

EXHIBIT 25

U.S. Department of the Interior, Report to Congress on R.S. 2477 (June 1993) (excerpts)

United States Department of the Interior

June 1993

**Report to Congress
on
R.S. 2477**

The History and Management
of R.S. 2477
Rights-of-Way Claims
on Federal and Other Lands





THE SECRETARY OF THE INTERIOR
WASHINGTON

May 28, 1993

Honorable Sidney R. Yates
Chairman, Subcommittee on Interior
Committee on Appropriations
House of Representatives
Washington, DC 20515

Dear Mr. Yates:

In the Conference Report on the Fiscal Year 1993 Appropriations Bill for Interior and Related Agencies, Congress directed the Department of the Interior to study the history, impacts, status, and alternatives to R.S. 2477 rights-of-way and to make sound recommendations for assessing claims. The Department understands that its recommendations must take into account the intent of R.S. 2477 and the Federal Land Policy and Management Act (FLPMA), and that any proposed changes in use of valid rights-of-way must be in accordance with applicable law.

The Department directed the Bureau of Land Management, Utah State office, to take the lead in investigating this issue and preparing a report to Congress. Public participation was obtained in two stages. Preliminary "scoping" meetings were held in December 1992 and January 1993 in eight western cities. Over 6000 pages of public comments were received and reviewed. These comments were instrumental in preparing the March 1993 draft report, which was circulated to approximately 4000 interested parties. Seven additional public meetings were held on the draft report and attended by nearly 400 people. Approximately 1000 pages of further comments were provided to the Department. All comments received before May 7 were reviewed in preparation of the final report, even if received after the public comment period closed.

The Department's draft report outlined five general alternatives for addressing R.S. 2477. These alternatives were intended to generate comment and discussion that would aid the Department in making recommendations in the final report. The comments received were beneficial in development of the recommendations that follow.

Although R.S. 2477 was repealed in 1976 by FLPMA, a law that charted new directions for public land management, valid existing rights under R.S. 2477 at the time of repeal were protected. The final report contains extensive information about the history, status, impacts, and alternatives to R.S. 2477. It is intended to help Congress and the public, as well as the Department, to understand this often misunderstood issue and put it in perspective.

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To provide sound recommendations, the Department must move beyond description and discussion. It must grapple with unresolved conflicts and must help provide answers to several important questions, including: what are valid existing rights, what are the proper roles of holders of those rights and the managers of the land they traverse, and what is the relationship between R.S. 2477 and the modern legislation that dictates current federal responsibilities.

Some of these answers must ultimately and finally be provided by the courts. But the Department of the Interior should be engaged in these questions, to bring its expertise to bear on them. To this end, I have directed appropriate officials of the Department to begin work immediately on a formal rulemaking on R.S. 2477, and to publish proposed regulations promptly. The process of rulemaking will furnish a regularized process for exploring and resolving the many legal and policy questions inherent in this issue, providing ample opportunity for the public, affected states, other federal agencies, and Congress to participate.

Questions that will be addressed in the rulemaking include:

- * Appropriate definitions of the statutory terms construction, highways, and public lands not reserved for public purposes.
- * The respective roles of, and relationships between, federal and state law in defining key terms and resolving other issues.
- * The extent of the Department's authority and obligation to manage R.S. 2477 rights-of-way on federal lands, including whether some of the processes in FLPMA Title V might be used to channel the Department's management.
- * Recordation requirements.
- * The elements of proof for an R.S. 2477 claim.
- * Public notification and administrative appeals processes.

The Secretary of the Interior has broad authority to regulate the management of the public lands, but the Department will consult with Congress on whether, and the extent to which, further Congressional action is needed.

Until final rules are effective, I have instructed the Bureau of Land Management to defer any processing of R.S. 2477 assertions except in cases where there is a demonstrated, compelling, and immediate need to make such determinations.

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The U.S.D.A. Forest Service suggests consideration of options that would preserve R.S. 2477 as a tool to maintain historic public access to federal lands across private lands. For example, Congress could provide mechanisms for assuring that R.S. 2477 rights-of-way continue to provide important public access where such access is necessary and appropriate. Such mechanisms might include federal assumption of management under temporary leaseholds or cooperative agreements.

I am pleased to recommend this report to you and anticipate steady progress on resolving this issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Bob Balliett". The signature is written in a cursive, flowing style with some loops and flourishes.

