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Highway Rights of Way: The Controversy Over Claims Under R.S. 2477

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SUMMARY

In 1866, Congress enacted a grant of rights of way over unreserved public lands for the "construction of highways." The grant originally was section 8 of the Mining Act of 1866, and later became section 2477 of the Revised Statutes (R.S. 2477), and was codified as 43 U.S.C. §932 until its repeal in 1976, subject to valid existing rights, as part of the Federal Land Policy and Management Act (FLPMA). Recently a controversy has arisen as to whether and which rights of way still may be claimed under the former grant. The issue is a significant one because such rights of way could still be important to the infrastructure of some states and counties, but could also disrupt management of the federal lands, possibly even resulting in disqualifying areas that are currently considered "roadless" from inclusion in the National Wilderness Preservation System.

In the conference report for the 1993 Appropriations Act for the Department of the Interior, Congress directed that the Department complete a report to Congress on the Act and its implementation, together with recommendations for criteria by which to evaluate remaining R.S. 2477 claims. A Draft Task Force Report was released by the Department in March, 1993 and a final report is expected in June, 1993.

This CRS report examines the language of the Act and its context, subsequent enactments, and some aspects of the administrative and judicial interpretations of the Act to date and concludes that, while the issue is not free from doubt, R.S. 2477 seems to have been intended to grant rights of way for "highways" in the sense of principal or significant roads. This meaning is supported by contemporary treatises and dictionaries and by contemporaneous and subsequent Congressional enactments.

The extent to which state law controls to define acceptance of the grant is a major issue, especially as to the necessity for construction. The Department implementing the Act has allowed state law on "the construction or establishment of highways" to define how the grant could be accepted. However, this position did not eliminate the requirement that the two elements of construction and highways be met. The acquiescence of the federal government in state court determinations over the years before FLPMA may be more a reflection of the historical context and lack of coherent management authority than it is probative of a federal legal position obviating the elements of the 1866 Act. Furthermore, a close reading of the cases indicates that typically the roads in question qualified under the terms of the Act, and that frequently state cases are cited for rulings that either were not the actual holdings or that were not necessary considering the facts before the courts. Therefore, the government does not appear to be precluded from reconsidering criteria for final R.S. 2477 determinations.

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I. INTRODUCTION

In 1866, Congress enacted an offer of grants of rights of way over unreserved public lands for the construction of highways. The grant was originally section 8 of the Mining Act of 1866, which became section 2477 of the Revised Statutes.[1] The grant was repealed in 1976, subject to valid existing rights, as part of the Federal Land Policy and Management Act (FLPMA),[2] an act that modernized management of the public lands. Recently, controversy has arisen as to whether and which rights of way still may be validly claimed under the former grant.

R.S. 2477 highways have played a significant role in the development of the West; many state and county highways originated under R.S. 2477. Most of these were clearly qualifying roads by 1976, having been improved and maintained by the states or counties for years. Issues surrounding remaining claims are significant because the highways could also be important to the infrastructure of some states, but could also disrupt management of the federal lands, and possibly result in disqualifying areas that are currently considered "roadless" from inclusion in the National Wilderness Preservation System.

Language in the conference report that accompanied the 1993 Appropriations Act for the Department of the Interior and related agencies directed the Department to study and report to the appropriate Congressional committees on the history and certain aspects of R.S. 2477 and other rights of way. The report also is to make recommendations for assessing the validity of R.S. 2477 claims "consonant with the intent of Congress both in enacting R.S. 2477 and FLPMA, which mandated policies of retention and efficient management of the public lands." The report of the Department was to be due by May 1, 1993.[3] As part of the process of preparing the report, the Bureau of

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[1] Although the provision was later codified until repeal at 43 U.S.C. 932, it generally is known as R.S. 2477, its enacted reference.

[2] Pub. L. No. 94-579, 90 Stat. 2744.

