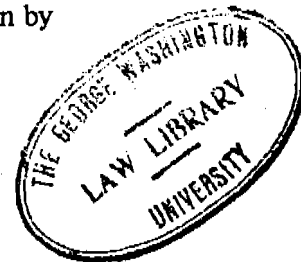


EXHIBIT 8

THE PUBLIC DOMAIN
ITS HISTORY
WITH STATISTICS

By Thomas Donaldson

With a New Introduction by
PAUL W. GATES



JOHNSON REPRINT CORPORATION

New York and London

1970

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Printed in the U.S.A.

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CHAPTER XX.

To JUNE 30, 1882.

[See pages 753-949.]

To JUNE 30, 1883.

[See pages 1260-1276.]

CANAL, WAGON, AND RAILROAD GRANTS.

To JUNE 30, 1880.

LAND GRANTS FOR PUBLIC IMPROVEMENTS.

The granting of subsidies of public lands to aid in constructing canals, wagon, and railroads grew out of the fierce political battles, after the year 1803, on the subject of internal improvements by aid of the National Government. It was contended by the various factions favoring these improvements that the power of Congress to act in such cases was derived from the clause for "common defense and general welfare," or the clause authorizing Congress "to establish post-offices and post-roads," and under the clause to "regulate commerce with foreign nations and among the several States and with the Indian tribes." (See report of John C. Calhoun, Secretary of War under President Monroe; the message of President Monroe favoring internal improvements under the general government, May 4, 1822; veto message of President Monroe of Cumberland road bill, May 4, 1822; veto message of President Jackson of Maysville road bill (Kentucky), May 27, 1830, and same of date December 2, 1834, on Wabash improvement bill in sixth annual message; see also veto message of President Polk upon the river, harbor, and improvement bill; the report of Mr. Calhoun to the Memphis convention upon the improvement of the Western rivers; Mr. Benton's Thirty Years in the United States Senate; Wheeler's Biographical Dictionary of Congress; Williams's Statesman's Manual; Presidents' messages to 1880, and reports of committees of Congress to 1880.)

FIRST ACT GRANTING LANDS FOR PUBLIC IMPROVEMENTS—OHIO, 1802.

April 30, 1802, Congress made the first appropriation of public lands in favor of public improvements. In the enabling act for the State of Ohio it was provided that one-twentieth part of the net proceeds from the sales of public lands lying in said State and sold by Congress should be given to the State for the purpose of laying out and making public roads from the navigable waters emptying into the Atlantic to the Ohio River—roads to be laid out under authority of Congress with the consent of the several States through which they passed.

The act giving Ohio 3 per cent. of the net proceeds of land sales for laying out, opening, and making roads within said State was passed March 3, 1803.

CANAL GRANTS, OHIO, INDIANA, AND ILLINOIS.

Legislation of like character was passed until after the year 1823. A canal act, with right of way, for Indiana, was passed March 26, 1824. This was not utilized.

The act for Indiana, passed March 2, 1827, abrogated the act of 1824, and an act of like date gave to Illinois—as did the act to Indiana—grants of land in aid of the construction of two canals. The Indiana canal, the Wabash and Erie, was to connect the Wabash River with Lake Erie, and the Illinois canal was to connect the waters of the Illinois River with those of Lake Michigan. The act of May 24, 1828, gave to the State of Ohio a grant to aid in the construction of the Miami Canal from Dayton to Lake Erie.

LAND GRANTS FOR WAGON ROADS.

The grant to the Territory of Wisconsin took effect upon the admission of Wisconsin as a State, and was for the improvement of the Fox and Wisconsin rivers, in that State, and to aid in constructing a canal connecting those two rivers. It was approved August 8, 1846, the same day as the Iowa grant. In this act was the first provisions for increasing the price of reserved sections of land to double minimum, \$2.50 per acre.

WAGON ROAD AND MILITARY WAGON-ROAD GRANTS.

The Ohio wagon-road grants of money to aid in constructing roads, in 1802 and 1803, and others of like character, gave way to grants of land for wagon-road purposes.

March 2, 1827, Indiana was granted a piece of public land (Pottawatomie Indian lands), or the money from the sale thereof, for building a road from Lake Michigan, through Indianapolis, to the Ohio River.

March 3, 1827, Ohio was granted one-half of two sections along its line to construct a road from Columbus to Sandusky.

Other grants of like character were made. (See statutes of the United States, from 1827.)

The following shows the military wagon-road grants of public land made by the United States from 1863 to June 30, 1863:

Military wagon-road grants by act of Congress to States or corporations from 1824 to June 30, 1860.

States of—	Date of law.	Statutes at Large.		Wagon roads.	Mile limits.	Number of acres certified or patented to June 30, 1860.
		Volume.	Page.			
Wisconsin.	Mar. 2, 1863	12	797	From Fort Wilkins, Copper Harbor, Mich., to Fort Howard, Green Bay, Wis.	3 and 15	302,930.36
Do.....	June 8, 1868	15	67	Act extending time for completion of road to March 1, 1870.		
Do.....	May 6, 1870	16	121	Act extending time for completion of road to January 1, 1872.		
Do.....	June 25, 1864	13	183	Act granting lands to the State to build a military road to Lake Superior.		
Michigan..	Mar. 3, 1863	12	797	From Fort Wilkins, Copper Harbor, Mich., to Fort Howard, Green Bay, Wis.	3 and 15	221,013.35
Do.....	June 8, 1868	15	67	Act extending time for completion of road to March 1, 1870.		
Do.....	May 6, 1870	16	121	Act extending time for completion of road to January 1, 1872.		
Do.....	Apr. 24, 1872	17	58	Act extending time for completion of road to January 1, 1874.		
Do.....	June 20, 1864	13	140	No map filed; limitations of grant expired June 20, 1860.		
Oregon.....	July 2, 1864	13	355	Oregon Central military road.....	3	361,327.43
Do.....	Dec. 26, 1866	14	374	Act making provision for indemnity limits.	6	
Do.....	Mar. 8, 1869	15	338	Act extending time for completion of road to July 2, 1872.		
Do.....	July 4, 1866	14	86	Corvallis and Aquinnia Bay.....	3 alternate sections to be selected within six miles.	78,885.98
Do.....	July 5, 1866	14	89	Willamette Valley and Cascade Mountain.		107,893.01
Do.....	Feb. 27, 1867	14	409	Dalles military road.....	3 and 10	128,010.23
Do.....	Mar. 3, 1869	15	340	Coos Bay military road.....	3 and 6	104,064.11
				Total acres.....		1,301,040.47

RECAPITULATION.		Acres.
Wisconsin.....		302,930.36
Michigan.....		221,013.35
Oregon.....		777,096.76
Total.....		1,301,040.47

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GRANTS OF PUBLIC LANDS.

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EXHIBIT 9

poration, and to the secular affairs of said congregation, agreeable to the rules, ordinances and by-laws thereof, during their continuance in office: *Provided*, that not less than five trustees be a quorum to do business; that no by-law, rule or ordinance shall be made, repugnant to the laws of this district.

Proviso.

Annual meetings of the members of the congregation for the choice of trustees, &c.

SEC. 5. *And be it further enacted*, That there shall be an annual meeting of the members belonging to said congregation, held on the first Tuesday of April, in every year hereafter, at the church or usual place of public worship, at which time and place the said members, or such of them as may be present, shall elect, and choose, by ballot, from their own number, nine trustees, to serve for the year ensuing their election, and until others shall be elected or appointed to serve in their place.

Suitable books to be kept by the trustees.

SEC. 6. *And be it further enacted*, That the trustees shall keep, or cause to be kept, in suitable books for the purpose, just and proper entries of all the proceedings and accounts of said congregation and corporation, and have them laid before the members, at every annual meeting, previous to taking the votes, and shall always deliver the said books, together with all the property of said congregation and corporation, in good order to their successors in office, whenever required.

APPROVED, March 28, 1806.

STATUTE I.

March 28, 1806.

[Expired.]