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Impacts of Current and Potential R.S. 2477 Claims

Congress has instructed the DOI to address impacts of current and potential R.S. 2477 claims from three different perspectives in this Report. These are: (1) impacts on the management of federal lands, (2) impacts to multiple-use activities, and (3) impacts on access to federal, state, private, Indian, and Native lands. These will be addressed individually. Additionally, numerous comments were received that addressed impacts to state and local governments. These impacts will be considered in the last part of this section.

*Broad perspective -- all
agencies*

The impacts on management discussed in this section are addressed from the broad standpoint of all federal land management agencies affected by the R.S. 2477 issue. No attempt has been made to split out the discussion among the various agencies, although reference to a particular agency or agencies will be made when appropriate.

This approach has been used for two reasons.

1. A lack of specific information and the difficulty in predicting the number of potential R.S. 2477 claims make the precise assessment of impacts on an agency or regional basis impossible.
2. An examination of impacts on management of federal lands as a whole is more appropriate to the scope of this nationwide study. Also, the identification and discussion of the central-management issues and concerns that may affect federal lands in the West due to R.S. 2477 are more in keeping with the information needs of Congress, federal land managers, and affected interests at this time.

Impacts on the Management of Federal Lands

Valid R.S. 2477 rights-of-way are recognized and important means of access to and across federal lands. In most instances they have not presented problems to land managers. However, the recent onslaught of assertions, so long after termination of the statute, the potential problems of proof, and the growing contentiousness of the issue do create problems for resource management. The uncertainty attending this issue makes planning and development difficult, compromises an agency's mission, and undermines the relationship between federal officials and the people they serve. The actual impact of use of current and potential

R.S. 2477 rights-of-way depends on the number of claims recognized, the type of resources affected, and how the right-of-way is used. Current and potential R.S. 2477 rights-of-way can pose significant adverse impacts to federal land management in many situations depending on the extent to which an agency is able to manage an R.S. 2477 grant.

*Higher level of impacts
than with other
authorities*

Recognized R.S. 2477 rights-of-way historically have been managed only to prevent unnecessary and undue degradation of resources, to the extent that the holder of the right-of-way is not denied reasonable use. R.S. 2477s are sought by many because they perceive R.S. 2477s as virtually unregulated. If this were the case, R.S. 2477 claims could permit a higher level of impact to resources than would occur with issuance of rights-of-way pursuant to other authorities. Under FLMPA, for example, federal managers have authority to review changes in use and to require appropriate mitigation of impacts. Therefore, indefinite recognition of R.S. 2477 rights-of-way could prevent the federal government from providing full protection to important geographic features and biological, cultural, and physical resources. This would pose a particularly significant threat to resource values in National Parks, Wildlife Refuges, Wilderness and WSAs, Wild and Scenic River corridors, Areas of Critical Environmental Concern, or other areas that require special-management practices to protect important resources. Some federal land managing bureaus have and do regulate R.S. 2477s. The Department will explore the extent of its regulatory authority over these rights-of-way.

Under this heading, impacts from R.S. 2477 highways on the manageability of federal lands are discussed first. This part addresses the topic of converting use along a right-of-way as a result of the holder's extending rights and concludes with a brief overview of agency concerns regarding costs associated with future R.S. 2477 highway claims. Possible impacts related to wilderness follow.

**The Ability to Manage
According to
Agency Mission**

The federal agencies that manage substantial acreages of federal land and are the most likely to be affected by recognition and use of R.S. 2477 rights-of-way are the BLM, National Park Service, U.S. Fish and Wildlife Service, and the Department of Agriculture's U.S. Forest Service.

The missions of these agencies are summarized briefly below.

National Park Service--preservation of natural values in National Parks, National Monuments, National Recreation Areas, Wild and Scenic Rivers, trails, etc., while providing for public use and enjoyment. No activity can be authorized which is in derogation of Park values and purposes.

U.S. Fish and Wildlife Service--management of National Wildlife Refuges for protection of migratory waterfowl and consultation under the Endangered Species Act and other protective legislation.

U.S. Forest Service--management of the National Forest System, including many National Recreation Areas and National Forest Monuments, according to the principles of multiple use and sustained yield. R.S. 2477 rights-of-way affect substantial National Forest areas. While some R.S. 2477 rights-of-way do limit the agency's management discretion, other such rights-of-way provide important public access to the National Forests. The Forest Service endeavors to retain historic public access.