[3] H.R. Rep. 901, 102 Cong., 2d Sess. 71 (1992) states:

"Amendment No. 155: Deletes House proposed language that would have prohibited the use of funds to process rights of way claims under section 2477 of the Revised Statutes, as proposed by the Senate.

The managers agree that by May 1, 1993, the Department of the Interior shall submit to the appropriate committees of the Congress a report on the history of rights of way claimed under section 2477 of the Revised Statutes, the

Land Management is compiling historical materials and agency interpretations over the years. A draft report was released by the Department's R.S. 2477 Task Force in March, 1993, and a final report is expected in June, 1993.

The issues presented are complex, and the current study being conducted by the Department may clarify many facets of R.S. 2477. This CRS report preliminarily examines the history of roads and rights of way in public land law, analyzes possible interpretations of the right of way grant in question, discusses some aspects of the administrative and judicial interpretations to date, and offers some possible alternatives for resolving some of the R.S. 2477 issues.

Based on a review of the contemporary meaning of the language used in the Act, the history of Congressional policies and actions regarding access and rights of way that provided the context of the 1866 provision, together with subsequent enactments, and the position of the Department over the years, it appears that Congress intended "highways" to mean significant roads, and that such roads had to have been constructed or improved by mechanical means by 1976 to qualify.

Regardless of what original Congressional intent appears to have been, additional issues remain. Because of the lengthy interval of time during which most R.S. 2477 issues were litigated in state courts without a federal position being represented, the current status of the law and possible administrative and legislative alternatives now must also be examined.

II. BACKGROUND

After the United States acquired the vast territories West of the Mississippi, Congress debated how best to encourage settlement of the lands. Rapid settlement was considered desirable both to secure the new lands from foreign

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likely impacts of current and potential claims of such rights of way on the management of the Federal lands, on the access to Federal lands, private lands, State lands, Indian and Native lands, on multiple use activities, the current status of such claims, possible alternatives for assessing the validity of such claims and alternatives to obtaining rights of way, given the importance of this study to the Western public land States. In preparing the Report the Department shall consult with Western public lands States and other affected interests.

The managers expect sound recommendations for assessing the validity of claims to result from this study, consonant with the intent of Congress both in enacting R.S. 2477 and FLPMA, which mandated policies of retention and efficient management of the public lands.

Such validity criteria should be drawn from the intent of R.S. 2477 and FLPMA.

The managers further expect that any proposed changes in use of a valid right of way shall be processed in accordance with the requirements of applicable law."

encroachment and to speed the conveyance of lands from federal to state and private ownership in order to build the new nation. Although Congress enacted many piecemeal laws in furtherance of these goals, the westward movement outpaced Congressional efforts at comprehensive legislation. As a result, many explorers, developers, and settlers were already on the western lands by the time the first national homesteading and land laws were enacted. Comprehensive authority to manage the lands that remained in federal ownership was not enacted until the 20th century.

Mining and mineral development is an example of an area in which federal law was playing "catch up" with events. Private individuals and companies entered upon the federal public domain lands in search of mineral wealth before there was legislated authorization to do so. Sometimes the influx of miners was quite significant, as when thousands of miners flocked to California after the discovery of gold in 1849. Because in many areas even territorial governments had not yet been established, claimants developed local rules and customs to govern the location (establishment) of mining claims and priorities among claimants.

In the 1860's, Congress enacted several pieces of legislation that both legitimized existing occupations of the federal lands and addressed their use prospectively. One of these was the Homestead Act of 1862[4] which provided a system by which citizens could obtain title to public lands for agricultural settlement purposes. The Mining Act of 1866[5] provided an initial system for the recognition of mining claims and for obtaining title to the lands on which mining claims were established. Section 8 of the 1866 Act provided:

> *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.[6]