CHAP. XVII.—*An act declaring the consent of Congress to an act of the state of South Carolina, passed on the twenty-first day of December, in the year one thousand eight hundred and four, so far as the same relates to authorizing the city council of Charleston to impose and collect a duty on the tonnage of vessels from foreign ports.*

Act of the legislature of South Carolina, laying a duty on tonnage, assented to by Congress.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress be, and it is hereby granted and declared to the operation of an act of the general assembly of the state of South Carolina, passed the twenty-first day of December, in the year of our Lord one thousand eight hundred and four, intituled "An act to authorize the city council of Charleston, with the consent of Congress, to impose and levy a duty on the tonnage of ships and vessels, for the purposes therein mentioned," so far as the same extends to authorizing the city council of Charleston to impose and levy a duty not exceeding six cents, per ton, on all ships and vessels of the United States, which shall arrive and be entered in the port of Charleston from any foreign port or place whatever.

The collector of Charleston to collect the duty and pay it over.

SEC. 2. *And be it further enacted*, That the collector of Charleston is hereby authorized to collect the duty imposed by this act, and to pay the same to such persons as shall be authorized to receive the same by the city council of Charleston.

Limitation of the law.

Continued 1809, ch. 5.

SEC. 3. *And be it further enacted*, That this act shall be in force for three years, and from thence to the end of the next session of Congress thereafter, and no longer.

APPROVED, March 28, 1806.

STATUTE I.

March 29, 1806.

CHAP. XIX.—*An Act to regulate the laying out and making a road from Cumberland, in the state of Maryland, to the state of Ohio.*(a)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the

(a) The acts which have been passed relating to the "Cumberland road," are:

An act to regulate the laying out and making a road from Cumberland in the state of Maryland, to the state of Ohio, March 29, 1806, chap. 19.

An act in addition to the "act to regulate the laying out and making a road from Cumberland in the state of Ohio," March 3, 1811, chap. 45.

An act in addition to the act to regulate the laying out and making a road from Cumberland in the state of Maryland, to the state of Ohio, May 6, 1812, chap. 78.

Three disinterested persons to be appointed commissioners to lay out a road.

United States be, and he is hereby authorized to appoint, by and with the advice and consent of the Senate, three discreet and disinterested citizens of the United States, to lay out a road from Cumberland, or a point on the northern bank of the river Potomac in the state of Maryland, between Cumberland and the place where the main road leading from Gwinn's to Winchester, in Virginia, crosses the river, to the state of Ohio: whose duty it shall be, as soon as may be, after their appointment, to repair to Cumberland aforesaid, and view the ground, from the points on the river Potomac herein before designated, to the river Ohio; and to lay out in such direction as they shall judge, under all circumstances, the most proper, a road from thence to the river Ohio, to strike the same at the most convenient place, between a point on its eastern bank, opposite to the northern boundary of Steubenville, in said state of Ohio, and the mouth of Grave creek, which empties into the said river, a little below Wheeling, in Virginia.

Width, &c. of the road.

SEC. 2. *And be it further enacted*, That the aforesaid road shall be laid out four rods in width, and designated on each side by a plain and distinguishable mark on a tree, or by the erection of a stake or monument, sufficiently conspicuous, in every quarter of a mile of the distance, at least, where the road pursues a straight course so far or farther, and on each side, at every point where an angle occurs in its course.

Commissioners to present a plan of the road to the President, &c.

SEC. 3. *And be it further enacted*, That the commissioners shall, as soon as may be, after they have laid out said road, as aforesaid, present to the President an accurate plan of the same, with its several courses and distances, accompanied by a written report of their proceedings, describing the marks and monuments by which the road is designated, and the face of the country over which it passes, and pointing out the particular parts, which they shall judge require the most and immediate attention and amelioration; and the probable expense of making the same passable in the most difficult parts, and through the whole distance: designating the state or states, through which said road has been laid out, and the length of the several parts which are laid out on new ground, as well as the length of those parts laid out on the road now travelled. Which report the President is hereby authorized to accept or reject, in the whole, or in part. If he accepts, he is hereby further authorized and requested to pursue such measures, as in his opinion shall be proper, to obtain consent for making the road, of the state or states, through

President authorized to accept or reject it, and to pursue measures for having it executed.

An act in addition to the act to regulate the laying out a road from Cumberland in the state of Maryland, to the state of Ohio, February 14, 1815, chap. 43.

An act to authorize the appointment of commissioners to lay out the road therein mentioned, May 15, 1820, chap. 122.

An act for the preservation of the Cumberland road, March 2, 1827, chap. 44.

An act for the construction of the Cumberland road, westwardly of Zanesville, March 2, 1829, chap. 10.

An act for the continuation of the Cumberland road, March 2, 1829, chap. 31.

An act for the preservation and repair of the Cumberland road, March 2, 1829, chap. 52.

An act for the continuation of the Cumberland road in the states of Ohio, Indiana, and Illinois, March 2, 1831, chap. 63.

An act declaring the assent of Congress to an act of the general assembly of the state of Ohio, herein-after recited, March 2, 1831, chap. 97.—[The act of the state of Ohio provides for the erection of toll gates, the appointment of toll gatherers and rates of toll on the part of the Cumberland road, which is in the state of Ohio.]

An act declaring the assent of Congress to an act of the general assembly, hereinafter recited, March 2, 1833, chap. 79.—[This act provides for the erection of toll gates, and the collection of tolls in that part of the road which passes through the state of Virginia.]

An act for the continuation and repair of the Cumberland road, June 24, 1834, chap. 68.—[By the 4th section of this act the road is surrendered to the states respectively, through which it passes.]

An act for the continuation and repair of the Cumberland road, in the states of Ohio, Indiana, and Illinois, March 3, 1835, chap. 29.

An act amendatory of the act for the continuation of the Cumberland road, March 3, 1835, chap. 30.

An act for the continuation of the Cumberland road in the states of Ohio, Indiana, and Illinois, July 2, 1836, chap. 264.

An act to provide for the continuing the construction, and for the repairs of certain roads, and for other purposes, during the year 1837, March 3, 1837, chap. 44.

An act making appropriations for the continuation of the Cumberland road in Ohio, Indiana, and Illinois, and for other purposes, May 25, 1838, chap. 84.

which the same has been laid out. Which consent being obtained, he is further authorized to take prompt and effectual measures to cause said road to be made through the whole distance, or in any part or parts of the same as he shall judge most conducive to the public good, having reference to the sum appropriated for the purpose.

SEC. 4. *And be it further enacted*, That all parts of the road which the President shall direct to be made, in case the trees are standing, shall be cleared the whole width of four rods; and the road shall be raised in the middle of the carriage way with stone, earth, or gravel and sand, or a combination of some or all of them, leaving or making, as the case may be, a ditch or water-course on each side, and contiguous to said carriage way: and in no instance shall there be an elevation in said road, when finished, greater than an angle of five degrees with the horizon. But the manner of making said road, in every other particular, is left to the direction of the President.

SEC. 5. *And be it further enacted*, That said commissioners shall each receive four dollars per day, while employed as aforesaid, in full for their compensation, including all expenses. And they are hereby authorized to employ one surveyor, two chainmen, and one marker, for whose faithfulness and accuracy, they, the said commissioners, shall be responsible, to attend them in laying out said road, who shall receive in full satisfaction for their wages, including all expenses, the surveyor three dollars per day, and each chainman and the marker, one dollar per day, while they shall be employed in said business; of which fact, a certificate signed by said commissioners shall be deemed sufficient evidence.

SEC. 6. *And be it further enacted*, That the sum of thirty thousand dollars be, and the same is hereby appropriated, to defray the expense of laying out and making said road. And the President is hereby authorized to draw, from time to time, on the treasury, for such parts, or at any one time, for the whole of said sum, as he shall judge the service requires. Which sum of thirty thousand dollars, shall be paid, first, out of the fund of two per cent. reserved for laying out and making roads to the state of Ohio, by virtue of the seventh section of an act passed on the thirtieth day of April, one thousand eight hundred and two, intituled "An act to enable the people of the eastern division of the territory northwest of the river Ohio, to form a constitution and state government, and for the admission of such state into the Union, on an equal footing with the original states, and for other purposes." Three per cent. of the appropriation contained in said seventh section, being directed by a subsequent law, to the laying out, opening, and making roads within the said state of Ohio. And secondly, out of any money in the treasury not otherwise appropriated, chargeable upon, and reimbursable at the treasury by said fund of two per cent. as the same shall accrue.

SEC. 7. *And be it further enacted*, That the President be, and he is hereby requested, to cause to be laid before Congress, as soon as convenience will permit, after the commencement of each session, a statement of the proceedings under this act, that Congress may be enabled to adopt such further measures, as may, from time to time, be proper, under existing circumstances.

