "maintenance" to turn primitive tracks into real roads.

Does the policy describe how agencies may limit a claimant's request to expand the current footprint of an alleged right-of-way?

Not in any detail. Secretary Norton lays out the direction from the Tenth Circuit's decision as to how to the agency and the right-of-way holder should interact, and states that DOI is the party to determine whether a proposed action falls within or without the scope of a right-of-way. Policy Attachment at 7. However, nothing in her policy reminds agencies that they have an obligation to preserve and protect public lands, cultural sites, and visitors under the National Historic Preservation Act, the Endangered Species Act, the agencies' enabling acts, and that these laws might be used limit the ability of the claimant to expand the route in a way that increases the scope of on-the-ground damage. This is a disturbing omission.

Where can I get more information about the Norton policy?

The Department of Interior's explanation of its policy is at www.doi.gov/issues/rs2477.html. Conservation groups critical of the policy have information and media reports available at www.rs2477.com/Giveaway/Giveaway1.htm and www.tws.org/NewsRoom/Release/20060322.cfm.