This provision became section 2477 of the Revised Statutes (R.S. 2477) and later was codified as 43 U.S.C. §932 until its repeal by FLPMA, an act that repealed many previous land laws and put in place a new, comprehensive system for the retention and management of the federal public lands. Title V of FLPMA sets out new provisions for the granting of all kinds of rights of way. Section 706 of FLPMA repealed R.S. 2477 in its entirety, and repealed as to issuance of rights of way almost all other rights of way statutes. However, section 701 states that nothing in the Act terminates any valid right of way existing on the date of approval of the Act. Similarly, section 509 of FLPMA states that nothing in Title V on rights of way "shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or

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

5 Act of July 26, 1866, ch. 262, 14 Stat 251.

6 *Id.*, 14 Stat. 253.

permitted." Therefore, R.S. 2477 rights of way that were valid on October 22, 1976, the effective date of FLPMA, were protected.

After the repeal of R.S. 2477, and in association with promulgation of new regulations to implement Title V of FLPMA that provided new rights of way procedure, the Bureau of Land Management issued a regulation permitting persons, or State or local governments who had constructed public highways under the authority of R.S. 2477 to file maps with BLM showing the locations of highways claimed to be valid existing rights.[7] The initial proposed regulations required the filing of maps within three years, noting that this filing would protect holders against other claims or changes in land ownership. However, the final regulations merely provided an opportunity to file within three years. More streamlined regulations were proposed in 1981 that eliminated 43 C.F.R. §2802.3-6 and the mention of map filings. However, the new final regulations in 1982 included within 43 C.F.R. §2803.5 an opportunity for filing maps as a means of resolving road status, but with no time limit imposed.

A 1988 Departmental Policy Statement set out expansive terms for claiming R.S. 2477 rights.[8] At the same time there was a growing awareness that claiming such roads might disqualify areas previously considered "roadless" from being eligible for inclusion in the National Wilderness Preservation System, and controversies arose as to which roads still might be claimed as R.S. 2477 rights of way.

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 in 1976 was clearly established. 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. 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.

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[7] The initial proposed regulations for 43 C.F.R. §2802.3-6 appeared at 44 Fed. Reg. 58106, 58118 (October 9, 1979), with final regulations at 45 Fed. Reg. 44518, 44521, 44531 (July 1, 1980). The next proposed regulations that eliminated §2802.3-6 and the mention of map filings were at 46 Fed. Reg. 39968-69 (August 5, 1981), with new final regulations adopting 43 C.F.R. §2803.5 again with the opportunity for map filings at 47 Fed. Reg. 12568, 12570 (March 23, 1982).

[8] *Departmental Policy Statement on Section 8 of the Act of July 26, 1866, Revised Statute 2477 (Repealed), Grant of Right-of-Way for Public Highways (RS2477)*, December 7, 1988 ("1988 Policy Statement").

Because R.S. 2477 was a federally enacted grant, questions involving its proper interpretation are questions of federal law.[9] But there are times when federal law incorporates state law as part of the law to apply; this is expressly true of many of the mining law provisions in the 1866 Act. In interpreting the right of way grant, it appears that some aspects may be defined by state law, but the parameters within which state law applies are subject to debate, as will be discussed later in this report.

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

III. 1866 ACT

It is a fundamental rule of statutory construction that every issue of statutory interpretation should begin with a close textual examination,[10] and that the "plain meaning" of a provision must guide its interpretation.[11] 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; is a grant of a right of way for the construction of something; and it is a grant of a right of way for the construction of highways across unreserved lands.

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 most discussions of R.S. 2477, 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.

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[9] Hughes v. Washington, 389 U.S. 290 (1967); United States v. Oregon, 295 U.S. 1, 27-28 (1935).

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

[11] *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).

Like many words in the English language, the term "highway" has more than one meaning; unfortunately, two of its meanings have somewhat opposite connotations, as can be demonstrated from numerous treatises and other sources.[12] 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.[13] Congress has used the term in this sense when it has referred to rivers being free highways.[14]

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 American state law.[15]

Under English law, too, better roads -- those that were built up so as to be literally "high" ways, typically connecting towns or market places, etc. and enjoying 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."[16]

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[12] *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."