BLM--management of the public lands, including National Conservation Areas and Areas of Critical Environmental Concern according to principles of multiple-use and sustained yield.

Common mandate for protection could be compromised

Every federal agency shares a common mandate for use and protection of federal lands and resources within a framework of long-term stewardship. Recognition and use of R.S. 2477 rights-of-way could interfere with and prevent effective management of the individual and common objectives of the affected agencies in some cases. The ability of federal managers to implement management plans and meet the requirements of federal laws, such as the Wilderness Act, Endangered Species Act, Clean Water Act, Archaeological Resources Protection Act, National Historic Preservation Act, etc., would be compromised if they are required to continue indefinitely recognizing R.S. 2477 rights-of-way.

Change of use could cause impacts

Changing the use or status of individual R.S. 2477 highways in conflict with federal purposes could cause localized impacts. For example, road-widening may directly impact natural resources contiguous to the right-of-way. Converting a rough, four-wheel-drive road into a paved thoroughfare could lead to direct impacts resulting from better access to, and increased use of, sensitive locations.

Resource management plans compromised

The recognition of additional R.S. 2477 rights-of-way within a federal unit could lead to more substantial problems. Without the ability to manage access, the ability of federal managers to implement short- and long-term resource management plans could be seriously compromised.

New claims continue to be filed

This potential problem of impact on management due to R.S. 2477 is aggravated due to 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 1976 (the date the statute was repealed) and new R.S. 2477 claims, it will become harder to trace the evidence needed to make an accurate validation determination.

*Impacts on wilderness
designations*

Federal agencies manage designated wilderness areas and proposed wilderness according to principles outlined in the Wilderness Act of 1964. It is argued that the assertion of R.S. 2477 rights-of-way in proposed wilderness areas could be used as a tool to defeat wilderness designation because by definition the area must be roadless.

Concern over the ability to manage according to agency mandate is also a particularly sensitive issue in National Parks, Wildlife Refuges, and other similar federal reservations. These areas have been set aside for preservation rather than multiple use purposes. R.S. 2477s within the boundaries of these areas could compromise the specific purposes and values these areas were established to protect.

These issues are of great interest in Alaska, where concerns over both access and the conservation of environmental values are intense. The large number of more recently established federal parks, refuges, etc., in Alaska create special access and management issues.

**Degree of Impact Depends on
Scope of Right-of-Way**

Assessing the extent of impacts of R.S. 2477 claims on the management of federal lands is difficult. Confusion over the law and its application further clouds this evaluation. However, an important correlation can be made in many cases between the types of rights-of-way that may qualify as R.S. 2477 highways and the extent of impacts that could occur.

*Significant roads normally
a benefit rather than a
problem*

Generally, existing significant roads pose limited potential for conflict with federal management purposes. In many cases, these roads are major travel corridors providing access for commercial and recreational activities. As some members of the public have commented, these R.S. 2477 highways benefit both the federal managing agency and the public in a number of ways. This is particularly true in situations where state or local governments provide maintenance or other services to facilitate access.

Conversely, there is greater potential for adverse impacts to the management of federal lands if primitive roads--normally characterized as jeep trails, constructed through use only--are asserted and deemed valid R.S. 2477 highways.

*Concern over primitive
roads*

If primitive roads are recognized as valid R.S. 2477 highways, there is greater opportunity for conflict because this type of access and associated use poses more potential for negative impacts to resources and sensitive locations. Without the option to regulate vehicle access, federal managers may not be able to mitigate adverse impacts or manage for nonmotorized types of experiences.

**Conversion of Rights from
Unimproved Road to
Improved Road**

*Reduced ability to protect
resources*

The issue of impacts related to a change in use when a holder decides to develop or extend rights on an R.S. 2477 highway is addressed next under this heading.

Quite often, continued use of an R.S. 2477 highway has minimal impact on the management of federal lands as long as that use continues in the same manner and degree. However, should there be a change in use to recognized R.S. 2477 highways, the potential for adverse impacts increases. If recognized rights-of-way are substantially improved or if the scope and use are significantly changed, the ability of federal land managers to protect important resources is reduced.

For example, simple road maintenance may improve access and benefit all. But, road widening or realignment could potentially cause damage to adjacent resources that a federal manager may have difficulty controlling. Converting a jeep trail to accommodate heavy commercial traffic is another example of a situation that could impose various impacts on federal lands.

