W. Dorman

R.S. 2477:
Is This As Good As It Gets?

By

Wendy J. Thurm

Solicitor's Office
U.S. Department of the Interior
Washington, D.C.

5/4/98

(Margin notes & proofreading marks are by Wendy Dorman)

Paper 7

[Rocky Mt. Min. L. Foundation, Mineral Law Series, Vol. 1998, No. 2.]

Biographical Sketch

WENDY J. THURM

Wendy J. Thurm is the Special Assistant to the Solicitor at the U.S. Department of the Interior in Washington, DC. In that capacity, Ms. Thurm represents the Department in complex and sensitive legal matters involving litigation, rule-making, and drafting and negotiating of legislation. Before joining the Department in April, 1997, Ms. Thurm practiced civil and criminal law at Keker & Van Nest, L.L.P., in San Francisco, California, and was a law clerk to Judge Phyllis A. Kravitch of the Eleventh Circuit Court of Appeals in Atlanta, Georgia.

In 1987, Ms. Thurm received a Bachelor of Arts degree in political science, *summa cum laude,* from Tufts University in Medford, Massachusetts. She received a Juris Doctor degree, *cum laude,* from Harvard Law School in Cambridge, Massachusetts in 1992.

TABLE OF CONTENTS

R.S 2477: IS THIS AS GOOD AS IT GETS?

By: Wendy J. Thurm[1]
Office of the Solicitor
U.S. Department of the Interior
1849 C Street NW
Washington, DC 20240
(202) 208-4423

I. INTRODUCTION

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

With this seemingly simple, 20-word federal statute, Congress offered to grant rights-of-way to construct highways over unreserved public lands. Originally, the grant was Section 8 of a law entitled "An Act Granting Right of Way To Ditch and Canal Owners Over The Public Lands, and For Other Purposes." The law was also known as the Mining Act of 1866. Several years after the Act was passed, this provision became section 2477 of the Revised Statutes, hence the reference as R.S. 2477. Later still, the statute was recodified as 43 U.S.C. § 932.

R.S. 2477 was passed during a period in our history when the federal government was aggressively promoting settlement of the West. Under the authority of R.S. 2477, thousands of miles of highways were built across the public domain. It was a primary authority under which many existing state and county highways were constructed and operated over federal lands in the western United States. Highways were constructed without any approval from the federal government and with no documentation in the public land records. Consequently, there are few official records documenting R.S. 2477 rights-of-way or indicating that a highway was constructed on federal land under this authority.

One hundred and ten years after its enactment, R.S. 2477 was repealed by the Federal

---

[1] Wendy J. Thurm is the Special Assistant to the Solicitor, U.S. Department of the Interior. Since joining the Solicitor's Office in April, 1997, Ms. Thurm has been substantially involved in all legal and policy matters regarding R.S. 2477, including matters discussed in this paper. Parts II and III of this paper are substantially derived from the Department of the Interior's June, 1993, Report to Congress on R.S. 2477: The History and Management of R.S. 2477 Right-of-Way Claims on Federal and Other Lands. Ms. Thurm would also like to acknowledge the assistance of Renee Stone, Associate Solicitor, Division of Land & Water, and formerly, Special Assistant to the Solicitor.

Land Policy and Management Act (FLPMA) of 1976.[2] Nevertheless, the impact of this right-of-way provision is still being felt, because highways built before October 21, 1976 (the effective date of FLPMA) were protected, as valid, existing rights-of-way.[3]

In recent years, there has been growing debate and controversy over whether specific highways were constructed pursuant to R.S. 2477, and if so, the extent of the rights obtained under the grant. This uncertainty as to the nature and extent of R.S. 2477 rights-of-way across federal land has made sensible land planning and management difficult, at best. To address this problem, in 1992, Congress directed the Department of the Interior to conduct a study of the history and management of R.S. 2477 rights-of-way. Interior's Report to Congress was submitted in June, 1993.

In its report to Congress, the Department recommended the adoption of regulations to determine finally the validity and scope of claimed R.S. 2477 rights-of-way. At the same time, Secretary Babbitt directed the land management agencies to refrain from taking any administrative action on R.S. 2477 claims -- save for those claimants who demonstrated an immediate and compelling need for such a determination -- until final regulations were in place. Interior followed up this recommendation by proposing regulations in 1994 to create such a process. Following a year long comment period in which the Department received over 3,200 public comments, Congress prohibited Interior from finalizing these regulations. In the Interior and Related Agencies Appropriations Bill for FY 1997, Congress prohibited the Department from promulgating final rules without the express approval of Congress.

The 1995 and 1996 legislative sessions of Congress saw the introduction of several bills seeking to resolve outstanding disputes over R.S. 2477. In general, these bills would have set up a process for determining the validity of thousands of claimed R.S. 2477 rights-of-way, put the burden on the United States to disprove the validity of any claimed right-of-way, and mandated that all determinations on R.S. 2477 be made under state law. The Department strongly opposed these proposals.

To fill the void left by Congress' prohibition on final rules, Secretary Babbitt issued interim guidance on R.S. 2477 in January, 1997. This interim guidance reiterated the previous directive that claims processing should be delayed unless the claimant demonstrated an immediate and compelling need for an administrative determination. For those claimants

---

[2] Pub. L. 94-579, 90 Stat. 2744 (1976) (codified at 43 U.S.C. § 1701 et. seq.). All citations are to the 1994 edition of the United States Code, unless otherwise noted.

[3] In fact, much of the public land became "reserved for public uses" long before 1976 with the creation of the myriad national parks, monuments, wildlife refuges, national forests, and military bases, and therefore, not available for the construction of a public highway under R.S. 2477.

demonstrating such a need, the interim policy provided skeletal guidance on the key terms of the statute.