APPROVED, March 29, 1806.

Mode in which the road is to be made.

Compensation of the commissioners.

Commissioners authorized to employ surveyor, chainmen, &c. &c.

Their compensation.

Specific appropriation.

President authorized to draw for the whole or a part of the sum appropriated.

Out of what fund the money is to be paid. 1802, ch. 40.

President to make a statement to Congress of the proceedings under this act.

STATUTE I.

CHAP. XX.—*An Act for establishing Rules and Articles for the government of the Armies of the United States.*(a)

April 10, 1806.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the pass-

Armies of the U. S. to be go-

(a) The acts for establishing rules and articles for the government of the army of the United States.

An act for the better organization of the troops of the United States, and for other purposes, March 3, 1799, repealed.

EXHIBIT 10

CHAP. CLII. — *An Act to amend the Act of the twenty-first December, eighteen hundred and sixty-one, entitled "An Act to further promote the Efficiency of the Navy."* June 25, 1864.
1861, ch. 1.
Vol. xii. p. 329.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first section of the act of the twenty-first of December, anno Domini eighteen hundred and sixty-one, entitled "An act to further promote the efficiency of the navy," shall not be so construed as to retire any officer under the age of sixty-two years, and whose name shall not have been borne upon the navy register for a period of forty-five years after he had arrived at the age of sixteen years.

Certain navy officers not to be retired, if, &c.

APPROVED, June 25, 1864.

CHAP. CLIII. — *An Act granting Lands to the State of Wisconsin to build a Military Road to Lake Superior.* June 25, 1864.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and is hereby, granted to the State of Wisconsin, to aid in the construction of a military wagon-road from Wausaw, Marathon County, Wisconsin, following the Wisconsin River as far as Skonowang, and from thence, on the most feasible and direct route, to a point on the state line between the States of Wisconsin and Michigan, in a direction leading to Ontonagon, on Lake Superior, every alternate section of public land, not mineral, designated by odd numbers, for three sections in width on each side of said road. But in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold, reserved, or otherwise disposed of any section, or any part thereof, granted as aforesaid, or that the right of preëmption or homestead settlement has attached to the same, then it shall be the duty of the Secretary of the Interior to set apart from the public lands of the United States, as hereinbefore described, designated by odd numbers, as near to said even section aforesaid as may be, and the same shall be located within six miles of said road, so much land as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of preëmption or homestead settlement has attached; which lands, (thus selected in lieu of those sold, reserved, or otherwise appropriated, and to which the right of preëmption or homestead settlement has attached as aforesaid) together with the sections and parts of sections designated by odd numbers as aforesaid, and approved as aforesaid, shall be held by the State of Wisconsin for the use and purpose aforesaid: *Provided,* That the lands hereby granted shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatever: *Provided, further,* That any and all lands heretofore reserved to the United States, or granted by any act of congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved and excluded from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way only shall be granted.

Lands granted to Wisconsin for military wagon-road.

Mineral lands not granted.

Lands to be granted in lieu of those previously disposed of.

Lands, how to be applied.

Former grants not affected hereby.

SEC. 2. *And be it further enacted,* That the said lands hereby granted to the said state shall be subject to the disposal of the legislature thereof, for the purposes aforesaid and no other; and the said road shall be, and remain, a public highway for the use of the government of the United States, free from tolls or other charge upon the transportation of any property, troops, or mails of the United States.

State legislature to dispose of lands.
Road to be highway, &c.

SEC. 3. *And be it further enacted,* That the lands hereby granted to said state shall be disposed of only in the following manner — that is to say, when the said governor shall certify to the Secretary of the Interior that

Lands, how only to be disposed of.

Patents not to be granted until ten miles of road are completed, &c.

Lands to revert, if, &c.

Road, how to be constructed.

any ten consecutive miles of said road has been completed under the provisions of this act, and in accordance with the fourth section of this act, stating definitely where said completed section of road commences and where it terminates, it shall be the duty of the said secretary to cause patents to issue to said state for three sections of land for each mile of road thus completed as aforesaid, and so on until the whole of said road is completed: *Provided, further*, That no patent shall be given for any of the aforesaid lands before the completion of ten consecutive miles of road, or for any road, or for any part of any road, made before the passage of this act, or for any greater quantity than thirty sections for each ten miles completed according to the provisions of this act; and if said road is not completed within five years, no further sales shall be made, and the lands unsold shall revert to the United States.

SEC. 4. *And be it further enacted*, That said military road shall be constructed under the direction of such agents or commissioners as the governor of said state may appoint, and where it passes through timbered lands shall be chopped out a uniform width of at least six rods. The road-bed proper to be not less than thirty-two feet wide, and constructed with ample ditches on both sides, so as to afford sufficient drains, with good and substantial bridges and proper culverts and sluices where necessary. All stumps and roots to be thoroughly grubbed out between the ditches the entire length of said road; the central portion of which to be sufficiently raised to afford a dry road-bed by means of drainage from the centre to the side ditches; the hills to be levelled and valleys raised so as to make as easy a grade as practicable.

APPROVED, June 25, 1864.

June 25, 1864.

1850, ch. 76.
Vol. ix. p. 496.

CHAP. CLIV. — *An Act to amend the Act of Congress making Donations to the Settlers on the Public Lands in Oregon, approved September twenty-seven, eighteen hundred and fifty, and the Acts amendatory thereto.*

Failing to file notice in time, not to work forfeiture in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases under the act of congress approved September twenty-seventh, eighteen hundred and fifty, entitled "An act to create the office of surveyor-general of the public lands in Oregon, and to provide for the survey, and to make donations to settlers of the said public lands," and the several acts amendatory and supplemental thereto, in which the actual settlement may be shown to be bona fide, and the claim in all respects to be fully within the requirements of existing laws, except as to the failure of the party to file notice within the time fixed by statute, such failure shall not work forfeiture when no adverse rights intervene before the filing of the required notification by the claimant.

APPROVED, June 25, 1864.

June 25, 1864.

CHAP. CLV. — *An Act to expedite and regulate the Printing of Public Documents, and for other Purposes.*

Heads of departments to send annual reports to superintendent of public printing before, &c.
Number of copies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter, instead of furnishing manuscript copies of the documents usually accompanying their annual reports to each house of congress, the heads of the several departments of government shall transmit them, on or before the first day of November in each year, to the superintendent of public printing, who shall cause to be printed the usual number, and, in addition thereto, one thousand copies for the use of the Senate and two thousand copies for the use of the House of Representatives; and that it shall be the duty of the joint committee on printing to appoint some competent person, who shall edit and select such portions of the documents so placed in their

Editor to be

EXHIBIT 11

be, and he is hereby, authorized and empowered to negotiate with the city of Brooklyn, in the State of New York, and to effect an exchange of lands in Wallabout Bay between the United States and the said city, and thereupon to make, execute, and deliver good and sufficient deeds and releases therefor.

Lands in Wallabout Bay.

APPROVED, July 2, 1864.

CHAP. CCXIII. — *An Act granting Lands to the State of Oregon, to aid in the Construction of a Military Road from Eugene City to the Eastern Boundary of said State.*

July 2, 1864.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and hereby is, granted to the State of Oregon, to aid in the construction of a military wagon-road from Eugene City, by way of Middle Fork of Willamette River, and the most feasible pass in Cascade range of mountains, near Diamond Peak, to the eastern boundary of the State, alternate sections of public lands, designated by odd numbers, for three sections in width on each side of said road: *Provided*, That the lands hereby granted shall be exclusively applied in the construction of said road, and shall be disposed of only as the work progresses; and the same shall be applied to no other purpose whatever; *and provided further*, That any and all lands heretofore reserved to the United States by act of congress, or other competent authority, be, and the same are, reserved from the operation of this act, except so far as it may be necessary to locate the route of said road through the same, in which case the right of way is granted.

Lands granted to Oregon for a military wagon-road.

Lands to be applied exclusively in constructing such road.

Lands heretofore reserved excepted from this act.

SEC. 2. *And be it further enacted*, That the said lands hereby granted to said state shall be disposed of by the legislature thereof for the purpose aforesaid, and for no other; and the said road shall be and remain a public highway for the use of the government of the United States, free from tolls or other charge upon the transportation of any property, troops, or mails of the United States.

Lands granted to be disposed of by legislature, &c.