*The extent of the ability to
require mitigation is
unclear*

Under current policy, federal managers have no effective mechanism to review an R.S. 2477 highway holder's plans for maintenance or improvement to identify mitigation measures necessary to meet legislative mandates, including protection of cultural properties, management of habitat for sensitive plant and animal species, and management of federal land for wilderness values. Furthermore, due to conflicting interpretations of the statute and the lack of precise DOI procedures, federally imposed limitations or mitigation requirements have been challenged, making it difficult for land managers to meet legislative obligations. The DOI intends to further explore its legal authority and obligation to manage R.S. 2477 on federal land.

Agency Costs

Agency costs regarding R.S. 2477 can be broken down into two general categories--personnel costs relating to the administration of claims, and costs associated with litigation. Administrative costs include the cost of making administrative determinations and the cost of managing rights-of-way once they are recognized. Administrative determinations include costs of processing claims, reviewing historical records to determine unreserved status, and field examinations of claimed rights-of-way. Agency costs have been estimated to be between \$1,000 and \$5,000 per claim. The cost of managing recognized R.S. 2477 rights-of-way primarily involves working with the holder of the right-of-way when changes are planned. This cost is extremely variable based on a number of factors, and is not reflected in the figures above.

In addition, agency litigation costs are extremely difficult to estimate, but experience has shown that R.S. 2477 litigation can be protracted and expensive. Litigation costs are expected to remain high until administrative, legislative or judicial action clarifies the R.S. 2477 controversy.

Wilderness

Wilderness areas and Wilderness Study Areas (WSAs) are roadless by definition and preclude any recognition of R.S. 2477 rights-of-way. BLM has been informed by two Utah counties that they intend to pursue quiet-title actions on a road in an existing WSA.

The effect of recognition and use of R.S. 2477 rights-of-way on manageability of wilderness areas and WSAs is a special concern. It is this topic that elevated the R.S. 2477 issue to Congressional attention.

*Wilderness manageability
compromised*

If federal managers cannot prevent improvement and use of recognized R.S. 2477 rights-of-way, protection of wilderness values, such as naturalness and outstanding opportunities for solitude and primitive recreation in wilderness areas and WSAs, could not be ensured. The manageability of the area for protection of wilderness values would be compromised.

Wilderness proposals

If primitive access routes are recognized as R.S. 2477 highways, large areas of public land in some areas currently proposed for wilderness designation by various public-interest groups may be disqualified. Citizen wilderness proposals on BLM lands in Utah and in the California Desert Conservation Area are two examples of this situation.

*Mechanically constructed
vs. primitive roads*

When assessing the extent of impacts of R.S. 2477 on wilderness management and potential designations, one can again make a distinction between well-established, significant roads and primitive roads. Well-established roads that have been constructed through some type of mechanical means pose no threat either to existing or potential wilderness. However, there is great concern over potential impacts to areas under consideration for future designations if primitive routes constructed by the mere passage of vehicles are deemed valid existing R.S. 2477 highways.

Responses from public scoping echoed the impacts addressed above in many instances and in some cases expressed very different perspectives on impacts of R.S. 2477 on management of federal lands. The impacts identified by the public are listed below:

Constituency Concerns

- BLM has been informed that Millard County, Utah, intends to file suit for quiet-title to a road in the King Top WSA.
- Public lands cannot be managed by BLM as Congress intends when the lands are covered with a “spaghetti plate” of rights-of-way.
- It should be recognized by federal land managers that their activities on the land are made possible largely because counties have exercised their rights pursuant to R.S. 2477. An extensive network of roads has been built and maintained at the expense of local government and taxpayers and to the benefit of the nontaxpaying federal agency managing the land.
- Current and potential R.S. 2477 roads disrupt management of federal lands and threaten resources and public purposes and values of public land.
- Incomplete records and confusion over the law and its application make it difficult to inventory, thus assess, impacts of potential R.S. 2477 claims.
- It does not serve the public interest to allow abandoned rights-of-way to be converted to other purposes that may be incompatible with current purposes.
- Denial of R.S. 2477 rights-of-way does not mean that access has been eliminated; it merely leaves access under the management and jurisdiction of BLM or other federal agencies. This is precisely what Congress intended in the passage of FLPMA.
- There is the potential to misuse this law greatly in a way that would destroy so much important wildlife and recreational lands and corresponding local and regional economies.
- Congress did not designate National Parks, Refuges, and Forests in Alaska to protect wilderness and wildlife values with the notion that an ancient claim could be upgraded, reconstructed, or converted to uses that are incompatible with the conservation purposes established by law.
- Confirmation of pending or potential R.S. 2477 assertions would degrade or disqualify areas of public lands designated or proposed for designation as wilderness.

