

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
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To: All Washington Office, Field Officials, and NBC
From: Deputy Director
Subject: Disclaimers of Interest-Guidance for Processing Applications for Valid R.S. 2477 Highways

Program Area: Lands and Realty

Purpose: This Instruction Memorandum (IM) discusses the procedures to be used for processing disclaimer of interest applications filed to acknowledge valid R.S. 2477 rights-of-way. This procedural guidance is found in Attachment 1 to this IM.

Background:

1. Revised Statute 2477

Revised Statute (R.S.) 2477, first enacted as section 8 of the Mining Act of 1866, states that “the right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.” 43 U.S.C. 932 (repealed 1976). R.S. 2477 was repealed by the Federal Land Policy and Management Act (FLPMA) on October 21, 1976 (Pub. L. 94-579, sec. 706(a), 90 Stat. 2744, 2793). However, FLPMA did not terminate valid rights-of-way existing on the date of its approval (sec. 509(a), 90 Stat. 2781, 43 U.S.C. 1769; sec. 701(a), 90 Stat. 2786, 43 U.S.C. 1701 note).

Since its enactment in 1866, a large number of rights-of-way were developed under the authority vested by R.S. 2477. Although exact numbers are not known, it is believed that the total number could be in the thousands. In most instances, R.S. 2477 rights-of-way were not recorded on the public land records or in official county records because R.S. 2477 did not require any formal approval from the Secretary of the Interior or any other Federal government official. The uncertainty resulting from unrecorded rights-of-way under R.S. 2477 has created clouds on title. Among the items in R.S. 2477 which have remained controversial over the years are what constitutes construction, and how is a highway defined.

In 1988 Secretary Hodel issued a policy (Hodel Policy) pertaining to R.S. 2477 which described what requirements were necessary for acceptance including what constituted reserved lands, what was appropriate to meet the requirements for construction, and what was necessary to meet the definition of a highway. It also discussed items such as what ancillary uses

were allowed, criteria to be used to determine width, what constitutes abandonment, what reasonable uses consist of, and the responsibility of the right-of-way holder. These last items are now generally considered under a heading entitled “scope”.

On August 1, 1994, the Department of the Interior (DOI) proposed new regulations (59 FR 39216) to create an administrative process for resolving right-of-way claims made under R.S. 2477. Before the R.S. 2477 proposed rule was published as a final rule, 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. This provision was an amendment to the National Highway System Designation Act of 1995 (Pub. L. 104-59, 109 Stat. 568, 617-18 (1995)). Congress extended the prohibition on “developing, 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 Appropriations Act (Pub. L. 104-134, 110 Stat. 1321, 1321-177 (1996)). In section 108 of the Fiscal Year 1997, Department of the Interior and Related Agencies Appropriations Act (Pub. L. 104-208, 110 Stat. 3009, 3009-200 (1996)), Congress stated that:

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 an Act of Congress subsequent to the date of enactment of this Act.

Since 1976, the Bureau of Land Management (BLM) has authorized over 1,000 R.S. 2477 roads through right-of-way grants issued under Title V of FLPMA. However, these authorizations were made prior to any of the prohibitions established by Congress, and none have been made since, although interest has been maintained by several states, especially Utah and Alaska, in securing these rights.

In 1997 Secretary Babbitt issued a revised policy which revoked the Hodel Policy and provided new guidance for considering and processing an R.S. 2477 right-of-way claim. The Secretary has retained decision making authority for assertions for these filings. The critical items contained in this policy are as follows:

1. A claim must be filed in writing to the agency having jurisdiction over the lands. The entity filing the application must supply maps and other pertinent information supporting its claim and also explain why there is a compelling and immediate need for such a determination. If the agency does not believe that a compelling need exists, it will recommend the Secretary defer processing of the application;
2. The agency will determine the status of the lands at the time that the highway was allegedly constructed. If the lands were reserved or otherwise unavailable, the agency will recommend the Secretary deny the claim;
3. If, upon examination, the agency determines that construction did not occur, the agency will recommend that the Secretary deny the claim;
4. The agency will make a determination if the alleged right-of-way meets the criteria of a highway, which is defined as a thoroughfare used prior to the enactment of FLPMA for the passage of vehicles carrying people or goods from place to place. If not, then the agency will recommend the Secretary deny the claim;
5. An agency will not recommend that a claim be approved if it is not in conformance with State law.

2. The Disclaimer of Interest Rule and its Relation to R.S. 2477

Section 315 of FLPMA authorizes the Secretary of the Interior to issue recordable disclaimers of interest in lands in specified cases if the disclaimer will help remove a cloud on the title to lands or interests in lands and if the Secretary finds no Federal interest (43 U.S.C. 1745(a)). Recordable disclaimers may be issued where applicants assert title previously created under now expired authorities. For example, after adjudicating the claim, BLM may issue a recordable disclaimer of interest to disclaim the United States' interest in a highway right-of-way under R.S. 2477.