SEC. 3. *And be it further enacted*, That said road shall be constructed with such width, graduation, and bridges, as to permit of its regular use as a wagon-road, and in such other special manner as the State of Oregon may prescribe.

Width, grade, &c., of road.

SEC. 4. *And be it further enacted*, That the lands hereby granted to said state shall be disposed of only in the following manner, that is to say: that a quantity of land not exceeding thirty sections for said road may be sold; and when the governor of said state shall certify to the Secretary of the Interior that any ten continuous miles of said road are completed, then another quantity of land hereby granted, not to exceed thirty sections, may be sold, and so from time to time until said road is completed; and if said road is not completed within five years, no further sales shall be made, and the land remaining unsold shall revert to the United States.

Mode of disposition of lands.

Land to revert if, &c.

APPROVED, July 2, 1864.

CHAP. CCXIV. — *An Act to establish Colfax Street in the City of Washington and District of Columbia.*

July 2, 1864.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage hereof, the alley, which is sixty feet wide, across square seven hundred and twelve, and which connects L and M streets north, and the west line of which is two hundred and twelve feet east of the east line of First street east, shall be known as Colfax street.

Colfax street established.

SEC. 2. *And be it further enacted*, That congress may hereafter, at any time, amend or repeal this act.

This act may be amended, &c.

APPROVED, July 2, 1864.

EXHIBIT 12

Surveyor-general for Nevada.
Location of office.
Pay.
Duties, &c.
Allowances.

is hereby, authorized to appoint a surveyor-general for Nevada, who shall locate his office at such place as the Secretary of the Interior shall from time to time direct, whose compensation shall be three thousand dollars per annum, and whose duties, powers, obligations, responsibilities, and allowances for clerk hire, office rent, fuel and incidental expenses shall be the same as those of the surveyor-general of Oregon, under the direction of the Secretary of the Interior, and such instructions as he may from time to time deem it advisable to give him.

Lines of subdivisions may be changed from rectangular.
Mineral lands reserved.

SEC. 5. *And be it further enacted*, That in extending the surveys of the public lands in the State of Nevada, the Secretary of the Interior may, in his discretion, vary the lines of the subdivisions from a rectangular form, to suit the circumstances of the country; but in all cases lands valuable for mines of gold, silver, quicksilver, or copper shall be reserved from sale.

Public lands in the State not to be subject to entry, &c., until the State has her full quota.

SEC. 6. *And be it further enacted*, That until the State of Nevada shall have received her full quota of lands named in the first, second, and third sections of this act, the public lands in that State shall not be subject to entry, sale, or location under any law of the United States, or any scrip or warrants issued in pursuance of any such law except the homestead act of May twentieth, eighteen hundred and sixty-two, and acts amendatory thereto, and the acts granting and regulating pre-emptions, but shall be reserved exclusively for entry by the said State for the period of two years after such survey shall have been made: *Provided*, That said State shall select said lands in her own name and right, in tracts of not less than forty acres, and dispose of the same in tracts not exceeding three hundred and twenty acres, only to actual settlers and bona fide occupants: *And provided further*, That city and town property shall not be subject to selection under this act: *And provided further*, That this section shall not be construed to interfere with or impair rights heretofore acquired under any law of Congress.

1862, ch. 75.
Vol. xii. p. 392.

Mode of selecting and disposing of lands by the State.

City and town property.

Vested rights not affected.

APPROVED, July 4, 1866.

July 4, 1866.

CHAP. CLXVII. — *An Act granting Lands to the State of Oregon, to aid in the Construction of a Military Road from Corvallis to the Acquinna Bay.*

Lands granted to Oregon for a military road;

how to be applied and disposed of.

Lands heretofore reserved not granted hereby.

Right of way.

Lands, how to be disposed of.

Road to be a public highway, and free to the United States.

Construction of road.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and is hereby, granted to the State of Oregon, to aid in the construction of a military wagon road from the town of Corvallis to the Acquinna Bay, three alternate sections per mile from the unoccupied public lands, designated by odd numbers, and not more than six miles from said road: *Provided*, That the lands hereby granted shall be exclusively applied in the construction of said road, and shall be disposed of only as the work progresses; and the same shall be applied to no other purposes whatever: *And provided further*, That any and all lands heretofore reserved to the United States by act of Congress, or other competent authority, be, and the same are, reserved from the operation of this act, except so far as it may be necessary to locate the route of said road through the same, in which case the right of way is granted.

SEC. 2. *And be it further enacted*, That the said lands hereby granted to said State shall be disposed of by the legislature thereof for the purpose aforesaid, and for no other; and the said road shall be and remain a public highway for the use of the government of the United States, free from tolls or other charges upon the transportation of any property, troops, or mails of the United States.

SEC. 3. *And be it further enacted*, That said road shall be constructed with such graduation and bridges as to permit of its regular use as a wagon road, and in such other special manner as the State of Oregon may prescribe.

SEC. 4. *And be it further enacted*, That the lands hereby granted to said State shall be disposed of only in the following manner, that is to say : when the governor of said State shall certify to the Secretary of the Interior that any ten continuous miles of said road are completed, then a quantity of land hereby granted coterminous to said completed portion of said road, not to exceed thirty sections may be sold, and so from time to time until said road is completed ; and if said road is not completed within five years, no further sales shall be made, and the land remaining unsold shall revert to the United States.

Lands, how to be disposed of.

Road to be completed in five years ; if not, unsold lands to revert.

APPROVED, July 4, 1866.

CHAP. CLXVIII. — *An Act making an additional Grant of Lands to the State of Minnesota, in alternate Sections, to aid in the Construction of Railroads in said State.*

July 4, 1866.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and is hereby, granted to the State of Minnesota, for the purpose of aiding in the construction of a railroad from Houston, in the county of Houston, through the counties of Fillmore, Mower, Freeborn, and Faribault, to the western boundary of the State ; and also for a railroad from Hastings, through the counties of Dakota, Scott, Carver, and McLeod, to such point on the western boundary of the State as the legislature of the State may determine, every alternate section of land designated by odd numbers to the amount of five alternate sections per mile on each side of said road ; but in case it shall appear that the United States have, when the lines or route of said roads are definitely located, sold any section, or part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by odd numbers and sections, by the direction of the Secretary of the Interior, shall be held by said State of Minnesota for the purposes and uses aforesaid : *Provided*, That the land so selected shall in no case be located more than twenty miles from the lines of said road : *And provided further*, That no land shall be granted or transferred by the provisions of this act not included within the jurisdiction of the State of Minnesota : *And provided further*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or other purpose whatever, be, and the same are hereby, reserved and excepted from the operations of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way shall be granted, provided the United States has yet in possession the title thereto.

Additional grants of lands to Minnesota for railroads.
Description of railroads.

If lands have been disposed of, &c., other lands to be selected in lieu thereof ;

but within twenty miles of lines of road, and the jurisdiction of Minnesota.

Reserved lands not granted.

Right of way.

SEC. 2. *And be it further enacted*, That the sections and parts of sections of land which by such grant shall remain to the United States within ten miles on each side of said road shall not be sold for less than double the minimum price of public lands when sold, nor shall any of said lands become subject to sale at private entry until the same shall have been first offered at public sale to the highest bidder at or above the minimum price as aforesaid : *Provided*, That actual bona fide settlers under the pre-emption laws of the United States may, after due proof of settlement, improvement, and occupation as now provided by law, purchase the same at the increased minimum price : *And provided also*, That settlers under the pro-

Price of lands remaining to the United States.
Lands to be first offered at public sale.
Pre-emption settlers.

Homestead settler.

EXHIBIT 13

months' notice of the time and place of such sale, by advertising the same in such newspapers and for such period of time as he may deem best. Every such lot shall be sold separately to the highest bidder for cash, and when not paid for within twenty-four hours from the time of purchase, it shall be liable to be resold under the order of the Commissioner of the General Land Office aforesaid, at such reasonable minimum as may be fixed by the Secretary of the Interior, and no sale shall be binding until approved by that officer.

Notice of sale.

Mode of sale.

SEC. 2. *And be it further enacted*, That it shall be the duty of the President to cause patents to be issued in due form of law for each and every such lot, as soon as may be after the purchase of and payment for the same.

Patents to issue.

APPROVED, July 4, 1866.