- The original intent of R.S. 2477 was to open the West. The BLM is abusing the original intent of the law by using it to increase their control over some roads.

Impacts on Multiple-Use Activities

General comments and information regarding impacts of R.S. 2477 claims on multiple-use activities will be discussed first under this general heading. Specific discussions relating to recreation, the mineral industry, grazing, and the forestry industry will follow.

The U.S. Forest Service and the BLM are the principal multiple-use land management agencies of the Nation. The public lands under the jurisdiction of these two agencies provide for a wide variety of consumptive and nonconsumptive uses, including mining, ranching, forestry, and recreation, to name a few.

Most of these activities have taken place on the public domain since the settlement days of the West. As these uses developed, so did an infrastructure of roads to support these activities. This historical network of roads, largely still in use today, was created in a number of different ways and by a number of different interests. Most roads were developed by users of the public lands; a few were developed by federal management agencies; and others were established by State and local governments. Access to federal lands that may be provided by these roads may be very important to multiple use activities.

A portion of this road system was developed under the authority of the R.S. 2477 grant. These R.S. 2477 highways continue to provide significant benefits not only to public land users but also to the managing federal agency as well. For example, the U.S. Forest Service encourages the use of R.S. 2477 to keep open historical public access to federal lands across lands now in private ownership. Many of these R.S. 2477 highways provide essential access, facilitating public land uses, protection, and management. This system has been developed at little or no cost to federal agencies or to taxpayers at large. The costs of acquiring access by other means can be high.

R.S. 2477 was neither the only, nor perhaps even the dominant, method by which citizens gained access to their public lands. A great deal of access has been and continues to be developed through casual use. The public lands and the roads across them are largely open and available to use without the need of a right-of-way or other formal authorization. Access for some multiple-use activities is allowed because of implicit authorities within related legislation. For example, the Taylor Grazing

Act and the Mining Act of 1872 have been interpreted as providing reasonable access for individuals engaged in those activities on the public land.

Access in support of multiple-use activities is an integral part of agency planning. Access related to grazing, mining, forestry, recreation, etc., is a key element of Forest Service and BLM management plans.

While R.S. 2477 played an important part in building the road infrastructure system on the public lands, its role should not be overstated, for at least two important reasons:

1. R.S. 2477 is only one of several different ways that access has been developed, and other viable alternatives continue to provide access to and across federal lands.
2. For numerous reasons detailed earlier in this draft report, it is not clear what percentage of the existing road infrastructure system on the public lands is attributable to the R.S. 2477 grant.

It is very clear, however, that the entire road system that developed across the public lands prior to 1976 was established and is in use today with very few R.S. 2477 right-of-way claims asserted or recognized by federal agencies or the court system.

Because of this, it is reasonable to assume that current and potential R.S. 2477 claims will continue to have little overall impact on multiple-use activities. Access for a wide variety of multiple-use activities has been available on the public lands and that situation will continue regardless of the recognition of R.S. 2477 rights-of-way. This is especially true for significant roads that were established by the grant. These well-established travel corridors will continue to support public land access and activities.

The potential effect of recognition and use of primitive roads as R.S. 2477 highways is greater than continued use of significant roads because of potential improvements to the primitive roads and increases in use. The nature of the related impacts is described below under individual activity headings.

Recreation Activities

Impacts to recreation vary depending on the type of recreational activity pursued. Some supporters of motorized recreation feel that current and potential R.S. 2477 claims could have a positive effect on their activities. This is because extending claims could maximize access options and perhaps provide an opportunity to maintain or even reopen areas currently closed by agencies.

Other recreationists feel that the proliferation of R.S. 2477 rights could adversely impact their enjoyment of wilderness and other uses of public lands that are not compatible with motor vehicle use.

Both types of impacts described above are more likely if primitive roads are recognized as R.S. 2477 highways.