The Department's interim guidance sparked yet more controversy, with some members of Congress arguing that it violated Congress' prohibition on the promulgation of final "rules or regulations." To that end, an amendment was added to the Fiscal Year 1997 Supplemental Appropriation bill that would have nullified the 1997 interim policy and would have required that all judicial and administrative determinations of the validity of R.S. 2477 claims be made in accordance with state law. This amendment was deleted from the Supplemental Appropriations bill following a presidential veto.

In an effort to squarely present and seek to resolve all outstanding R.S. 2477 issues, the Departments of the Interior, Defense and Agriculture submitted legislation to Congress in August, 1997. To date, no action has been taken on this proposed legislation.

II. THE HISTORY AND CONTROVERSY OF R.S. 2477

A. Congressional Enactment of R.S. 2477

R.S. 2477 was one section of a law entitled "An Act Granting Right of Way To Ditch and Canal Owners Over The Public Land, and For Other Purposes." The law was more commonly known as the Mining Act of 1866. This legislation was passed during a period when the federal government was aggressively promoting settlement of the 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 undertakings. Passage of the Homestead Act in 1862[4] 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 but was ignored when it came to the handling of private and individual access. These important but smaller access matters were generally left to local customs or state law. The Mining Act of 1866 not only established the first system for the patenting of lode mining claims, but it also provided for access.

A brief look at how Congress passed this legislation provides some clues as to how right-of-way provisions for highways and canals were assembled into a mining law. The Mining Act of 1866 was enacted in the midst of a major dispute among factions of Congress over the handling of federal mineral deposits. Some, led by California, favored a do-nothing approach. Others favored the sale of the mineral lands for paying off the federal debt incurred by the Civil War and other federal activities. There was also continued movement to encourage people to use their War scrip and settle the Western Territories.

---

[4] Act of May 20, 1862, ch. 75, 12 Stat. 392, as amended.

The House of Representatives enacted a bill authorizing the sale of mineral lands.[5] The Senate countered with a bill providing for preemption of lode minerals.[6] When the House Committee on Public Lands held up action on S. 257, the Senate amended a House-passed ditch and canal right-of-way bill with a revised version of S. 257 in order to keep the legislation out of the hands of the House Committee on Public Lands.[7] This last version was then approved by the House and enacted into law on July 26, 1866.[8] One significant change between the original H.R. 365 and the legislation enacted was the addition of Section 8, the grant of rights-of-way for the construction of highways across unreserved federal land.

Section 8 of the Mining Act was reenacted and codified as part of the Revised Statutes in 1873. This was the result of recommendations from the Public Land Review Commission, authorized in 1866 to review existing legislation affecting public lands and to suggest codification into related groups. The designation "R.S. 2477" thus replaced "Section 8 of the Mining Act." In 1938, as part of the recodification of the statutes, R.S. 2477 became 43 U.S.C. § 932 until its repeal in 1976 by FLPMA.

B. What Does It Mean?

The significance of Congressional reenactment of this right-of-way provision is a subject of debate. Some view the Congressional action as a conscious move to retain a broad right-of-way authority. Others see this as an oversight by Congress that has allowed the language of R.S. 2477 to take on a meaning that was probably unintended in the 1866 Act. A search of the statute's legislative history reveals little hard evidence of what Congress was thinking when it included Section 8 in the Mining Act of 1866.[9]

The words in the statute are straightforward. R.S. 2477 is a grant of a right-of-way for the construction of highways across unreserved public lands. One hundred and thirty-two years after enactment, however, the intent and scope of this statute remains elusive. Several historical and legal questions remain. What did Congress grant and to whom? If a grant was made, to what extent were rights conveyed? How and when should these rights be applied? Who has jurisdiction over these rights?

Some argue that the Congressional grant and its application are very broad -- a blanket

---

5 H.R. 322, 39th Cong., 1st Sess. (1866).

6 S. 257, 39th Cong., 1st Sess. (1866).

7 H.R. 365, 39th Cong., 1st Sess. (1866).

8 Act of July 26, 1866, ch. 262, 14 Stat. 251 (1866).

9 See generally The Congressional Globe, vol. 36, 39th Cong., 1st Sess. (1866).

authority, to be accepted by state and local governments, to build access across the public domain.[10] They argue that the right was without reservation or limitation. Others argue that Congress viewed R.S. 2477 in much narrower terms, with specific limitations to the establishment and application of rights.[11] Advocates for this position assert that R.S. 2477 rights-of-way over federal lands should be narrowly defined and limited to their original use and scope.

Similar differences of interpretation exist regarding the key elements of the statute. Congress' possible intentions in the definitions of the statutory terms "highway," "construction," and "unreserved public lands," can be imagined to support whichever position is being advocated. For example, some support an inclusive definition of "highway," citing historically broad uses of the term.[12] Under this view, an R.S. 2477 highway embraces any avenue of travel open to the public, including trails, pathways, traces, and similar public travel corridors. Under this expansive definition, these types of ways should be included along with more substantial roads in the definition of an R.S. 2477 highway.

Others argue that Congress intended only to recognize major roads that were mechanically constructed as R.S. 2477 rights-of-way.[13] This position relies on the plain meaning of the term "construction" and on a narrower definition of "highway."

A report prepared by the Congressional Research Service in 1993 addresses the issue of what Congress intended to grant as a public highway.[14] In the CRS Report, the definitions of road and highway are compared in modern and historic contexts. The CRS Report found that the most likely interpretation of the statute is that a highway was intended to mean a significant type of road, that is: "one that was open for public passage, received a significant amount of public use, had some degree of construction or improvement, and that connected cities, towns, or other

---

[10] See Barbara G. Hjelle, *Ten Essential Points Concerning R..S. 2477 Rights-of-Way*, 14 *J. Energy Nat. Resources & Envtl. L.* 301 (1994); Leroy K. Latta, Jr., *Public Access Over Public Lands as Granted by Section 8 of the Lode Mining Act of 1866*, 28 *Santa Clara L. Rev.* 811 (1988).