On January 6, 2003, BLM issued a final rule that made technical changes to the existing regulations under which an applicant may submit an application to have a disclaimer issued to remove a cloud on title to lands to which the United States asserts no ownership or interest. First, the rule amends the existing regulations to allow any entity claiming title, as opposed to only present owners of record, to apply for a recordable disclaimer of interest. This change eliminates inconsistent administrative interpretations of the owner-of-record requirement, a term that is not defined in the existing 1984 regulations. Second, the final rule eliminates the application deadline in section 1864.1-3, as it applies to States. This change conforms the regulations to the Quiet Title Act, 28 U.S.C. 2409a(g), which exempts States, in most instances, from the twelve-year statute of limitations under that Act. These changes to the existing regulations do not expand the kinds of circumstances in which a disclaimer could be issued, expand or modify any rights created, or create any new rights under R.S. 2477. The BLM may issue recordable disclaimers relating to valid R.S. 2477 rights-of-way under the existing 1984 regulations, and this capability will continue under this final rule.

An issue that arose is whether the publication of the disclaimer rule is a violation of the moratorium prohibiting any Federal agency from preparing, promulgating, or implementing any rule or regulation regarding R.S. 2477 rights-of-way. After considerable discussion and consideration of the issue, the Department believes that if BLM were to issue a disclaimer of the United States' interest in a valid right-of-way under R.S. 2477, the recognition of such right-of-way would not be the result of this notice-and-comment rulemaking but, rather, an informal agency adjudication resulting in a final decision. Because BLM's rule is not a final rule or regulation relating to the "recognition, management, or validity of a right-of-way pursuant to Revised Statute 2477," this rule is not subject to the moratorium in section 108 of the 1997 Interior Appropriations Act. The Congressional Research Service came to a similar conclusion in a report dated November 7, 2003.

3. The MOU between the State of Utah and the Secretary of the Interior

A Memorandum of Understanding (MOU), between the State of Utah (State) and the Department of the Interior (DOI) pertaining to the acknowledgement of R.S. 2477 roads on State and County Roads and the regulations at 43 CFR Subpart 1864 was approved on April 9, 2003.

The Secretary recognized in the MOU that many of the R.S. 2477 rights-of-way asserted by the State that actually have been part of the State's inventoried and maintained transportation infrastructure since before the enactment of the Federal Land Policy and Management Act (FLPMA) in 1976 may be valid R.S. 2477 rights-of-way. Under the MOU, the State has agreed to submit only those claims for roads that existed prior to October 21, 1976, and were and continue to be public and capable of accommodating automobiles

or trucks with four wheels and have been the subject of some type of periodic maintenance. Through the MOU, DOI and the State have agreed to focus their limited resources on acknowledging these R.S. 2477 rights-of-way, which satisfy the statutory requirements of "construction" and "highway" under almost any interpretation of those statutory terms. The State has spent considerable time and substantial resources cataloguing, photographing, documenting, and verifying the history and use of many roads in the State. Through this process, the State has developed information to submit in support of applications for disclaimers under the MOU.

For purposes of implementing the MOU, no application for disclaimers will be processed by BLM for roads within congressionally designated Wilderness Areas or Wilderness Study Areas designated on or before October 21, 1993, under section 603 of FLPMA, or roads within the boundaries of any unit of the National Park System or any unit of the National Wildlife Refuge System.

In addition, the requirements for determinations under the "Interim Departmental Policy on Revised Statute 2477 Grant of Right-of-Way for Public Highways; Revocation of December 7, 1988 Policy," dated January 22, 1997, are inapplicable.

To date, seven disclaimer applications (one of which was withdrawn by the State) have been filed under the authority of section 315 of FLPMA to acknowledge R.S. 2477 roads. These applications are currently being processed.

Policy/Action: BLM Offices are directed to follow the guidance contained in Attachment 1 in processing applications for disclaimers of interest filed for the purpose of acknowledging valid R.S. 2477 roads. Note that applications may be filed only in BLM State Offices. Offices are also encouraged to work with applicants to file Title V rights-of-way in lieu of disclaimers of interest where practicable.

Timeframe: This IM is effective upon receipt.

Budget Impact: This IM provides guidance for processing disclaimer of interest applications for valid R.S. 2477 rights-of-way. The cost for processing disclaimers of interest is subject to reimbursement of our expenses. Therefore, the impact on the budget should be minimal in this instance. However, if a State or local government entity files a FLPMA right-of-way application to authorize an access route, cost recovery provisions do not apply. Therefore, BLM will have to bear those expenses, unless the applicant wishes to reimburse us for our costs.

Manual/Handbook Sections Affected: No Manual/Handbook Sections are affected for processing disclaimers of interest. The Manual/Handbook 2800 series should be used for processing FLPMA right-of-way grants.

Coordination: This guidance was coordinated within the Washington Office and with State Office staffs involved in the R.S. 2477 program.

Contact: If you have any questions or concerns regarding this policy, please contact Jeff Holdren, Lands and Realty Group (WO350) at 202-452-7779 or via email at jeff_holdren@blm.gov.

Signed by:
Jim M. Hughes
Deputy Director

Authenticated by:
Barbara J. Brown
Policy & Records Group, WO-560

1 Attachment

[1 – Guidance to Process Applications for Disclaimers of Interest or Rights-of-Way for Valid R.S. 2477 Highways \(7 pp\)](#)