**Mineral Industry
Activities**

Overall impact to the mineral industry from recognition or use of R.S. 2477 rights-of-way would be minor. A number of public respondents did state that R.S. 2477 rights-of-way were essential because they help to maximize access options for exploration and development. Although this could be true in limited situations, particularly if primitive roads are deemed valid R.S. 2477 highways, the availability of access under casual use, provisions for access under the mining law, and alternative methods of obtaining a right-of-way under FLPMA and other laws combine to provide other means of ensuring continued access by miners.

Livestock Grazing

The overall impact of current and potential R.S. 2477 claims on grazing activities is also minimal. The availability of access under casual use, implicit provisions of the grazing regulations, and other alternative methods of obtaining access provide adequate means of ensuring continued access by livestock operators.

Forestry

The overall impact of current and potential R.S. 2477 claims on forestry uses of the public lands is minimal for the same general reasons stated above. Many National Forests are surrounded by private lands and securing access to them is more of a problem than controlling access across them. R.S. 2477, along with other access acquisition authorities, is valued by the U.S. Forest Service as a cost effective way of providing public access.

Constituency Concerns

Many respondents felt that multiple-use management objectives should be placed above the objectives of holders of R.S. 2477 rights-of-way. However, some felt that R.S. 2477 claims should mandate reconsideration of federal management objectives. Other concerns are listed as follows:

- BLM is violating the intent of both statutes by granting R.S. 2477 pro forma and by limiting the Secretary's ability to retain and manage public lands for multiple use and sustained yield with an emphasis on land-use planning, protection of the environment, and involvement of the public in decisionmaking.
- A conflict between management objectives and an R.S. 2477 claim is grounds for reconsidering the management objective.
- A functional R.S. 2477 will go a long way toward opening up our public lands for public use and enjoyment and curtailing exclusive use, commercialization for profit, and de facto management of public lands.
- The mineral industry depends on unimpeded access to remote areas of the public domain. Any attempt to restrict the scope of valid existing rights established under R.S. 2477 will directly hamper mineral exploration and development that is absolutely vital to this country's economy and national security.
- Access across public lands to private lands is of particular concern because of patented mining claims surrounded by public lands and the railroad checkerboard system of land ownership.
- Existing regulations pertaining to several multiple-use activities contain access provisions, such as the mining regulations under 43 CFR 3809, precluding the need for other authorizations such as FLPMA or R.S. 2477.

Impacts On Access

Impacts from current and potential R.S. 2477 claims on access to federal, private, state, Alaskan Native, and Indian lands will be discussed under this heading.

To Federal Lands

Access to significant areas of public lands is an important issue. As outlined in the Government Accounting Office report of April 1992 (Federal Lands--Reasons for and Effects of Inadequate Public Access), approximately 700 million acres are owned by the federal government.

This land contains many resources (both consumptive and nonconsumptive) of value to the American people. Intermingled with these lands are state, local government, tribal, corporate, private, and other lands. This fragmented pattern of ownership, especially in the West, makes it difficult in many instances for the public to access federal land easily or legally. Unless the federal, state, and local governments obtain additional access or identify and maintain existing legal public access routes, non-federal landowners can often control or deny public access to federal land.

In recent years, there has been more focus on and analysis of this situation by some federal agencies. What are now private and state lands may, in some cases, have included valid R.S. 2477 highways when they were conveyed out of federal ownership. When this historical access is closed by private land owners, the public may be deprived of access or may be charged a fee to access federal lands. Federal land managers have lacked adequate resources to gain legal access across these lands.

Recent actions to reopen or prevent closing of historical public highways pursuant to state law have been actively pursued by private citizens and by the federal government. The U.S. Forest Service and the BLM have entered into agreements with some private citizen groups to pursue reopening of closed historical access across private land where such routes may qualify as public highways under appropriate state law.

In addition, the BLM in Colorado, in conjunction with the DOI Regional Solicitor's Office, has been reviewing access needs across private lands. Where review finds that there is a valid public highway under Colorado state law, the private landowner is notified and BLM manages the public lands assuming there is legal public access. Other BLM State Offices are looking at this approach and are assessing its applicability to their access management.

To Private Lands

Inherent in private property ownership is a need for some sort of access to the property. Access also affects the value of private lands through the appraisal process. Many parcels of private land are reached by routes across federal lands. Management of motorized vehicle use over federal lands would directly affect use and enjoyment of the private lands, especially if the only access route is across federal lands. Some of those routes may be valid highways under appropriate state law.