[11] See Michael J. Wolter, *Revised Statutes 2477 Rights-of-Way Settlement Act: Exorcism or Exercise for the Ghost of Land Use Past?*, 5 *Dick. J. Envtl. Law & Pol.* 317 (1996); William J. Lockhart, *Federal Statutory Grants Are Not Placeholders for Manipulated State Law: a Response to Ms. Hjelle*, 14 *J. Energy Nat. Resources & Envtl. L.* 323 (1994).

[12] Hjelle, supra note 10, at 304-07.

[13] Lockhart, supra note 11, at 340.

[14] Pamela Baldwin, *Cong. Res. Serv., CRS Report for Congress No. 93-74A, Highway Rights Of Way: The Controversy Over Claims Under R.S. 2477* (April 28, 1993) (hereinafter "CRS Report").

significant places, rather than simply two places."[15]

The intended meaning of the term "construction" is debated as well. Some believe "construction" requires improvement by mechanical means.[16] Others argue that mere passage may constitute construction.[17] The CRS Report found that some construction or improvement is a necessary element of the grant of an R.S. 2477 highway.[18]

What "unreserved public lands" was intended to mean is also a subject of disagreement and ambiguity. Federal land was withdrawn and dedicated for a wide range of federal purposes and subject to different levels of protection. Some argue that because of broad federal withdrawals there was little or no unreserved public land during the effective life of R.S. 2477.[19] They interpret the term reserved land to include all types of federal actions to classify land. Those who support this viewpoint often cite the establishment of grazing districts under the Taylor Grazing Act as an example of a type of federal classification action that constitutes reserved public land, thus disqualifying any subsequent R.S. 2477 highways. Others argue that reserved lands are those that have been withdrawn or dedicated for a more particular purpose, such as a National Park or Indian Reservation.[20]

C. What Law Governs?

Another important question about the intent of Congress in enacting R.S. 2477 focuses upon whether state or federal law should govern. Some look to the 1866 Mining Act's recognition of state law and local customs pertaining to mineral rights, and its reliance on state law to fill in many of the details for implementation, as ample evidence that state law should govern this grant.[21] Others believe that federal law must control the issue without regard to state

---

15 Id. at 8.

16 Wolter, supra note 11, at 332-38.

17 Hjelle, supra note 10, at 309.

18 CRS Report, supra note 14, at 29.

19 Mitchell R. Olson, *Comment: The R.S. 2477 Right-of-Way Dispute: Constructing a Solution*, 27 *Envtl. L.* 289, 300-01 (1997).

20 Hjelle, supra note 10, at 309.

21 Id.. at 304-07; Latta, supra note 10, at 824-28.

law because the statute does not expressly incorporate or even refer to state law.[22] The CRS Report characterized the proper role of state law in defining R.S. 2477 as one of the "most fundamental and thorniest issues."[23] It notes: "state law may apply to elaborate on the Act, but must comport with the requirements of the Act."[24]

Interpreting R.S. 2477 solely by reference to state law could result in an inconsistent application of the 137 year old federal grant because the public land states do not apply consistent standards for the creation of public highways. For example, Kansas, South Dakota and Alaska each have statutes designating all section lines as public highways.[25] Colorado, Oregon and Utah, on the other hand, require public use to establish a highway.[26]

Moreover, as the Department's Report to Congress made plain, there is no clear precedent in the federal case law on the interpretation of R.S. 2477. I refer you to the Report to Congress for a concise summary and analysis of the federal case law up through June, 1993. Federal cases decided since then shed precious little light on these thorny and important issues.

Adams v. United States[27] involved a dispute over access to private property entirely within the boundaries of the Toiyabe National Forest in Nevada. Among other claims, the owners sought to quiet title to an easement across forest land under R.S. 2477. Substantial historical evidence was presented to the district court regarding construction of the claimed easement and of other National Forest Service roads in the vicinity of the claimed right-of-way. The district court found, and the Ninth Circuit affirmed, that the claimed easement was not constructed until after 1906, the date the public land was reserved as the Toiyabe National

---

22 Lockhart, supra note 11, at 333-44.

23 CRS Report, supra note 14, at 23.

24 Id. at 24.

25 See Alaska Stat. §§ 19.10.010, 19.10.015 (1988 & Supp. 1997); Girves v. Kenai Peninsula Borough, 536 P.2d 1221, 1226 (Alaska 1975); Kan. Stat. Ann. §§ 68-101 to 68-106 (1992 & Supp. 1997); Tholl v. Koles, 70 P. 881, 883 (Kan. 1902); S.D. Codified Laws Ann. §§ 31-18-1 to -4 (1984 & Supp. 1997); Pederson v. Canton Township, 34 N.W.2d 172, 173 (S.D. 1948).

26 Colo. Rev. Stat. §§ 43-1-202, 43-2-201 (1993); Nicholas v. Grassle, 267 P. 196, 197 (Colo. 1928); Or. Rev. Stat. § 368.131 (1996); Montgomery v. Somers, 90 P. 674 (Or. 1907); Utah Code Ann. §§ 27-12-89, 27-16-101 to 106 (1995); Lindsay Land & Livestock Co. v. Churnos, 285 P. 646-648-49 (Utah 1930).

27 3 F.3d 1254 (9th Cir. 1993), aff'g, 687 F. Supp. 1479 (D. Nev. 1988).

Forest.[28] As a result, no R.S. 2477 right-of-way was created.

In addition to the factual finding on the R.S. 2477 claim, there are a number of other important aspects of the Ninth Circuit's ruling. In discussing the standard for determining the existence of a valid R.S. 2477 right-of-way, the court stated that the claimant had the burden to show that "the road in question was built before the surrounding land lost its public character in 1906."[29] Thus, the court appears to have construed the grant as one requiring actual "construction" of a highway. Moreover, the court made no reference whatsoever to state law, but instead relied on previous Ninth Circuit cases involving asserted right-of-way in states other than Nevada.[30] Finally, the court noted that, even if the claimants "had an easement under R.S. 2477, they would still be subject to reasonable Forest Service regulations."[31]

A similar claim was asserted, and a similar result obtained in Fitzgerald v. United States.[32] The owners of private property enveloped by the Apache-Sitgreaves National Forest sought to establish the existence of an R.S. 2477 over forest land and providing access to their property. After considering substantial historical evidence from all parties, the district court concluded that "the road in question was developed after the reservation of public land for the Black Mesa National Forest, which later became the Sitgreaves National Forest."[33] In setting out the standard by which to assess the R.S. 2477 claim, the court cited to Adams v. United States, supra, and the cases cited therein. As in Adams, the court made no reference to state law.