[13] Abbott, *supra;* Byron K. and William F. Elliott, The Law of Roads and Streets, 1 (1890).

[14] *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."

[15] *See e.g.*, James Kent, III Commentaries, 548 *et seq.*

[16] 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.

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 passage; *a track for travel*, forming a communication between one city, town, or *place*, and another.[17]

According to the same 1865 dictionary, a "highway" is a public road, a way open to all passengers.[18]

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 lane .... [19]
>
> 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.[20]

Although the terms at times have been used interchangeably in discussing R.S. 2477, "highways" is the term used by Congress. Furthermore, "roads" appears to be the more general term and "highways" the more specific term. In

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[17] Webster's *American Dictionary of the English Language,* 1143 (1865). (Emphasis added.)

[18] *Id.*, at 627.

[19] Webster's *American Dictionary of the English Language*, 959 (1860). (Emphasis added.)

[20] *Id.*, at 552. (Emphasis added.)

other words, while all highways are roads, not all roads are highways, since highways are both public and a more significant kind of road.[21]

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 can seldom, of its own force and vigor, influence the judicial mind engaged in the work of ascertaining and enforcing the legislative intention.[22]

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, had some degree of construction or improvement, and that connected cities, towns, or other significant places, rather than simply two places. 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.

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21 This distinction is still evident in modern usage: the 1977 Webster's New Collegiate Dictionary defines "highway" as "a public road, *esp. a main direct road.*" (Emphasis added.)

22 Elliott, *supra*,at 6.

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 the act also confirmed established rights of way for ditches for the transport of water. As noted, section 8 of the Act granted the highway rights of way in question.

The principal focus of the floor debates on the Act was on the alternative proposed systems for disposing of the mineral lands of the United States, and section 8 was not discussed.[23]

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[23] 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. 66, 39th Cong., 1st Sess. (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 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.

Therefore, in seeking clarification of the intent of Congress in enacting R.S. 2477, we can look only 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,[24] and by Congressional enactments since.

IV. 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, that was later enacted by the new federal government.[25] 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 township tracts 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 as needed. Subsequent settlers took

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See also, the discussion of the enactment of the 1866 act in: Paul W. Gates, *History of Public Land Law Development*, 715-721.

[24] Ute Indian Tribe v. Utah, 521 F. Supp. 1072, 1080, 1087 (C.D. Utah 1981).

[25] Act of May 18, 1796, c. 29, 1 Stat. 464.

title subject to established roads and ways.[26] 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.[27]

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.[28]

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[26] 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).

[27] Mackay v. Uinta Development Co., 219 F. 116, 118 (8th Cir. 1914).

[28] Buford v. Houtz, 133 U.S. 320, 326-327 (1890).

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:

> [illegible]
> 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, and that in the 117 years since the [railroad] grants were made, litigation over access questions generally has been rare.[29]

It is interesting to note that an 1895 Solicitor's opinion found that the government has 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....[30]

The opinion did not mention section 8 of the 1866 Mining Act (R.S. 2477) as relevant to the discussion of mining road access, a fact that argues for an interpretation that section 8 was speaking of roads other than mere individual access roads. 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. 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.

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[29] Leo Sheep Co. v. United States, 440 U.S. 668, 686-687 (1979).

[30] 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.

As noted, the federal government made no specific provision for individual or public access or roads as part of its surveying and disposal systems, but consistently allowed the use of the public lands for roads and other access ways -- both before and after the 1866 Act.

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 permits or attaching 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.

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 lands[31]) and prohibited the obstruction of "free passage or transit over or through the public lands".[32] 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. If R.S. 2477 is interpreted as having granted rights of way for all forms of public access even including footpaths and trails, arguably those rights of way could be protected under state law and there would be less of a need for a federal statute. 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 important 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, 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 "wagon roads", which were to be large, well constructed roads adequate for the movement of troops

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[31] Camfield v. United States, 167 U.S. 518 (1897).