When private landowners pursue formal authorization of access to their private property, the cost of access may be a prime consideration. There may be significant costs associated with formal authority to construct, operate, and maintain such access. If an access route exists that might be considered a public highway and thus not require a landowner to undertake these costs, this would probably be the preferred method of access. However, R.S. 2477 is clearly only a grant for a "public highway," and would not be applicable as authority for a strictly private road.

To State Lands

Many parcels of state land are reached by crossing federal land. Use of state lands by state leaseholders, other users, and the public can be significantly impacted by federal actions regarding management of access on federal land. State lands can consist of both trust and sovereign lands. Trust lands are generally managed by the respective states to maximize revenue generation in support of schools and other government services.

While a federal district court has addressed the right of access to state trust lands within WSAs in Utah and has stated that there is a right for such access, the question of the right of access to state lands in other states, as is reasonably necessary to the economic development of such lands, is not so clear.

R.S. 2477 highways are a valid method of securing historic access to State lands, but they are not available prospectively. The attractive feature for states and localities of R.S. 2477 is that, under current policy, no regulatory obligations are imposed, unlike other right-of-way authorities.

Access affects the value of state lands just as it does private land. The value of state lands may also be impacted based on the potential for R.S. 2477 rights-of-way across the land.

To Alaskan Native Lands

It was the intent of Congress to resolve aboriginal claim issues in Alaska with the Alaska Native Claims Settlement Act (ANCSA). Between this act and the Native Allotment Act of 1906, Native lands have taken on a unique and prominent aspect in Alaska. Native lands conveyed to Alaskan Natives have been not only used for the continuation of traditional culture, but also for the provision of economic development.

Access has been an important component of this issue. Access to and across Native lands is essential for the future economic development of Alaska, but there is a concern that uncontrolled access will impact the

traditional lifestyles of Alaskan Natives and lessen their ability to manage lands for their benefit. Important historical subsistence resources may exist on Native lands and on adjacent federal lands. Access to subsistence areas by contemporary access modes such as snowmobiles and all-terrain vehicles is considered by some Native peoples as critical to subsistence uses.

As discussed previously, the lack of development of a traditional access network in Alaska has resulted in unique access methods. Alaska Natives have depended on the use of traditional lands and access routes for subsistence. With the selection and conveyance of lands to for-profit corporations established by and for Alaskan Natives, the value of access has become an important issue.

Section 17(b) of ANCSA addressed the issue of reserving easements across Native lands conveyed to Native corporations. Physical access may exist to many Native lands, but formal authorizations over interspersed federal, state, and private lands generally do not exist. Costs associated with acquisition of other formal authorizations across federal and other lands may be a significant impact to Native landowners in Alaska or to the state of Alaska.

To Indian Lands

Most Indian Reservations in the Lower 48 States were established by Congress prior to the development of extensive infrastructure and road networks. Access to Indian lands is much the same as access to state and private lands, including Interstate, federal, state, and county roads. Access to Indian lands has not been identified as an issue through public comments, and little impact is anticipated to Indian lands as a result of existing or potential R.S. 2477 claims.

There could be impacts on access to Indian religious and cultural sites located outside Reservations. These sites have been determined by the courts in some cases to be Indian lands. Access to these areas could be impacted, but the extent of the impacts is not known. No comments were received that addressed this issue.

Many commenters on this study reiterated access concerns and suggested that Federal land managers take a more aggressive role, including the use of R.S. 2477, to lessen what they considered to be an access dilemma. These concerns include access to and across private lands.

Constituency Positions

Many comments stated that Alaska, for a variety of reasons, posed a special situation and that R.S. 2477 access is particularly critical to that state. Contributing factors include the state's large federal land base, coupled with the fact that much of the private, State, and local property has recently been established from federal lands.

Other typical comments included:

- R.S. 2477 maximizes access options.
- Federal, state, or private individuals should reestablish R.S. 2477 rights-of-way on roads currently blocked by private landowners in order to gain access to public lands.
- Maintaining R.S. 2477 rights-of-way across private lands ensures future access of the public to public lands.
- R.S. 2477 facilitates access to private lands. This is particularly important in the West, where land ownership patterns are often checkerboarded or where large areas of public lands surround private inholdings.
- R.S. 2477 may present an opportunity to gain access to areas currently closed, both public and private.
- Denial of R.S. 2477 does not eliminate access. It merely leaves access under the jurisdiction of the federal land manager.
- Access across public lands to private lands is of particular concern because of patented mining claims surrounded by public lands and railroad checkerboard.
- Average citizens will never see access with Title XI. There are too many loopholes; even major corporations won't use it.
- FLPMA and ANILCA are inadequate and do not provide the flexibility that R.S. 2477 provides to state and local government right-of-way needs.