CHAP. CLXXIV. — *An Act granting Lands to the State of Oregon, to aid in the Construction of a Military Road from Albany, Oregon, to the Eastern Boundary of said State.*

July 5, 1866.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and hereby is, granted to the State of Oregon, to aid in the construction of a military wagon road from Albany, Oregon, by way of Canyon City, and the most feasible pass in Cascade range of mountains, to the eastern boundary of the State alternate sections of public lands, designated by odd numbers, three sections per mile, to be selected within six miles of said road: *Provided*, That the lands hereby granted shall be exclusively applied in the construction of said road, and shall be disposed of only as the work progresses; and the same shall be applied to no other purpose whatever: *And provided, further*, That any and all lands heretofore reserved to the United States by act of Congress or other competent authority be, and the same are, reserved from the operation of this act, except so far as it may be necessary to locate the route of said road through the same, in which case the right of way is granted, subject to the approval of the President of the United States.

Lands granted to Oregon for military wagon road.

Route of road.

Lands granted, how to be applied.

Lands heretofore reserved, not granted hereby.

Right of way.

SEC. 2. *And be it further enacted*, That the said lands hereby granted to said State shall be disposed of by the legislature thereof for the purpose aforesaid, and for no other; and the said road shall be and remain a public highway for the use of the government of the United States, free from tolls or other charge upon the transportation of any property, troops, or mails of the United States.

Lands, how to be disposed of.

Roads to be public highway, and free to the United States.

SEC. 3. *And be it further enacted*, That said road shall be constructed with such width, graduation, and bridges, as to permit of its regular use as a wagon road, and in such other special manner as the State of Oregon may prescribe.

Construction of road.

SEC. 4. *And be it further enacted*, That the lands hereby granted to said State shall be disposed of only in the following manner, that is to say: that when ten miles of said road shall be completed, a quantity of land not exceeding thirty sections for said road may be sold coterminous to said completed portion of said road; and when the governor of said State shall certify to the Secretary of the Interior that any ten continuous miles of said road are completed, then another quantity of land hereby granted, not to exceed thirty sections, may be sold, coterminous to said completed portion of said road, and so from time to time until said road is completed; and if said road is not completed within five years, no further sales shall be made, and the land remaining unsold shall revert to the United States.

Lands, how to be disposed of.

If road not completed in five years, unsold lands to revert to the United States.

APPROVED, July 5, 1866.

EXHIBIT 14

CRS Report for Congress

Received through the CRS Web

Highway Rights of Way on Public Lands: R.S. 2477 and Disclaimers of Interest

November 7, 2003

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Highway Rights of Way on Public Lands: R.S. 2477 and Disclaimers of Interest

Summary

A succinct provision in an 1866 statute known as “R.S. 2477” granted rights of way across unreserved federal lands for “the construction of highways.” The provision was repealed in 1976 by the Federal Land Policy and Management Act (FLPMA), an act that also protected valid rights of way already established by that time. What definitions, criteria, and law should be applied to confirm or validate these R.S. 2477 rights of way has been controversial. The issues are important to states and communities whose highway systems are affected, and also because the rights of way may run either through undeveloped federal lands that might otherwise qualify for wilderness designation, or across lands that are now private or within federal reserves (such as parks or national forests) created after the highways might have been established.

Section 315 of FLPMA authorizes the Secretary of the Interior to issue a “disclaimer of interest” if an interest or interests of the United States in lands has “terminated by operation of law or is otherwise invalid.” A disclaimer is a recordable document that can help remove a cloud from land title because it has the same effect as if the United States had conveyed the interest in question. The Department of the Interior has finalized amendments to existing regulations on disclaimers of interest that allow states, state political subdivisions, and others to apply for disclaimers that previously were time-barred. A recent Memorandum of Understanding (MOU) between Utah and the Department of the Interior establishes an “acknowledgment process” whereby R.S. 2477 rights of way on certain federal lands can be validated and a disclaimer to them issued by the United States. Several other states have requested negotiations to develop MOUs regarding R.S. 2477 rights of way.

The disclaimer regulation changes are controversial for many reasons; one of which is that Congress in § 108 of P.L. 104-208 prohibited regulations “pertaining to” R.S. 2477 from becoming effective without Congressional approval. The use of disclaimers to acknowledge R.S. 2477 rights of way is also controversial because the criteria that will be used to determine the validity of asserted R.S. 2477 claims are not set out, and without clearly stated criteria and standards, it is not clear whether the terms of § 315 have been met – whether a disclaimable interest of the United States has terminated or not. Most agree that a resolution of R.S. 2477 validity issues is desirable, but there is disagreement on standards and on whether and how the Congress and the courts should be involved. H.R. 1639 in the 108th Congress would authorize a process for determining the validity of R.S. 2477 claims and define crucial terms for those determinations. A House-passed amendment to FY 2004 Interior and Related Agencies Appropriations (H.R. 2691) would have prohibited implementation of the disclaimer regulation amendments in certain federal conservation areas, but was removed in conference. This report reviews the disclaimer provision of § 315 of FLPMA, the Utah MOU, the R.S. 2477 grant to construct highways and interpretation of it, the relationship of the new disclaimer regulations to that statute and to the statutory prohibition against rules that “pertain to” R.S. 2477, and H.R. 1639. It will be updated as events warrant; see CRS Report RS21402 for information on recent events.

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R.S. 2477 highway grants played an important role in the development of the West. Many state and county roads in the West today originated as R.S. 2477 roads, and the validity of most of these roads was clearly established by 1976. However, it is essential to note that R.S. 2477 rights of way are not now, nor were they ever, the only type of road or access allowed across federal lands.⁸⁴ In any particular instance, a denial of a R.S. 2477 right of way is not dispositive of whether and how a road or other access was or may be recognized or permitted.

The next section of this report will examine the statute itself, the historical context in which it was enacted, and proffer a possible interpretation.

1866 Act.

It is a fundamental rule of statutory construction that every issue of statutory interpretation should begin with a close textual examination,⁸⁵ and that the "plain meaning" of a provision must guide its interpretation.⁸⁶ The provision reads:

And be it further enacted, That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

Succinct though the section is, it is clear that R.S. 2477 is a grant of a right of way for the "construction" of "highways" across public lands "not reserved." Several approaches to possible meanings of these terms will be discussed. Because the basic purpose of the grant -- for highways -- sheds light on what Congress might have meant by "construction," the term "highways" will be examined first.

In many discussions of R.S. 2477 (and in the Utah MOU), there is a tendency for speakers to use "highway" and "road" interchangeably, or to substitute other words such as "ways" or even "trails" and cease to refer to "highways" at all. Arguably, this can produce a significant shift in emphasis. There appear to be distinctions between "highway" and "road," and between "road" and still lesser terms, such that only "highways," the term chosen by Congress, should properly be used.

Like many words in the English language, the term "highway" has more than one meaning; unfortunately, two of its meanings have somewhat opposite

⁸⁴ See Title V of FLPMA, which authorizes rights of way across federal lands, and Title XI and especially § 1110 on access to inholdings in the Alaska National Interest Lands Conservation Act of 1980 (ANILCA) (Pub. L. 96-487, 94 Stat. 2464), and other access statutes.

⁸⁵ Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976), quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975).

⁸⁶ See INS v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12 (1987); TVA v. Hill, 437 U.S. 153 (1978); W.Va. Div. Izaak Walton League, Inc. v. Butz, 367 F. Supp. 422, 429 (1973), affirmed 522 F.2d 945 (4th Cir. 1975).

connotations, as can be demonstrated from numerous treatises and other sources.⁸⁷ One of the principal definitions of the term is a generic one meaning *any* avenue of travel open to the public, including rivers and bridges.⁸⁸ Congress has used the term in this sense when it has referred to rivers being free highways.⁸⁹ With respect to ground transportation, the term "highway" similarly can mean any way open to the public, even including footpaths. The term especially has this meaning in English law when used in the context of prescriptive rights obtained by the public across private lands, and this meaning carried over into some American state law.⁹⁰

Under English law, too, better roads -- those that were built up so as to be literally "high" ways, typically connected towns or market places, etc. and enjoyed better protection for travelers -- were known as "King's (or Queen's) highways". This usage gave rise to the second meaning of highway as "a main or principal road forming the direct or ordinary route between one town or city and another, as distinguished from a local, branch, or cross road, leading to smaller places off the main road, or connecting two main roads."⁹¹

American dictionaries of common usage published near the time of enactment of R.S. 2477 indicate that this second meaning, that of principal public roads, was evidently the common American meaning at the time of enactment: highway was not defined in the generic sense as a travel corridor of any kind. Rather, the contemporaneous common usage dictionaries use "road" as the more generic term, and "highway" (at least in the context of ground transportation) to mean a more significant road. According to the 1865 Webster's Dictionary, a "road" is

a riding, a riding on horseback, that on which one rides or travels, a trackway, a road, from *ridan*, to ride a place where one may ride; an *open way* or public

⁸⁷ See, e.g., the nearly contemporaneous BENJAMIN V. ABBOTT, DICTIONARY OF TERMS AND PHRASES (1879) which points out "[t]here is a difference in the shade of meaning conveyed by two uses of the word. Sometimes it signifies right of free passage, in the abstract, not importing anything about the character or construction of the way. Thus, a river is called a highway; and it has been not unusual for congress (sic), in granting a privilege of building a bridge, to declare that it shall be a public highway. [On the other hand], it has reference to some system of law authorizing the taking of a strip of land, and preparing and devoting it to the use of travelers. In this use it imports a roadway upon the soil, constructed under the authority of these laws."