Finally, in Shultz v. Department of the Army,[34] the claimant sought to quiet title to an alleged R.S. 2477 right-of-way across Fort Wainwright in Alaska that provided access to his private property. In a short per curiam opinion, the court upheld a determination by the district court that Shultz "did not sustain his burden to factually establish a continuous R.S. 2477 route

---

28 Id. at 1258.

29 Id. (emphasis added) (citing Humboldt County v. United States, 684 F.2d 1276, 1281 (9th Cir. 1982)).

30 Id. at 1258.

31 Id. (citing United States v. Vogler, 859 F.2d 638, 642 (9th Cir. 1988), cert. denied, 488 U.S. 1006 (1989)).

32 932 F. Supp. 1195 (D. Ariz. 1996).

33 Id. at 1204.

34 96 F.3d 1222 (9th Cir. 1996), petition for cert. filed, No. 97-1117.

or right-of-way under Alaska common law."[35] In so holding, the court implicitly ruled that the existence of an R.S. 2477 right-of-way is to be determined by reference to state law. The opinion makes no reference to the Adams decision or the cases relied on therein. Shultz petitioned the U.S. Supreme Court for certiorari to review the Ninth Circuit's decision. The United States opposed this petition. As of this writing, the Supreme Court had not yet decided whether to grant the certiorari petition. (the S.Ct. denied cert. 118 S.Ct. 1511 (Apr. 20, 1998))

III. HISTORICAL ADMINISTRATION OF R.S. 2477 RIGHTS OF WAY

A. Pre-FLPMA Regulations

A review of Interior records indicates that there was no official Departmental guidance or policy about R.S. 2477 rights from 1866 until 1898. In 1898, the Secretary of the Interior held that an attempt by a county to accept R.S. 2477 grants along all section lines in the county was ineffective.[36] The Secretary stated, "Whatever may be the scope of the statute under consideration, it was not intended to grant a right-of-way over public lands in advance of an apparent necessity therefor, or on the mere suggestion that at some future time roads may be needed."[37] In 1938, an early Interior regulation was published dealing with R.S. 2477 rights-of-way.[38] The guidance read as follows: "This grant becomes effective upon the construction or establishing of highways, in accordance with the state laws, over public lands not reserved for public uses. No application should be filed under the act, as no action on the part of the Federal Government is necessary."[39] In 1944, this provision was renumbered,[40] and a new section dealing with procedures when reserved land is involved was added.[41]

---

[35] Id. at 1223. Initially, the Ninth Circuit had issued an opinion reversing the district court, concluding that Shultz had established the existence of an R.S. 2477 right-of-way before the establishment of Fort Wainwright. Following a request for rehearing by the United States, and following further briefing and oral argument, the Court of Appeals withdrew its earlier opinion, and issued a one paragraph per curiam opinion in its place.

[36] Board of County Comm'rs of Douglas County, Washington, 26 L.D. 446 (1898).

[37] Id. at 447.

[38] 43 C.F.R. §§ 244.54 & 244.55 (1938).

[39] 43 C.F.R. § 244.55 (1938).

[40] 43 C.F.R. § 244.46 (1944).

[41] 43 C.F.R. § 244.47 (1944).

In 1954, these provisions were amended and again renumbered.[42] The language contained in the 1938 regulation was not amended. New language, however, was added. The new provision stated "[h]olders of grants under R.S. 2477 shall be subject to the terms and conditions of the following paragraphs of § 244.9 (b), (c), (d), (e), (i), (k)."[43] Further, section 244.9(b) required the holder to "clear and keep clear the lands within the right-of-way to the extent and in the manner directed by the superintendent in charge."[44] Under section 244.9(c), the holder must "take such soil and resource conservation and protection measures . . . on the land covered by the right-of-way as the superintendent in charge of such lands may request."[45] Thus, more than forty years ago, the Department evidenced its intent to reasonably regulate R.S. 2477 rights-of-way so as to prevent undue degradation to the public lands.

B. Post-FLPMA Regulations

With the enactment of FLPMA on October 21, 1976, Congress set forth its intentions for public land management. FLPMA provided for multiple-use management, a presumption that public lands should be retained and definitive process for granting rights over public lands. Section 706(a) of FLPMA repealed the right-of-way authority for R.S. 2477[46], subject to valid existing rights.[47] Thus, rights-of-way established pursuant to R.S. 2477 prior to its repeal remain valid, but no new rights-of-way could be acquired after its repeal.

---

[42] 43 C.F.R. §§ 244.58 & 244.59 (1954).

[43] 43 C.F.R. § 244.58(b) (1954).

[44] 43 C.F.R. § 244.9(b) (1954). "Superintendent in charge" is defined as "the officer of the United States having supervision of the land under authority of the agency having jurisdiction and control over the land involved." 43 C.F.R. § 244.1(g) (1954). This provision remained essentially the same but was renumbered in 1966 as 43 C.F.R. § 2234.2-5 and remained so numbered until 1970.

[45] 43 C.F.R. § 244.9(c) (1954). In 1970, the regulation was again renumbered. The requirement that holders of a right-of-way are subject to specific terms and conditions was renumbered at 43 C.F.R. § 2822.2-2 (1974). (Because of a technical error, corrected in 1974, the first condition (b) was not included in the list of terms and conditions.) These same 1970 regulations also clarified that a right-of-way pursuant to R.S. 2477 was limited to highway purposes. Prior to these regulations, some holders of R.S. 2477 rights-of-way authorized third parties to ancillary uses within the right-of-way, such as power or telephone lines. This regulation stipulated that separate applications were required under other regulations to use lands within R.S. 2477 rights-of-way for other purposes.