Impacts to State and Local Governments

Some state and local governments view access pursuant to R.S. 2477 as a very significant issue. Their concern is not necessarily in maximizing public highways under their management, but preserving their ability to expand and upgrade their transportation systems to provide for road safety and future growth. Local interests fear that their economies and infrastructures may be limited or diminished if federal lands and resources are unavailable for development. Such limits will translate to lower tax bases for government services, loss of employment opportunities for present and future generations, and the potential loss of local control over their own destinies.

State and local governments also sometimes argue that R.S. 2477 is a blanket authority that was granted to local government to build access across the public domain for purposes of public convenience. They argue that the grant was without reservation, irrevocable, and that any taking of the right-of-way must involve compensation.

The following comments summarize many of the additional concerns expressed by or about state and local government entities.

Constituency Concerns

Because R.S. 2477 rights-of-way were historically available and stimulated road building, some state and local interests would like to retain its availability. Other right-of-way authorities are, of course, available, but are less desirable because they involve more federal control.

- R.S. 2477 has provided state and local governments greater flexibility in administering lands within their jurisdictions and provided access to neighboring public and private lands.
- Federal government is undoing policy that was made for the public.
- R.S. 2477 was a blanket authority granting the right to local government to build access across the public domain for the purposes of public conveyance and convenience. The right granted was total and without reservation.
- Once accepted, rights-of-way created under the R.S. 2477 grant are irrevocable. Any taking of the grant must involve some form of compensation to the affected state(s).
- The right granted by Congress in 1866 and the work and expense of local citizens pursuant to this right must not be treated casually by either federal managers or the U.S. Congress.

NEW MEXICO

STATUTES

N.M. STAT. ANN. § 67-2-1 (1978 & Supp. 1992)(definition of public highways, originally enacted in 1905, former codification includes § 58-101, N.M. STAT. (1941); § 55-1-1, N.M. STAT. ANN. (1953)

N.M. STAT. ANN. § 67-5-1 (1978 & Supp. 1992)(county bridges, township and section lines are parts of public highways; width, originally enacted in 1891, former codification includes § 64-702, Comp. St. 1929)

N.M. STAT. ANN. § 67-5-2 (1978 & Supp. 1992)(width of public highways, enacted 1905)

N.M. STAT. ANN. § 67-5-5 (1978 & Supp. 1992)(alteration or establishment of roads, enacted 1905)

CASES

Atchison, T. & S.F. Ry. Co. v. Richter 148 P. 478 (N.M. 1915)(when a valid entry has been made by a citizen, that portion of the public land covered by the entry is segregated from the public domain and is not subject to further entry, and is not included in subsequent grants made by Congress)

Frank A. Hubbell Co. v. Gutierrez, 22 P.2d 225 (N.M. 1933)(citing § 64-702, Comp. St. 1929, declaring section and township lines public highways, roads lying along section lines in county must be established under ordinary statutory proceedings for establishment of highways)

Wilson v. Williams, 87 P.2d 683 (N.M. 1939)(under federal statute granting right to establish highway over public land, generally the construction of a highway or establishment by user is sufficient)

King v. Brown 284 P.2d 214 (N.M. 1955)(upheld Wilson, public use is sufficient to constitute dedication of highway over public land)

State v. Walker, 301 P.2d 317 (N. M. 1956)(citing § 55-1-1, N.M. Stat. Ann. (1953), defining public highways, Enabling Act, school sections and RS 2477)

Lovelace v. Hightower, 168 P.2d 864 (N.M. 1946)(continuous use of a road for such time and under such circumstances as to clearly prove acceptance of federal grant will suffice to establish a highway regardless of the length of time of such user, citing § 58-101, N.M. Stat. (1941), discusses the history of RS 2477 in other states)

NEW MEXICO

CASES cont.

Luchetti v. Bandler, 777 P. 2d 1326 (N.M. Ct. App. 1989) (use of road to reach single private residence, hike, picnic, etc. was insufficient to require finding of acceptance of government's offer to dedicate road as a public highway)