⁸⁸ ABBOTT, *supra*; BYRON K. AND WILLIAM F. ELLIOTT, THE LAW OF ROADS AND STREETS 1 (1890).

⁸⁹ See Act of March 3, 1811, ch. 46, 2 Stat. 606, R.S. 5251, 33 U.S.C. §10, which states that "All the navigable rivers and waters in the former Territories of Orleans and Louisiana shall be and forever remain public highways."

⁹⁰ See, e.g., JAMES KENT, III COMMENTARIES 548 *et seq.*

⁹¹ JAMES A.H. MURRAY, A NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 285 (1888). See also the definition of "highway" contained in ALEXANDER M. BURRILL, LAW DICTIONARY AND GLOSSARY 23 (2d Ed. 1867), which includes both the generic meaning of highway and the distinction of a King's highway as a "great road" that goes from town to town.

passage; *a track for travel*, forming a communication between one city, town, or place, and another.⁹²

According to the same 1865 dictionary, a "highway" is a public road, a way open to all passengers.⁹³ The 1860 Webster's Dictionary also indicates that "road" is the general term for any ground appropriated for travel, while "highway" is a significant type of road:

Road: an *open way* or public passage; *ground appropriated for travel*, forming a communication between one city, town, or place, and another. The word is generally applied to highways, and as a generic term it *includes* highway, street and lane⁹⁴

Highway: a public road; a way *open to all* passengers; so called, either because it is a *great or public* road, or because the *earth was raised* to form a dry path. Highways open a communication from one *City or town* to another.⁹⁵

Although the terms at times have been used interchangeably in discussing R.S. 2477, "highways" is the term used by Congress and it is used in conjunction with a requirement for construction. "Roads" appears to be the more general term and "highways" the more specific term. In other words, while all highways are roads, not all roads are highways, since, arguably, highways are public, and are more significant, built up roads.⁹⁶

In which sense Congress used the term highway is obviously of great significance in interpreting R.S. 2477. Whatever the meaning of highway might be in other contexts, such as the determination of prescriptive rights, the question arising from its use in legislation is one of congressional intent. One writer noted the difficulties entailed by the use of the term highway in legislation:

...It is to be regretted that the term 'highways' has not been more accurately employed by the courts and text writers, for it is undeniably true that confusion, and sometimes injustice, has resulted from the use of this vague and ill defined term. Whether streets, ferries, railroads, rivers, or rural roads, are all meant to be included in a particular statute can not, in many instances, be asserted without a careful study of the entire statute and a full consideration of all the matters which the courts usually call to their assistance in ascertaining the meaning and effect of legislative enactments. A word capable of so many different meanings

⁹² WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 1143 (1865) (emphasis added).

⁹³ *Id.* at 627.

⁹⁴ WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 959 (1860) (emphasis added).

⁹⁵ *Id.* at 552 (emphasis added).

⁹⁶ This distinction is still evident in modern usage: the 1997 WEBSTER'S NEW COLLEGIATE DICTIONARY defines "highway" as "a public road, *esp. a main direct road.*" (Emphasis added.)

can seldom, of its own force and vigor, influence the judicial mind engaged in the work of ascertaining and enforcing the legislative intention.⁹⁷

For reasons that will be developed, it appears likely that Congress in the 1866 Act used the term highway in the sense of a significant or principal road; namely, one that was open for public passage, received a significant amount of public use, was constructed or improved, and that connected cities, towns, or other places of interest to the public. It is interesting to note that some degree of constructed improvement inheres in this concept of a highway in order to support the greater public use that characterizes such roads. This comports with Congress' reference to granting rights of way for the "construction of highways". Of course, it must be kept in mind that highways in times past were not 6-lane paved roads, and that the historical amount and type of travel in an area and era must be taken into account in evaluating what qualifies as a principal, public, improved road.

There is no legislative history that sheds light on why Congress included the highway grant as section 8 in the Mining Act of 1866 (Act), or on exactly what Congress intended by the language of the section. The Mining Act of 1866 established a system for the recognition of several practices that had been taking place on public domain lands. Some of the provisions directly addressed mining, other provisions related to the use of water and to rights of way. These latter provisions addressed practices that were related to mining, but had implications beyond the mining context. The Act legitimized mining claims in accordance with federal laws or regulations, state and local law, and even the local customs of miners, and provided that claimants could obtain full title to the lands on which mining claims were located. Because water was necessary for some types of mining, the Act acknowledged rights to use water, if such rights were recognized by local customs, laws, and the decisions of courts, and § 9 of the 1866 act also addressed construction of rights of way for ditches for the transport of water.

The principal focus of the floor debates on the Act was on alternatives for disposing of the mineral lands of the United States, and section 8 was not discussed.⁹⁸

⁹⁷ Elliott, *supra*, at 6.

⁹⁸ Rep. Julian, Chairman of the House Committee on Public Lands had introduced H.R. 322, a bill to sell the mineral lands of the United States in 40 acre parcels. This bill as introduced and as reported did not contain a right of way provision. See H.R. Rep. 39-66, (1866). S. 257 also proposed a system that regulated the occupation of mineral lands, extended preemption rights to claimants, and allowed the acquisition of full fee title to lode claims. Section 8 was not in S. 257 as introduced, but was section 10 of the bill as reported from the Senate Committee on Mines and Mining. No committee report is available on this measure. Note that when section 5 of the final Act was proposed as an amendment on the floor of the Senate it was defeated by a vote of 21-10. Section 5 recognizes the operation of state law in defining certain aspects of miners' rights, including "easements". This provision was included in the final version. It is not known what was intended by state law allowing "easements", or whether any states enacted laws allowing access easements to mines on federal lands. The title of the Senate bill was amended to read: "A bill to legalize the occupation of mineral lands and to extend the right of preemption thereto."

When S. 257 reached the House, Rep. Higby attempted to have it sent to the
(continued...)

Therefore, in seeking clarification of the intent of Congress in enacting R.S. 2477, we must look primarily to the words Congress actually used and to the historical context in which they were enacted. While the issue is not free from doubt, a court -- faced squarely with the issue -- is likely to find that the understanding of Congress in 1866 was probably of highways in the sense of significant public roads, an interpretation supported by the historical context in which the 1866 Act was passed,⁹⁹ including other congressional enactments, as discussed below

Historical context.

The creation of roads and access were fundamental problems implicit in the surveying system the federal government used to divide and dispose of public lands. The federal government applied the same system of surveying since the Continental Congress passed the Land Ordinance of 1785, an act that was later re-enacted by the new federal government.¹⁰⁰ Under this system, a principal meridian, base, standard and guides were first measured and marked, and "townships" -- squares six miles on a side -- were surveyed. The townships were then divided into "sections" one mile on a side, each of which contained 640 acres (the amount of land allowed under the Stock-Raising Homestead Act of 1916). These sections were divided into halves (the 320 acres allowed under the Desert Land Entry Act of 1877), or further divided into quarters (the 160 acres allowed under the Homesteading Act of 1862), or smaller subdivisions allowed under certain other acts.