[46] Pub. L. 94-579, § 706(a), 90 Stat. 2744, 2793 (1976).

[47] Pub. L. 94-579, § 701(a), 90 Stat. 2744, 2786 (1976).

After the 1976 repeal of R.S. 2477, there was a growing awareness of the need to identify and recognize the rights that had been established prior to 1976. Proposed regulations published in 1979 would have required persons or state or local governments to file maps within three years with BLM showing the locations of public highways constructed under the authority of R.S. 2477.[48] The submission of this information was not intended to be conclusive evidence as to the existence of an R.S. 2477 right-of-way, but an opportunity for BLM to be able to record the information in the public land records. However, when the final regulations were published, they simply afforded the opportunity to file maps within three years, but did not require it.[49] In 1981, regulations were proposed to streamline the existing regulations.[50] When final regulations to streamline were published on March 23, 1982, the three-year window was removed.[51]

Section 603 of FLPMA mandated that BLM review, for wilderness characteristics, roadless areas of 5,000 acres or more.[52] Much discussion ensued at the Department over the definitions of road and roadless area. The Solicitor's Office concluded in 1980 that the numerous and conflicting state and federal court rulings on R.S. 2477 were not helpful in clarifying these terms. Instead, it turned to the statutes, both R.S. 2477 and section 603 of FLPMA, to define the terms "highway" and "road." In a 1980 letter from Frederick Ferguson, Deputy Solicitor of the Department of the Interior, to James Moorman, Assistant Attorney General, the Department concluded that the reference to "construction" in R.S. 2477 meant that a track across the public lands that was not created or improved by mechanical means was only a "way" in the context of wilderness. Indeed, FLPMA's legislative history indicates Congress' intent that a "road" be more than a jeep track, requiring some evidence of mechanical improvement or maintenance through mechanical means.[53] Thus, a valid R.S. 2477 right-of-way (i.e. one that was constructed) would qualify as a "road" under FLPMA, but a "way" would not, thus eliminating a potential conflict between R.S. 2477 and FLPMA with regard to roadless areas.

C. The 1988 Hodel Policy

When Alaska became a state in 1959, approximately 98 percent of its land was in federal ownership, primarily under BLM management. This vast area contained few roads. Miners,

---

48 See 44 Fed. Reg. 58118 (October 9, 1979).

49 43 C.F.R. § 2802.3-6 (1980).

50 See 46 Fed. Reg. 39968-69 (August 5, 1981).

51 43 C.F.R. § 2802.5 (1982).

52 43 U.S.C. § 1782.

53 H.R. Rep. No. 1163, 94th Cong. 2d Sess. (1976).

trappers, and Native Alaskans traveled by foot, dogsled, or pack animal, using existing game trails or creating new trails. A few roads were constructed by the Bureau of Public Roads. In more recent years, access has also been gained by snowmobiles and tracked vehicles. Access by aircraft is common in many areas because of the cost-effectiveness of building airstrips compared to the cost of building roads.

Congress specifically recognized Alaska's unique problems with the passage of Alaska legislation. In 1971, the Alaska Native Claims Settlement Act (ANCSA) mandated the reservation of access for public use across Native lands.[54] This legislation and subsequent regulations established categories of easements, with different widths corresponding to different types of use, to apply to lands conveyed to Native corporations.[55]

In 1980, Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA).[56] In recognition that most of Alaska's transportation and utility system is undeveloped, ANILCA provided a process for acquiring rights-of-way for transportation and utility systems.[57] To date, nearly 18 years after enactment, only a few applications have been filed under this act, presumably because potential applicants fear the high costs and cumbersome process.

Alaska has devoted significant resources to identifying existing roads and trails. In 1985, an interagency task force was formed within the Department to work with Alaska on policy, process, and procedures for assertions of R.S. 2477 rights-of-way. This effort ultimately led to the development of a Department policy for the administrative recognition of asserted R.S. 2477 rights-of-way, signed by then Secretary Hodel on December 7, 1988.[58] The Hodel policy was based on and expanded the then-existing BLM Rights-of-Way Manual. The Hodel Policy was not published in the *Federal Register* for public comment.

Seeking to account for the perceived uniqueness of Alaska, the 1988 Hodel policy put forward loose criteria for R.S. 2477 claims and applied these criteria to all federal lands under the Department's jurisdiction in all 30 public land states. The Hodel policy addresses the three statutory requirements that must be met for acceptance of an R.S. 2477 right-of-way. It also

---

54 Pub. L. 92-302, 85 Stat. 688 (1971) (codified at 43 U.S.C. §§ 1601 et. seq.).

55 43 U.S.C. § 1633; 43 C.F.R. §2650.4-7 (1997).

56 Pub. L. 96-487, 94 Stat. 2371 (1980) (codified at 16 U.S.C. §§ 3101 et. seq.).

57 16 U.S.C. §§ 3161-3173 (1994).

58 December 7, 1988 Memorandum from Secretary of the Interior to Assistant Secretary, Fish, Wildlife & Parks; and Assistant Secretary, Land and Minerals Management (enclosing policy statement).

addresses ancillary uses, the width of highways, abandonment, and to some extent, the responsibilities of the agency and the right-of-way holder.