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

and the mail. They were typically required to be built to very substantial standards, involving considerable earth-moving activities, even to the extent of leveling hills. 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.[33]

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."[34]

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 troops typically were well constructed; this statute simply provided a process for condoning use of the military roads by the public. [35]

It is important to reiterate that the problem of securing access and constructing roads throughout the federal public lands subject to the 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 its open lands; settlement was the sole interest of the federal government in the eighteenth and nineteenth centuries, and allowing individual access was such a given factor that it is seldom discussed. Even after enactment of R.S. 2477, the principal work that reviews federal land grants does not discuss access issues, nor even mention the 1866 provision.[36]

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

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[33] Act of June 25, 1864, ch. 153, 13 Stat. 183.

[34] Act of July 2, 1864, ch. 213, 13 Stat. 355.

[35] Act of May 9, 1866, ch. 76, 14 Stat. 45.

[36] 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.

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.

Therefore, at the time of the enactment of the 1866 Act, one sees a federal policy of acquiescence in and protection of acquisition of routine private or individual rights of way on the one hand, together with a policy of subsidizing through land grants major transportation arteries -- whether canals, railroads, or large wagon roads suitable for defense purposes. Against this background, Congress then granted rights of way for the "construction of highways".

In 1872, Congress revisited the mining issues and modified many of the provisions of the 1866 Act.[37] 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.[38] (Emphasis added.)

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 appears to equate highways with wagon

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[37] Act of May 10, 1872, ch. 152, 17 Stat. 91.

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

roads.[39] In addition, it was felt necessary to specify that the new rights of way were also for railroads, because the Department did not construe the term highways as including railroads. It is noteworthy that the Department did not believe highway included railroads, because if that term were generally understood to mean all public avenues of travel, it would include railroads. As will be discussed, cases are split on this issue with respect to the 1866 Act.

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 road ....[40]

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 four-wheeled, motorized vehicles intended primarily for highway use.[41]

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[39] 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, and did not use the term highway. 32 CONG. REC. 2800 (1899).

[40] H.R.Rep. 1163, 94th Cong., 2d Sess. 17 (1976). An 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. Cases typically accord considerable weight to committee reports in interpreting statutes, because they are considered the most reliable and persuasive element of legislative history. Thornburg v. Gingles, 478 U.S. 30, 43 n. 7 (1986).

[41] 43 C.F.R. §19.2.

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:

> "Improved and maintained" -- 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.[42]

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."[43]

Other sections of FLPMA repealed R.S. 2477 and other rights of way statutes and replaced them with a new system of rights of way that integrated such rights better with the new planning processes required by FLPMA and which better protected the federal lands and resources. Therefore, Congress can be said to have been aware of R.S. 2477 when it used and commented on the term "roadless".

If the 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 an 1866 definition of highway as a constructed and improved road that served as a significant public connector.

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[42] USDI, Bureau of Land Management, *Wilderness Inventory Handbook*, 5 (September 27, 1978).

[43] Organic Act Directive No. 78-61, Change 2, at 4 (June 28, 1979).

Given the basic rules of statutory interpretation that statutes are to be construed in a manner that makes them consistent and harmonious,[44] and that statutes over time should be construed to give effect to every provision in all of them,[45] but recognizing that the matter is not free from doubt, it is arguably most correct to give "highways" in the 1866 highway grant its apparently then-preferred and ordinary meaning as referring to significant or principal public roads -- not because the 1976 usage is directly probative of the 1866 usage,[46] but because such a reading harmonizes both statutes, comports with the ordinary meaning of the term highway in 1866, and also is consistent with other uses of the term highway in contemporaneous statutes related to land transportation. If this is the correct approach, reading "highway" and "road" together, highways would be roads that were improved and maintained by mechanical means to insure relatively regular and continuous use, that were used regularly by the public, and that served as important connectors, such as by connecting towns and villages.

