

EXHIBIT 24

**Memorandum of M.C. Ott, NPS Rocky Mountain Region to R.S. 2477 Task Force Leader
(Jan. 14, 1993)**



United States Department of the Interior



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IN REPLY REFER TO

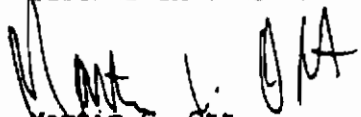
L3027 (RMR-UT)

January 14, 1993

Memorandum

To: R.S. 2477 Task Force Leader
From: Utah State Coordinator, National Park Service
Subject: National Park Service Response to House Report 102-901

Enclosed is the National Park Service response to House Report 102-901. Due to the difference in legislative authorities applicable to Alaska, the parks in that region are addressed separately in the report. Please contact me if I can assist further in this matter.


Martin C. Ott

RS 2477: NPS Response to House Report 102-901

The following information on RS 2477 was compiled to assist preparation of the report required by the 1993 Appropriations Committee Directives. Also, issues and alternatives that could be addressed in the report are noted. Due to the differences in legislative authorities applicable to Alaska, the parks in that region are addressed in a separate section of this report.

History: RS 2477 in National Park System

RS 2477 was enacted on July 26, 1866, and repealed on October 21, 1976, subject to valid existing rights. As this Act was applicable only to Public Land states and considering the date of the Act, NPS areas east of Colorado are unlikely to be affected.

Unreserved public lands in the western NPS units were open to RS 2477 from July 26, 1866, until the withdrawal for park purposes or until October 21, 1976, whichever was earlier. Not all western NPS units were created prior to the 1976 repeal of RS 2477.

In 1985, the DOI convened a task force on RS 2477 consisting of the Alaska offices of the DOI land managing bureaus, the State of Alaska, and other interested parties. A second RS 2477 task force consisting of the Alaska offices of the DOI land managing bureaus convened in 1987. The 1987 task force submitted a draft policy on RS 2477 to the Washington, D.C., office of the Bureau of Land Management (BLM) in July of 1987.

On December 7, 1988, the DOI adopted a policy prepared by the BLM after consultation with the State of Alaska and review by the other DOI land managing bureaus. This policy established criteria for evaluating possible RS 2477 rights-of-way and directed DOI land managing bureaus to develop internal procedures to administratively recognize possible RS 2477 rights-of-way that meet the criteria.

Status: RS 2477 Rights-of-way in NPS Units Other Than Alaska

Currently, no RS 2477 rights-of-way have been administratively recognized in NPS units. Several such rights-of-way have been judicially determined to exist, such as the Glade Park Road at Colorado National Monument, Colorado and the Burr Trail at both Capitol Reef National Park and Glen Canyon National Recreation Area in Utah.

The only NPS areas where RS 2477 assertions are currently pending are in Utah. An assertion by Kane County, Utah, of a 12 mile section of the Warm Creek Road within Glen Canyon National Recreation Area has been reviewed and a recommendation made to administratively acknowledge part of this claimed right-of-way. Two other rights-of-way have been asserted, but insufficient information has been provided to permit review of these assertions. Several rights-of-way are claimed in Washington and Idaho but have not been formally asserted.

While assertions of RS 2477 rights-of-way in other western NPS units are not currently pending, such are to be expected in the future. The current "wise use" movement, which is gaining momentum in the west, sees RS 2477 rights-of-way as a means of assuring access to areas which might otherwise be segregated in wilderness or parks.