Under the Hodel policy, "unreserved public lands" would include those federal lands open to the operation of the public land laws. This definition would exclude lands reserved or dedicated by Act of Congress, Executive Order, Secretarial Order, and some classifications authorized by statute. Also excluded would be public lands preempted or entered by settlers under the public land laws or located under the mining laws during the pendency of the entry or claim.[59] "Constructio"n would include a physical act of readying the highway for its intended method of transportation, which could include foot, horse, pack animal, or vehicle, and could be accomplished by such simple means as the removal of vegetation or rocks, road maintenance over several years, or the mere passage of vehicles. Survey, planning, or dedication alone would not constitute construction.[60]

The Hodel policy further stated that the "highway" must be a "public highway" that is freely open for its intended use but could potentially be a toll road or trail. The inclusion of a highway in a state, county, or municipal road system or the expenditure of public funds for construction or maintenance would constitute adequate evidence of this criterion. A statement by an appropriate public body that the highway was and still is considered a public highway would be acceptable, barring evidence to the contrary.[61]

The 1988 Hodel policy also provided guidance on several other aspects of R.S. 2477 rights-of-way. It confirmed that ancillary uses required separate authorizations under the 1974 BLM regulations. Widths of highway rights-of-way were to be in accordance with state law wherever possible, or established based on the width of the disturbed area of the highway, including back slopes and drainage ditches. Abandonment was to be accomplished within the procedures established by state, local, or common law or judicial precedent.[62]

The Hodel policy stated that under R.S. 2477, the Department would have no management control over proper uses of a highway right-of-way unless undue or unnecessary degradation of the servient estate can be demonstrated. The policy disavowed Departmental jurisdiction over reasonable activities of the right-of-way holder, while not precluding the applicability of other federal, state, or local laws that are relevant to the use of the right-of-way.[63]

---

59 Id. at 1.

60 Id. at 1-2.

61 Id. at 2.

62 Id. at 3.

63 Id.

IV. THE DEPARTMENT OF THE INTERIOR'S 1994 PROPOSED RULES ON R.S. 2477

More than 100 years after its enactment, nobody knows how many valid R.S. 2477 rights-of-way exist, or where they are. Controversy and confusion have resulted. Aggressive use of R.S. 2477 has been regarded by some as a potentially potent way to thwart more conservation-oriented management of federal lands. The profusion of unresolved claims makes planning and development difficult, compromises the Department's mission, and undermines the relationship between federal officials and the people they serve.

The adverse impact on management due to R.S. 2477 is aggravated by the inchoate nature of the grant. New claims for rights may surface at any time, frustrating a manager's ability to plan. Related to this is the concern that as more time elapses between October 21, 1976 (the date of FLPMA's enactment) and new R.S. 2477 claims, it will become more difficult to trace evidence necessary to making a fair and accurate assessment of the validity of the R.S. 2477 claim.

Concern over the ability to manage according to agency mandate affects all of the Department's land management agencies: the National Park Service, the Bureau of Land Management, and the Fish and Wildlife Service. Land managed by the Park Service and the Fish and Wildlife Service, in particular, have been set aside for preservation. R.S. 2477s within the boundaries of a national park or wildlife refuge could compromise the specific purposes and values the areas were established to protect.

Responding to this situation, in 1992 Congress asked the Department to study the R.S. 2477 situation and to make recommendations for administering claims.[64] The required study, which was completed in 1993, recommended that regulations be adopted to clarify and process R.S. 2477 claims.

The Department's proposed regulations aimed to define key terms, provide a process for assertion and processing of claims, and to provide public input and appeal procedures. The proposed regulations would have applied only to lands managed by Interior agencies, the National Park Service, U.S. Fish and Wildlife Service, and the Bureau of Land Management, and not to private lands, Indian or Native Alaskan lands, or lands of other agencies or entities.[65] If finalized, the proposed regulations would have had a two year filing period for administrative claims and announced a triggering of the twelve year statute of limitations period under the Quiet

---

[64] H.R. Rep. No. 901, 102d Cong., 2d Sess. (1992).

[65] 59 Fed. Reg. 39216, 39219 (August 1, 1994).

Title Act.[66]

The filing process outlined in the proposed regulations would have required claimants to produce evidence supportive of their claim on each requirement of R.S. 2477: evidence of actual construction, evidence that what was constructed was a highway, and evidence that the lands subject to the right-of-way were unreserved at a time when the grant was available.[67] It would only have been necessary to file with one federal office even if the claimed right-of-way crossed lands of more than one federal agency. The National Park Service, followed by the Fish and Wildlife Service, would have been designated the deciding agency if any of their lands were involved in the claim.[68]

Public participation was provided for by requiring publication in local newspapers of all claims filed and publication in local newspapers and the Federal Register of all administrative determinations made. Thirty days would be the minimum public comment period. Appeals made from administrative determinations to the appropriate agency director would be allowed within thirty days of the decision.[69]

The proposed definitions of the key terms of R.S. 2477 and other terms were among the most controversial elements of the proposed regulations. "Construction" was defined as "intentional physical acts that were intended to, and that accomplished, preparation of a durable, observable, physical modification of land for use by highway traffic." "Highway" was "a thoroughfare that is currently and was prior to the latest available date used by the public . . . for the passage of vehicles carrying people or goods from place to place."[70] On these important terms, the proposed regulations would have required higher standards of activity, of significance, and of intent than did the 1988 Hodel policy. Mere passage of vehicles, not accompanied or followed by intentional acts of construction, or merely moving rocks or vegetation out of the way by hand, would not qualify as construction. Animal trails or footpaths not used by vehicles or not connecting real places would not qualify as highways. On the other hand, the proposed regulations did not define highway or construction in what might be thought of in modern terms. Some interested parties had argued for more lenient standards, others argued for more stringent ones.