V. ADMINISTRATIVE AND JUDICIAL INTERPRETATION

With this look at the language and historical context of the 1866 Act in mind, we turn now to the administrative and judicial interpretation of the provision. Some of this interpretation to date is at odds with the above analysis in several respects, thereby raising issues as to what alternatives may now be possible to clarify and resolve current R.S. 2477 claims.

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 problems during the settlement of the West and the pre-FLPMA absence of coherent policies and authority for the management of the public

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[44] Allen v. Grand Central Aircraft Co., 347 U.S. 535 (1954); Peters v. City of Shreveport, 818 F. 2d 1148 (5th Cir. 1987); United States v. Carr, 880 F. 2d 1550 (2d Cir. 1989).

[45] *See,* Sutherland, *Statutory Construction*, 5th Ed. §51.02 and cases cited n. 11 at 129.

[46] The court in Sierra Club v. Hodel, 848 F. 2d 1068, 1082 (10th Cir. 1988) 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.

lands. No application or approval from the government was considered necessary to perfect an R.S. 2477 grant.

Although we know of no contemporaneous agency interpretation of the Act, an 1898 decision of the Secretary determined that dedication of highways along section lines, without construction, did not complete a grant.[47] A 1938 regulation that was repeated over time simply stated that a highway grant became effective "upon the construction or establishing of highways in accordance with the State laws."[48] We note, however, that this position retains the crucial statutory elements of "construction" and "highways", and does not necessarily mean that state interpretations that vitiate or eliminate these elements are valid. This issue will be more fully discussed later.

Too much can be read into this silence of the federal government. In reviewing the cases, it is important to distinguish those decided before FLPMA, when the federal government had much less interest in the validity or existence of rights of way of *any type* across its lands,[49] and much less management authority over the remaining public domain lands. For much of the time before the enactment of FLPMA it may well simply not have mattered whether a particular right of way was a highway that qualified under R.S. 2477, or was some other type of road for which some other federal permission could readily be demonstrated or obtained.

Over the years, federal policies increasingly stressed retention of the public lands in national ownership and the affirmative management of the remaining public domain lands to conserve and protect the lands and resources. In 1976, both FLPMA and a comprehensive statute governing planning and management of the national forests were enacted. These two acts modernized the management of the majority of federal lands. As noted, FLPMA expressly recognized a policy of retention of the remaining public lands together with management to preserve their scientific and ecological values and to prevent unnecessary and undue degradation.[50] FLPMA also repealed many of the piecemeal right of way statutes, including the 1866 Act.

Therefore, early state cases not involving the federal government are questionable precedent for testing the validity of R.S. 2477 claims now, not because the criteria for testing validity have changed, but because the context in which the inquiry arises has changed. The past failure of the federal government to litigate R.S. 2477 claims is arguably more indicative of the historical context and past policies of federal land management regarding rights

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[47] 26 L.D. 446 (1898).

[48] Par. 55, Circ. 1237a, May 23, 1938; 43 C.F.R. §244.55.

[49] *See*, Wilkenson v. Dept. of Interior of United States, 634 F. Supp. 1265, 1274-1275 (D. Colo. 1986).

[50] 43 U.S.C. §§1701(a); 1732(b).

of way, than it is probative of a particular federal legal position on R.S. 2477 itself, simply because there was no reason to focus on the issue. In any event, Congress ended past practices and policies in 1976.