These sections and blocks available for settlement and disposal were absolute, that is each surveyed subdivision abutted the next one without access corridors intervening. This practice, combined with the fact that many sections of lands were granted to the states and other entities for school and other public purposes to spur development, resulted in "checkerboard" land patterns and meant that access needs were a pressing exigency. Congress did not resolve the issue, choosing instead to acquiesce in whatever access solutions developed on unreserved federal lands. Access problems typically were resolved among settlers as the local topography and circumstances indicated; usually, settlers simply created roads and ways across lands

⁹⁸ (...continued)

Committee on Mines and Mining, but Rep. Julian succeeded in having it sent to his Committee on Public Lands, where it languished.

The Senate then amended H.R. 365, a bill to grant rights of way to ditch and canal owners in California, Oregon and Nevada, to substitute the text of S. 257. H.R. 365 did not originally contain a provision like section 8. That measure was sent to the House on a Saturday afternoon and was brought up under a rule precluding debate. Rep. Julian protested this "plot to obtain legislation under false pretenses" as a "reproach to public decency and common fair play". CONG. GLOBE, 39th Cong., 1st Sess. 4049 (1866). Rep. Julian attempted to amend the bill to substitute a system such as that in his bill, H.R. 322, again without a right of way section. This amendment was defeated and the Senate version was passed 73 to 37.

See also, the discussion of the enactment of the 1866 act in: PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 715-721.

⁹⁹ *Ute Indian Tribe v. Utah*, 521 F. Supp. 1072, 1080, 1087 (C.D. Utah 1981).

¹⁰⁰ Act of May 18, 1796, ch. 29, 1 Stat. 464.

as needed. Subsequent settlers took title subject to established roads and ways.¹⁰¹ Later, as areas became more developed, access needs were resolved by negotiation and purchase of the necessary rights. Given the intermingled patterns of land ownership, establishment of roads was typically of mutual benefit, which apparently facilitated resolution of this difficulty that was inherent in the survey system. Territorial and state laws also played a role in the resolution of access and roads issues, as will be discussed.

A court has discussed the problem caused by the surveying system as follows:

[The sections] touch at their corners and their points of contact, like a point in mathematics, are without length or width. If the position of the company were sustained, a barrier embracing many thousand acres of public lands would be raised, unsurmountable except upon terms prescribed by it. Not even a solitary horseman could pick his way across without trespassing. In such a situation the law fixes the relative rights and responsibilities of the parties. It does not leave them to the determination of either party. As long as the present policy of the government continues, all persons as its licensees have an equal right of use of the public domain, which cannot be denied by interlocking lands held in private ownership.¹⁰²

In an 1890 case the Supreme Court declined to enjoin sheepherders from driving sheep across sections owned by plaintiffs in order to reach open public lands, stating:

We are of the opinion that there is an implied license growing out of the custom of nearly a hundred years, that the public lands of the United States ... shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use

The whole system of the control of the public lands of the United States as it had been conducted by the Government, under acts of Congress, shows a liberality in regard to their use which has been uniform and remarkable.¹⁰³

The Court, in the course of distinguishing between access rights the federal government might have retained and those of settlers in the context of a federal land grant for the construction of a railroad, also stated:

Congress obviously believed that when development came, it would occur in a parallel fashion on adjoining public and private lands and that the process of subdivision, organization of a polity, and the ordinary pressures of commercial and social intercourse would work itself into a pattern of access roads It is some testament to common sense that the present case is virtually unprecedented,

¹⁰¹ Surveyors were to note all existing roads and trails on their field notes and final surveys. See the 1889 instructions of the Commissioner of the General Land Office, in C. ALBERT WHITE, *A HISTORY OF THE RECTANGULAR SURVEY SYSTEM* 574 (1982).

¹⁰² *Mackay v. Uinta Development Co.*, 219 F. 116, 118 (8th Cir. 1914).

¹⁰³ *Buford v. Houtz*, 133 U.S. 320, 326-327 (1890).

and that in the 117 years since the [railroad] grants were made, litigation over access questions generally has been rare.¹⁰⁴

It is interesting to note that an 1895 Solicitor's opinion found that the government had always allowed miners to build access roads without either a permit or the payment of a fee:

Since it has traditionally been customary for mining locators, homestead and other public land entrymen to build and/or use such roads across public lands other than granted rights-of-way as were necessary to provide ingress and egress to and from their entries or claims without charge, the question whether a fee may be charged for such use is not only of broad, general interest but to make such a charge now would change a long practice.

... Congress knew, when it enacted the mining laws, that miners necessarily would have to use public lands outside of the boundaries of their claims for the running of tunnels and for roads.

The Department has recognized that roads were necessary and complementary to mining activities....¹⁰⁵

The opinion did not mention section 8 of the 1866 Mining Act (R.S. 2477) as relevant to the discussion of mining road access. Furthermore, if the 1866 Act is read as granting individual access, this interpretation would controvert the universally recognized requirement that a way be public to be a highway.¹⁰⁶ It is arguable that the better interpretation is that creation of individual access was tolerated as a matter of course and that R.S. 2477 addressed public roads. If the 1866 Act is read to mean highways in the generic sense of all kinds and types of ways, including minor individual access ways, one could argue that the act was superfluous since the federal government at that time was allowing such use without requiring a grant or permit and did not attach any management significance to doing so. And if the 1866 provision was intended to legitimize all transit and access across the public domain, this would include individual access roads and trails that were not public.

However, the other meaning of "highways" -- as significant public roads -- arguably is more consistent with other measures Congress enacted that both addressed continued easy individual access on the one hand and the development of significant transportation corridors on the other.

¹⁰⁴ *Leo Sheep Co. v. United States*, 440 U.S. 668, 686-687 (1979).

¹⁰⁵ Opinion of Edmund T. Fritz, Acting Solicitor, M-36584, 66 I.D. 361, 362, 364 (1959). The granted rights of way referred to are those for tram roads and other purposes under the act of January 21, 1895, 28 Stat. 635.

¹⁰⁶ See the definitions cited above and the section of this report on Administrative Interpretation.

In the Unlawful Inclosures of Public Lands Act of 1885, Congress regulated the fencing off of public lands (even when the fences were on private lands¹⁰⁷) and prohibited the obstruction of "free passage or transit over or through the public lands".¹⁰⁸ This Act prohibits obstruction of *any* passage over the federal lands -- whether on established ways or not -- and is reflective of Congress' tolerance of such passage during the time of western settlement, an indication that a special statute on minor access ways was not required. If R.S. 2477 granted rights of way only for highways in the sense of significant public roads, the 1885 Act serves more of a function because there would be a need for federal protection of all other free passage and transit across the public lands.

During the time of settlement of the new national lands to the West, Congress also provided land grants for the "construction" of many transportation routes by canals, railroads, or "wagon roads". These grants, including those made for wagon roads, typically were for the construction of particular routes between named destinations, often with some legislated detail as to the type and timing of construction. Such grants typically included grants of lands sufficient both for the bed of the transportation route itself, and extra lands to be sold so that the proceeds could be put toward completing the work. If construction did not occur, there typically was language providing for the reversion of the lands to the United States.

Several statutes enacted before 1866 provided for "construction" of "wagon roads," which were to be well constructed roads adequate for the movement of troops and the mail. Clearly construction of these roads entailed definite physical acts to improve the roadbeds, and Congress at times required them to be built to very substantial standards, involving considerable earth-moving activities, even to the extent of leveling hills.¹⁰⁹

Some of these statutes provided simply that the roads were to be "public highways"; others stated that the road must remain a public highway "for the use of the government of the United States, free from tolls or other charge upon the transportation of any property, troops, or mails of the United States."¹¹⁰ An 1866 statute established a process for the dedication of military roads in the District of Columbia as public highways. As noted above, roads suitable for the movement of

¹⁰⁷ *Camfield v. United States*, 167 U.S. 518 (1897).

¹⁰⁸ Act of February 25, 1885, ch. 149, 23 Stat. 321, codified at 43 U.S.C. §§1061, 1063.

¹⁰⁹ For example, several acts specified an overall right of way 6 rods wide with the "road-bed proper to be not less than thirty-two feet wide, and constructed with ample ditches on both sides, so as to afford sufficient drains, with good and substantial bridges and proper culverts and sluices where necessary. All stumps and roots to be thoroughly grubbed out between the ditches the entire length of said road, the central portion of which to be sufficiently raised to afford a dry road-bed by means of drainage from the centre to the side ditches; the hills to be levelled and valleys raised so as to make as easy a grade as practicable." Act of June 25, 1864, ch. 153, 13 Stat. 183.