Definitions of "scope" "improvement," "routine maintenance," and "maintenance" were

---

66 Id. at 39221-39222, 39226-39227.

67 Id. at 39221-39222, 39226.

68 Id. at 39221, 39226.

69 Id. at 39223, 39227.

70 Id. at 39219-39220, 39225.

also significant. Scope was defined to be the "width, surface treatment, and location actually in use for public highway purposes at the latest available date." Improvement and routine maintenance were opposites; the former being any maintenance or construction activity that expanded the scope of a right-of-way and the latter, any such activity that stayed within the scope. Maintenance was defined to mean "recurring or periodic actions that repair or prevent damage to an existing right-of-way and keep an existing right-of-way surface suitable for travel by the intended vehicles." Thus, maintenance was intended to describe the kinds of activities that would occur on a right-of-way, while the other terms would describe the legal significance of these activities. The proposed regulation made clear that a right-of-way holder had authority to do routine maintenance of a valid right-of-way, but that all activities including routine maintenance were subject to federal regulation.[71]

One final significant position taken by the proposed regulations was on the use of state law. The proposal stated that state law in effect on the latest available date on which the right-of-way could have been constructed would be recognized, to the extent that it was consistent with the baseline requirements of federal law. That is, a state law that purported to accept more than was offered by the federal R.S. 2477 statute (for example, by removing the requirement for actual construction) or a state law passed after R.S. 2477's repeal would not be valid.[72]

After publishing the proposed rule on August 1, 1994, the Department extended the comment period three times.[73] In that time, the Department received more than 3,200 comments.

The Department's proposed regulation caused considerable consternation with the newly-elected Republican led Congress, particularly among the congressional delegations from Alaska and Utah. As a result, Congress enacted a moratorium prohibiting any federal agency from "preparing, promulgating, or implementing" any "rule or regulation" regarding R.S. 2477 rights-of-way until September 30, 1996.[74] This provision was an amendment to the National Highway System Designation Act of 1995.[75] Congress extended the prohibition on "developing,

---

[71] Id. at 39220-39221, 39225.

[72] Id. at 39218, 39221.

[73] The initial comment period was to last for 60 days, or until September 30, 1994. 59 Fed. Reg. 39216 (1994). Following requests from the public, the comment period was extended until November 15, 1994. 59 Fed. Reg. 46,952 (1994). On November 21, 1994, the comment period was re-opened and extended an additional 60 days, or until January 15, 1994. 59 Fed. Reg. 59,975 (1994). The comment period was finally extended until August 1, 1995. 60 Fed. Reg. 4135 (1995).

[74] Pub. L. 104-59, 109 Stat. 568, 617-18 (1995).

[75] Id.

promulgating, and thereafter implementing a rule concerning rights-of-way under section 2477 of the Revised Statutes" in the Fiscal Year 1996 Interior and Related Agencies Appropriation bill.[76] In 1996, Congress simply declared:

> 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 any act of Congress subsequent to the date of enactment of this Act.[77]

In response to a request from several western state representatives, the Comptroller General issued an opinion stating that the above-quoted moratorium is permanent, and did not expire at the end of the 1997 Fiscal Year.[78] To date, the Department has not completed work on its proposed regulation. Instead, as will be discussed below, the Department submitted proposed legislation to Congress in August, 1997.

V. RECENT LEGISLATIVE EFFORTS TO RESOLVE THE R.S. 2477 QUAGMIRE

A. Bills Introduced in the 104th Congress

In addition to the moratoria, the 104th Congress saw the introduction of two bills, one in the House (H.R. 2081), and one in the Senate (S. 1425). The stated intent of the two bills was to "settle" all R.S. 2477 claims, but neither bill would have achieved that objective. Although the bills differed slightly, they were similar in many key respects. Each bill sought to:

- Permit, but not require, anyone (not just right-of-way holders) to file notice of claimed R.S. 2477 rights-of-way with the Secretary (within 10 years under H.R. 2081, and within five years under S. 1425);
- Require the Secretary, within two years from the date the notice was filed, to either recognize the claimed R.S. 2477 right-of-way or object to the claim, with a statement of factual and legal reasons for the objection;
- Require the Secretary to commence an action under the Quiet Title Act within two

---

[76] Pub. L. 104-134, 110 Stat.1321, 1321-156 (1995).

[77] Fiscal Year 1997 Department of the Interior and Related Agencies Appropriation Act, as contained in section 101(d) of the Omnibus Consolidated Appropriation Act, 1997, Pub. L. 104-208, 110 Stat. 3009, 3009-181 (1996).

[78] August 20, 1997, Letter of Robert P. Murphy, General Counsel, General Accounting Office.

years of his objection to a claimed R.S. 2477 right-of-way;

- Impose the burden of proof on the United States to show that an R.S. 2477 was not validly created;

- Require that the Secretary apply state law in making determinations as to the validity and scope of a claimed R.S. 2477 right-of-way.[79]

The Department strongly opposed both measures. Among other objections, the Department maintained that the bills would not provide a workable process or standards to evaluate claims, but would reopen indefinitely the opportunity that R.S. 2477 once provided for the construction of rights-of-ways, and imperil federal land now reserved as national parks, wildlife refuges, military lands, and other sensitive federal lands.[80] Furthermore, according to the Department, the complete incorporation of current state law would greatly expand the rights originally granted under R.S. 2477, particularly in states, like Alaska, with section line statutes, because the original federal grant required "construction" of a highway, not the mere drawing of a future highway on a map.[81] Finally, the Department contended, imposing the burden on the United States to "disprove" a claimed R.S. 2477 right-of-way would reverse the longstanding rule of law that doubts regarding federal land grants are to be resolved in favor of the government.[82]

H.R. 2081 was voted out of the House Resources Committee with slight revisions but was not passed by the full House. S. 1425 was amended in the Senate Energy and Natural Resources Committee to delete the substantive provisions, and to impose the moratorium that eventually was included in the FY 1997 Interior Appropriations bill.[83]

---

[79] See S. 1425, 104th Cong., 2d Sess. (1996); H.R. 2081, 104th Cong., 1st Sess. (1995).

[80] See *Hearings on S. 1425 Before the Senate Energy and Natural Resources Committee*, S. 1425, 104th Cong., 2d Sess. (1995) (statement of John D. Leshy, Solicitor, U.S. Department of the Interior) *reprinted at* 1996 WL 7136833, database CONGTMY; *Hearings on H.R. 2081 Before the House Resources Committee*, H.R. 2081, 104th Cong., 1st Sess. (Statement of John D. Leshy, Solicitor, U.S. Department of the Interior) *reprinted in* 1995 WL 449196, database CONGTMY.