[illegible] regulation permitting persons, or State or local governments who had constructed public highways under the authority of R.S. 2477 to file maps with BLM showing the locations of highways claimed to be valid existing rights. The regulation states that the filings were not conclusive as to the existence or non-existence of the highways (leaving that final determination to the courts), but were to facilitate management of and planning for the public lands. As originally proposed, the regulation set out a 3-year period for such filings, but this time limit was eliminated in the final regulations in 1982.[51]

A new Departmental Policy was issued in 1988.[52] According to the March, 1993 Draft Task Force Report, circumstances in Alaska drove the new policy on R.S. 2477: "The 1988 DOI policy, attempting to account for the perceived uniqueness of the Alaska situation, put forward loose criteria for R.S. 2477 claims and applied these criteria to all Federal lands under DOI jurisdiction in all 30 Public Land States."[53]

Among these 1988 criteria was one that set out minimal construction requirements and stated that removal of rocks and vegetation by hand, or the mere passage of vehicles might be sufficient. The 1988 Policy also stated that a qualifying highway could be a trail or a footpath. The Policy did not include historical analysis for the positions it asserted, and the Policy was not issued with notice and opportunity for public comment.

The position of the Department consistently has been that the elements set out in the statute must be complied with: namely that there must be

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[51] The initial proposed regulations for 43 C.F.R. §2802.3-6 at 44 Fed. Reg. 58106, 58118 (October 9, 1979) required the filing of maps within three years, noting that this filing would protect holders against other claims or changes in land ownership. The final regulations merely provided an opportunity to file with three years: 45 Fed. Reg. 44518, 44521, 44531 (July 1, 1980). More streamlined regulations were proposed that eliminated §2802.3-6 and the map filings: 46 Fed. Reg. 39968-69 (August 5, 1981). The new final regulations for 43 C.F.R. §2803.5 at 47 Fed. Reg. 12568, 12570 (March 23, 1982) provided an opportunity for filing maps as a means of resolving road status, and no time limit was imposed.

[52] *Departmental Policy Statement on Section 8 of the Act of July 26, 1866, Revised Statute 2477 (Repealed), Grant of Right-of-Way for Public Highways (RS 2477)*, December 7, 1988 ("1988 Policy Statement").

[53] Draft Task Force Report, at 23.

construction of a highway across unreserved public lands.[54] However, some of the details of the Agency's articulation of these elements have changed over the years, especially in the 1988 Policy, and some aspects of agency interpretations may not comport with the probable intent of Congress, as analyzed above.

The contemporaneous and reasonable interpretation of the agency entrusted with implementing a law is entitled to deference.[55] In this instance, the BLM is the principal agency dealing with R.S. 2477 rights of way, since the grants were for highways across public lands that were not reserved at the time of the establishment of the roads.[56]

However, as noted, there does not appear to have been any contemporaneous interpretation adopted by the Department. Perhaps the current extensive study by the Department will compile more of the history of the pre and post-FLPMA positions of the Department on R.S. 2477 issues.[57] At the present time, it appears that except for the 1898 decision that mere declarations of highways along section lines without actual construction did not constitute completion of the grant, the 1938 regulation, the 1959 Solicitor's Opinion on mining access, and a few other pre-FLPMA documents, the Department's analysis has been almost entirely post-FLPMA. As noted, the Department seems to have consistently taken the position that a prospective grantee must comply with the elements of the granting law, but the arguably minimal standards of the 1988 policy call into question the meaning of the construction requirement.[58]

Until the current efforts of the Task Force, the Department of the Interior does not seem to have extensively analyzed the intended meaning of "highways" in the 1866 Act,[59] or to have correlated that definition either with the

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[54] *See,* 26 L.D. 446 (1898); Bureau of Land Management Manual, Part 2801.48 (evolving through Release 2-152, 2-229, 2-263, and 2-266); Letter and Memorandum from Deputy Solicitor Ferguson to Ass't Attorney General Moorman, April 28, 1980; and 1988 Policy Statement.

[55] Udall v. Tallman, 380 U.S. 1 (1965); Red Lion Broadcasting v. F.C.C., 395 U.S. 367 (1969).

[56] Other agencies that manage reserves of various types that were created after the establishment of such rights of way also are faced with these issues, but BLM usually was the managing agency at the time the right of way was created.