Impact: RS 2477 Rights-of-way in National Park Units

The impact of RS 2477 rights-of-way in National Park units could be devastating. The actual impact will depend on how many potential rights-of-way are validated, what resources they affect, how each right-of-way is used, and to what extent the NPS is allowed to manage valid RS 2477 rights-of-way. *

(1) Number of RS 2477 rights-of-way

It is impossible to determine at this time how many possible RS 2477 rights-of-way will be validated. National Park Service areas within the following four NPS regions (excluding Alaska) could be affected:

Pacific Northwest Region	11 areas (2,212,855 acres)
Western Region	21 areas (8,189,103 acres)
Rocky Mountain Region	27 areas (6,782,804 acres)
Southwest Region	9 areas (495,865 acres)

(2) Affected Resources

Congress established the National Park System to conserve scenic, natural, historic, and wildlife resources for the enjoyment of current and future generations. Possible RS 2477 rights-of-way in NPS areas could cross many miles of undisturbed fish and wildlife habitat, historical and archeological resources, and sensitive wetlands. Wilderness or potential wilderness could also be crossed by potential RS 2477 rights-of-ways. *

Validation of possible RS 2477 rights-of-way assertions would undoubtedly derogate most unit values and seriously impair the ability of the NPS to manage the units for the purposes for which they were established. *

(3) Use

Most public highway use of possible RS 2477 rights-of-way has been by horse-drawn wagon, foot, horseback, 4-wheel drive vehicle, and, in recent years, passenger vehicle. Historically, RS 2477 rights-of-way were used for access to cattle operations and mining claims, and to exercise other private property rights. Many possible RS 2477 rights-of-way have been long disused; others are currently used as public highways. State and local governments as well as individual interests have given recent indication that assertions for RS 2477 rights-of-way may be made for various purposes including mining, ranching, resource extraction, and diverse economic development pursuits. If validated, these assertions will have a severe negative impact on areas managed by the NPS, not only from the rights-of-way themselves but from the associated development.

(4) Management

The NPS has considerable authority to manage validated RS 2477 rights-of-way to prevent derogation of national park values. There is common thought among state and local governments that federal land management agencies have no control over use of RS 2477 rights-of-way, but federal case law suggests otherwise. In Sierra Club v. Hodel (Burr Trail), 848 F. 2d 1068 (10th Cir. 1988), the court found that the BLM has the authority and responsibility to regulate RS 2477 rights-of-way to prevent undue degradation of federal land. In U.S. v. Vogler, 859 F. 2d 638 (9th Cir., 1988) and Wilkenson v. Department of the Interior, 634 F. Supp. 1265 (D. Colo. 1986), the courts found that the NPS can regulate RS 2477 rights-of-way. The Vogler court stated that the

Organic Act of the NPS [16 USC §1] and the Mining in the Parks Act [16 USC §1902] authorize the NPS to prevent derogation of park values.

(5) Conclusion

Potentially, there are thousands of possible RS 2477 rights-of-way in the western units of the National Park Service. Many of these possible rights-of-way are extensive and, if validated, would impair scenic, natural, historic, wildlife, and wilderness resources. Also impaired would be the ability of the NPS to manage its areas for purposes for which they were established. The NPS may be able to mitigate some impact pursuant to applicable law and regulations if current federal case law withstands future challenge.

Impact: Access to National Park Units

Access to national park units generally does not currently rely on RS 2477 rights-of-way. Future planning may identify RS 2477 rights-of-way that could provide such access. However, it is not expected that this would be a common circumstance.

Alternatives: Public Highways in National Park System Units

The NPS has no general authority to approve improved public highways across a national park unit unless the highway would serve NPS administration [16 USC §8], would be within the Federal-aid highway system [23 USC §317], or, in Alaska, would be necessary to provide adequate and feasible access to inholdings for economic and other purposes (ANILCA §1110 (b)).

At a few NPS areas the establishing legislation authorizes the granting of rights-of-way for highway purposes, thus providing an alternative to RS 2477. Congress can, of course, legislate access across any area.

Alternatives: Assessing the Validity of RS 2477 Rights-of-way

(1) Continue Current DOI Policy on RS 2477

Under this alternative, the National Park Service will implement DOI policy when Service-wide procedures are finalized. Draft procedures produced by the Alaska and Rocky Mountain Regions were submitted to the Washington, D.C., office of the NPS for review and adoption in November 1992. The Alaska Region, NPS, has delayed review of two current assertions pending completion of the procedures. Rocky Mountain Region has adopted the draft procedures on an interim basis to guide the processing of urgent cases.