¹¹⁰ Act of July 2, 1864, ch. 213, 13 Stat. 355.

troops typically were well constructed; this statute simply provided a process for allowing use of the military roads by the public.¹¹¹

It is important to reiterate that the problem of securing routine access and constructing minor roads throughout the federal public lands surveying system existed and had been resolved for almost a century before Congress enacted R.S. 2477. Before and after R.S. 2477, the federal government tolerated the creation of access ways and roads across open federal lands; settlement was the principal interest of the federal government in the eighteenth and nineteenth centuries, and allowing individual access was such a given that it was seldom discussed. Even after enactment of R.S. 2477, the principal work that reviews federal land grants does not discuss access issues, nor mention the 1866 provision.¹¹²

After enactment of R.S. 2477, Congress adopted many other rights of way provisions for various types of rights of way, especially with respect to crossing federal reservations. This potpourri of other rights of way acts argues again for an interpretation of the 1866 Act as *not* meaning generic ways of all types, but rather as referring to significant roads.

Before enactment of R.S. 2477, in addition to acquiescing in the creation of individual access, Congress had authorized and made land grants for the construction of transportation arteries, including large, well constructed roads in some instances. We have found only one land grant for a wagon road enacted after the enactment of the 1866 Act. It is arguable that, since the federal government continued to acquiesce in the creation of access ways to individual properties as settlers spread westward, perhaps R.S. 2477 was an express grant of rights of way for all more significant roads -- those "highways" that were to be open to the public, to serve as important connectors, and that were to involve some degree of construction to support such use.

In 1872, Congress revisited the mining issues and modified many of the provisions of the 1866 Act.¹¹³ The 1872 Act did not change section 8 of the 1866 Act on rights of way, and there is no discussion of the section or its retention in the legislative history of the 1872 Act. In 1899, Congress enacted a provision of permanent law as part of an appropriations act:

That in the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad, *or other highway* over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby.¹¹⁴ (Emphasis added.)

¹¹¹ Act of May 9, 1866, ch. 76, 14 Stat. 45.

¹¹² THOMAS DONALDSON, THE PUBLIC DOMAIN: ITS HISTORY, WITH STATISTICS (1884). This work of 1,343 pages discusses only land grant wagon roads and railroads, but does not mention other roads.

¹¹³ Act of May 10, 1872, ch. 152, 17 Stat. 91.

¹¹⁴ Act of March 3, 1899, ch. 427, 30 Stat. 1214, 1233, codified before repeal at 16 U.S.C. §525 (national forests) and 43 U.S.C. §958 (reservoirs).

On the face of this provision, Congress arguably again used "highway" to indicate significant types of transportation corridors. The legislative history of the provision is inconclusive, but indicates that it was felt necessary to specify that the new rights of way were for railroads, because the Department did not construe the term highways as including railroads.¹¹⁵ This is noteworthy because if 'highway' was generally understood to mean *all* public avenues of travel, rather than just significant land roads, it would include railroads. However, it would also have included wagon roads as well, so why Congress mentioned both highways and wagon roads is not clear.

In 1875 Congress granted a general right of way through the public lands to any railroad company for tracks, stations, etc.¹¹⁶ Later statutes provided for the disposition of the lands underlying the railroad rights of way upon abandonment; both of these later statutes excepted "public highways" established within the railroad corridors from the disposal provisions that would otherwise apply.¹¹⁷

Section 603 of FLPMA in 1976 directed the BLM to conduct a wilderness suitability review of the large roadless areas under its management. Although "roadless" was not defined in the statute, the section by section discussion in the House report clarifies that:

The word 'roadless' refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road¹¹⁸

The explanation set out in the Committee report was reflected in the regulations implementing the wilderness review, which defined roadless areas in part as areas within which there is no improved road that is suitable for public travel by means of

¹¹⁵ The discussion focused on a railroad issue, and its sponsor, Sen. Carter, indicated that the 1897 Organic Act for the national forests already authorized "highways" across national forests, but that the Secretary of the Interior had interpreted that as not including railroads. In fact, the act in question had authorized ingress and egress and "wagon roads" necessary to reach settlers' homes, but did not use the term highway. 32 CONG. REC. 2800 (1899).

¹¹⁶ Act of March 3, 1875, ch. 152, 18 Stat. 482, codified at 43 U.S.C. § 934.

¹¹⁷ Act of May 25, 1920, ch. 197, 41 Stat. 621, codified at 43 U.S.C. § 913; and Act of March 8, 1922, ch. 94, 42 Stat. 414, codified at 43 U.S.C. § 912. The former statute authorizes the railroads to convey "to any State, county, or municipality" any portion of the railroad right of way to be used as a public highway or street.

¹¹⁸ H.R.Rep. 94-1163 at 17 (1976). A 1980 opinion by Deputy Solicitor Ferguson to Assistant Attorney General Moorman states that the transcript of the House Committee markup session reveals that Congressman Steiger of Arizona suggested the definition of "road" that appears in the House Report. Arizona is an arid state where "ways" can be created and used as roads merely by the passage of vehicles, and Congressman Steiger took some pains to draw the distinction between such a "way" and a "road" for wilderness purposes. The latter, he insisted, was any access route improved or maintained in any way, such as by grading, placing of culverts, or making of bar ditches. Transcript of Proceedings, Subcommittee on Public Lands of House Committee on Interior and Insular Affairs, Sept. 22, 1975, at 329-333.

four-wheeled, motorized vehicles intended primarily for highway use.¹¹⁹ The Wilderness Inventory Handbook, prepared to assist personnel with completing the wilderness suitability inventory, adopted the Committee report language as the definition of "road," and also defined several other relevant terms in connection with evaluating roads.¹²⁰ Because other sections of FLPMA repealed R.S. 2477, Congress can be said to have been aware of R.S. 2477 when it used and commented on the term "roadless." If the more general term "road" in 1976 connoted to Congress a way that had been "improved and maintained by mechanical means to insure relatively regular and continuous use," this usage is consistent with the use in 1866 of the more specific term "highway" as a constructed and improved road that served as a significant public connector.¹²¹

Administrative and Judicial Interpretation of 1866 Act

Administrative interpretation.

The federal government historically seems to have adopted a position of benign neglect of R.S. 2477 that probably reflects the acquiescence of the United States on access issues during the settlement of the West and the pre-FLPMA absence of coherent policies and authority for the management of the public lands. No

¹¹⁹ 43 C.F.R. §19.2.

¹²⁰ USDI, Bureau of Land Management, *Wilderness Inventory Handbook* 5 (September 27, 1978) defined "Improved and maintained" as "Actions taken physically by man to keep the road open to vehicular traffic." "Improved" does not necessarily mean formal construction. "Maintained" does not necessarily mean annual maintenance. "Mechanical means" -- Use of hand or power machinery or tools. "Relatively regular and continuous use" -- Vehicular use which has occurred and will continue to occur on a relatively regular basis. Examples are: access roads for equipment to maintain a stock water tank or other established water sources; access roads to maintained recreation sites or facilities; or access roads to mining claims. Additional explanatory material also stated that: "A route is not a road if no tools -- either hand or machine -- have been used to improve or maintain it. The intent of the definition of the phrase 'mechanical means' in the inventory handbook is that it refers to hand machinery, power machinery, hand tools, or power tools. Sole use of hands or feet to move rocks or dirt without the use of tools or machinery does not meet the definition of 'mechanical means.'" Organic Act Directive No. 78-61, Change 2, at 4 (June 28, 1979).

¹²¹ The court in *Sierra Club v. Hodel*, 848 F.2d 1068, 1082 (10th Cir. 1988), overruled on other grounds, *Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992) stated that "[i]t is incongruous to determine the source of interpretative law for one statute based on the goals and policies of a separate statute conceived 110 years later." In this instance, the court was considering an argument for current uniform federal rules as to scope of all federal rights of way; a goal of the Federal Land Policy and Management Act of 1976 (FLPMA). The court was saying that this goal does not guide interpretation of the intent of the 1866 grant of highway rights of way. This is a different issue from whether a plausible interpretation that harmonizes and gives full meaning to both the 1866 Act on "highways" and to FLPMA, which both repealed the 1866 Act and dealt with "roadless areas", should be preferred over an interpretation that does not encompass both statutes.