[81] Id.

[82] Id.

[83] See supra note 77 and accompanying text.

B. Interior's 1997 Interim Guidance

To fill the void left by Congress' prohibition on final rules, Secretary Babbitt issued interim guidance on R.S. 2477 in January, 1997.[84] This interim guidance officially revoked the 1988 Hodel policy, but also reiterated Secretary Babbitt's previous directive that claims processing should be delayed unless the claimant showed an immediate and compelling need for an administrative determination.[85] For those claimants demonstrating such a need, the interim guidance provided a claims-handling process. Further, the January, 1997 guidance directed the land management agencies to employ substantially the same definitions of "construction," "highway," and "public land, not reserved for public uses" as were set out in the 1994 proposed regulations, and to "apply state law in effect on October 21, 1976, to the extent that it is consistent with federal law."[86]

C. R.S. 2477 Rider Added to Flood Relief Bill

The Department's interim guidance sparked yet more controversy, with some members of Congress arguing that it violated Congress' prohibition on the promulgation of final "rules or regulations." To that end, an amendment was added to the Fiscal Year 1997 Supplemental Appropriation bill that would have nullified the January, 1997 interim guidance and required that all judicial and administrative determinations of the validity of R.S. 2477 claims be made in accordance with state law.[87] The provision further would have prohibited any "rule, regulation, policy, statement, or directive issued after October 1, 1993 regarding recognition, validity or management of any right of way established pursuant to Revised Statutes 2477 (43 U.S.C. 932)."[88] Senator Ted Stevens (R-AK), the proponent of the amendment, intended to prohibit the Department from using the 1997 interim guidance in any fashion.

Following objections by the Administration, the provision was further amended to provide instead for the creation of a Commission to resolve the R.S. 2477 dispute.[89] The

---

[84] January 22, 1997 Memorandum from Secretary of the Interior to Assistant Secretary, Fish, Wildlife & Parks; Assistant Secretary, Land & Minerals Management; Assistant Secretary, Indian Affairs; and Assistant Secretary, Water & Science.

[85] Id. at 2.

[86] Id. at 2-3.

[87] S. 672, § 310, 105th Cong., 1st Sess. (1997).

[88] Id.

[89] S. 851, § 5005, 105th Cong., 1st Sess. (1997); H.R. 1469, § 5005, 105th Cong., 1st Sess. (1997).

Administration continued to object to the inclusion of such a provision in the Supplemental Appropriations bill because, among other things, the proposed membership of the Commission would not have provided a balanced representation of views on the issue. President Clinton vetoed the Supplemental Appropriations bill sent to him by Congress, citing, in part, his objection to the R.S. 2477 provision.[90] Instead, the President stated, the Administration would submit a legislative proposal to Congress within 180 days.[91] Thereafter, the provision was deleted from the final bill signed into law.

D. Interior's Proposed Legislation

Together with the Departments of Defense and Agriculture, the Department submitted the requested legislation to Congress in August, 1997. The proposed legislation is substantially similar to Interior's 1994 proposed regulations, but differs in some important aspects. These include:

- The proposed legislation would apply to lands owned or controlled by the Departments of the Interior, Defense, and Agriculture, not just those owned or controlled by Interior.

- Under the proposed legislation, only states or their political subdivisions would qualify as a "claimant" entitled to an administrative determination of an R.S. 2477 right-of-way. This change was made to reflect the government's longstanding position that only those with property interests may sue the United States under the Quiet Title Act,[92] and thus, because R.S. 2477 was a grant for the construction of a public highway, only public entities may hold title to such rights-of-way.

- Under the proposed legislation, claimants would have up to three years after the date of enactment to file claims with the appropriate federal agencies; under the proposed rules, that time limit was two years.

- Under the proposed legislation, a claim would be filed with each federal land management agency having jurisdiction over any portion of the claimed right-of-way, but the administrative determination would be made by the authorized

---

[90] See The White House, Office of the Press Secretary, June 9, 1997, Veto Message to the House of Representatives.

[91] Id. at 2.

[92] 28 U.S.C. § 2409a(d); see also Kinscherff v. United States, 586 F.2d 159, 160-61 (10th Cir. 1978) (holding that "[m]embers of the public as such do not have 'title' in public roads. To hold otherwise would indicate some degree of ownership as an easement.").

officer of the federal land management agency with jurisdiction over the longest lineal portion of the claimed right-of-way.

- The proposed legislation requires a claimant to include in its claim information about the other entities with property interests in land over which the claimed right-of-way lies, and to provide notice of the claim to those entities.

- The proposed legislation contains a definition of "abandonment" and directs the authorized officer making the administrative determination to assess whether a valid R.S. 2477 right-of-way was subsequently ~~been~~ abandoned since the enactment of FLPMA. The definition of "abandonment" reflects a majority view of the law in the Western public land states.

- The proposed legislation contains a venue provision that would permit claimants and others adversely affected by the agency decision to seek judicial review of a final agency administrative determination in either the federal district court where the longest lineal portion of the right-of-way lies, or in the federal district court for the District of Columbia.

- Under the proposed legislation, a claimant that obtained a final agency determination of the validity of an R.S. 2477 right-of-way would be required to complete a center-line survey of the right-of-way, and to file the survey with the BLM and the state.

To date, no action has been taken on the Administration's proposed legislation.

VI. CONCLUSION

The continued absence of a clearly defined and efficient process for handling the thousands of assertions claiming valid R.S. 2477 rights-of-way seriously undermines the Department's ability to plan for and manage the federal public lands under its jurisdiction. The same is true for the Departments of Agriculture and Defense. It appears that, for now, it will be up to the federal courts to continue to painstakingly adjudicate these right-of-way claims. This system ill serves the claimants, the federal government, and most of all, the public land we hold in trust for the nation.