(2) Review and Revise DOI Policy on RS 2477

Revision of the DOI policy could emphasize that administrative recognition is a discretionary action that will be taken only when a possible RS 2477 right-of-way would clearly be validated by a court of competent jurisdiction; all borderline and doubtful assertions would be denied administrative recognition and would need to be validated by the courts.

Elements of the current DOI policy the NPS recommends for revision include:

- The policy should require a formal assertion of possible RS 2477 rights-of-way for administrative recognition by DOI land managing bureaus.
- The policy should require incontrovertible documentation for an asserted RS 2477 right-of-way to qualify for administrative recognition and direct DOI land managing bureaus to withhold administrative recognition if an assertion does not provide adequate documentation. Although this may result in more litigation than the current policy, it would accurately reflect the Congressional intent to retain federal control over public land.
- The policy should explicitly recognize existing management authorities available to DOI land managing bureaus and state the standard of protection available under such authorities. The NPS is authorized to prevent derogation of values pursuant to the Organic Act of the NPS, the Mining in the Parks Act, etc. This would clarify Congressional intent and facilitate efficient land management.
- The policy's definition of construction should require actual and intentional modification of land for the purpose of creating a highway. Although this may not conform to all applicable state laws, it is an appropriate general standard for administrative recognition of possible RS 2477 rights-of-way by DOI land managing bureaus.
- The policy's definition of construction could explicitly exclude survey, planning, or proclamation as qualifying actions. The policy could clearly state that DOI land managing bureaus will not administratively recognize unconstructed section line easements as RS 2477 rights-of-way.
- The policy should define "abandonment" and direct DOI land managing bureaus to withhold administrative recognition of possible RS 2477 rights-of-way in the event of demonstrable long-standing disuse as a public highway. Although this may not conform to all applicable state laws, it is an appropriate general standard for administrative recognition of possible RS 2477 rights-of-way by DOI land managing bureaus.
- The policy should address seasonal rights-of-way and direct DOI land managing bureaus to limit administrative recognition of rights-of-way to the season for which a right-of-way was accepted. The policy could also state that rights-of-way that have to be remarked annually, were never physically modified for public highway purposes, and vary in location depending on weather conditions and will not be administratively recognized by DOI land managing bureaus.
- The policy should address designated and proposed wilderness and state that DOI land managing bureaus will not administratively recognize RS 2477 rights-of-way in such areas. Administrative recognition of RS 2477 rights-of-way in such areas contradicts the Congressional intent of the Wilderness Act.
- The policy should require coordination between all agencies affected by an RS 2477 assertion to ensure consistent application of the policy.

(3) Revoke DOI Policy

Under this alternative, the DOI could revoke the current policy and require all assertions of RS 2477 rights-of-way to be submitted to a court of competent jurisdiction for a determination of validity. This would clearly implement the Congressional mandate to retain control of federal lands, but it may result in avoidable litigation and contravene the mandate for efficient management of federal lands.

(4) Congressional Alternatives

Congress has several alternatives to address RS 2477 that could be addressed:

- Congress could legislatively delegate the authority to adjudicate the validity of RS 2477 rights-of-way to the appropriate agencies. This would allow DOI land managing bureaus to determine validity in light of their Congressional mandates and change the courts' role to review of administrative process rather than review of the facts.
- Congress could set a deadline to assert RS 2477 rights-of-way. This would facilitate efficient land management by identifying all possible RS 2477 rights-of-way and, eventually, all valid RS 2477 rights-of-way. This would, however, require additional appropriations for all affected federal land managers to respond to assertions in a timely manner.
- The policy should address the intent of the original 1866 Act. It seems unlikely that Congress intended a total abdication of control over the public lands as even the RS 2477 grant is subject to the restriction that the lands be unreserved for public purposes.