[57] The Draft Task Force Report does not discuss documents beyond those discussed herein, but the Final Report will contain extensive Appendexes and possibly additional documents.

[58] *See,* 1988 Policy Statement, at 2.

[59] *See*, Ferguson opinion, *supra*, at 8.

statutory "construction" requirement, or with the Department's own analyses of mining access rights discussed previously, or with the use of "road" for purposes of wilderness review. Agency interpretations that are promulgated long after the act in question or that are inconsistent are not entitled to the same deference.[60] a rule that arguably may apply to agency interpretations of R.S. 2477.

A. Judicial interpretation

Judicial interpretation of R.S. 2477 has been inconsistent and does not provide clear precedent on some of the most important issues. For the most part, the cases predate the enactment of FLPMA, were in state courts, typically were cases in which the federal government was not a party, and therefore are not binding on it with respect to possible federal issues.[61] It also appears from an examination of the principal state cases, that courts sometimes indulged in dicta (non-binding judicial discussion) and the pronouncement of broadly worded rules not warranted by the facts before the court. A close examination of the facts of these cases often indicates that the roads in question clearly were constructed highways and, therefore, there was no need to resort to the broad generalizations or rules for which the cases are cited. In addition, the cases sometimes are cited for rules broader than those actually formulated by the courts.

The following discussion is not a definitive consideration of all cases and issues, but rather an initial look at some of the more important principles and most frequently cited cases and issues that have arisen in litigation involving R.S. 2477.

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60 Secretary of the Interior v. California, 464 U.S. 312, n.6 at 320 (1984).

61 The Department of Justice in an amicus brief submitted in 1986 in *Alaska Greenhouses, Inc. v. Anchorage*, (Civ.A85-630, D. Alaska) stated: "In any event, it is not at all unusual for federal courts to have to interpret federal statutes in a manner inconsistent with prior state law which remained unchallenged for a long period of time by federal authorities." *See also, e.g.* Federal Power Commission v. Oregon, 349 U.S. 435 (1955) in which the Supreme Court held that Congressional language on severance of water rights on federal public lands (including a section of the 1866 Act at issue here), which cases in state courts had concluded meant that all use of water in the West would be governed by state law, did not apply to federal reservations and hence did not bind the United States as to its own use of water; and United States v. California, 332 U.S. 19, 39-40 (1947).

B. Role of State law.

One of the most fundamental and thorny issues is the proper role of state law in defining R.S. 2477 rights of way. Clearly there is some role for state law [illegible]

The grant of highway rights of way under the 1866 Act and the interpretation of that Act raises questions of federal law.[62] A federal grant usually is construed in favor of the government. However, this strict interpretation has been held to be rebutted with respect to many grants made to assist in the settlement of our country, because of the great public interests intended by those grants. Courts have applied both approaches in this instance.[63]

Clearly, federal law may incorporate state law as federal law in some instances, and the 1866 Act, at least in part, is such an instance. Section 8 of the 1866 Act does not specify how a highway grant is to be accepted or the scope of the rights granted, and state law can play a role in defining these and certain other aspects.

The principal issue is whether state law may vitiate or contradict the express statutory elements. Arguably it cannot. This has been held to be true in other analogous instances. The portions of the 1866 Act that pertain to mining and mineral rights expressly recognize and permit state and local law and even local customs to apply if they are "not inconsistent with the laws of the United States." Here the requirement that state and local law comport with the related federal requirements is express. Although the highway grant in section 8 of the 1866 Act does not expressly incorporate state law and does not expressly allow it if not inconsistent with the laws of the United States, there are many aspects of the highway grant on which the Act is silent, giving rise to the implication that state law may supply those details within the parameters established by the Act. As noted above, the BLM has taken the position that state law on the construction of highways applies to determine at what point a grant under the section becomes effective. This position is not on its face inconsistent with the terms of the grant.

Another example is section 8 of the Reclamation Act of 1902, which expressly states that the Secretary of the Interior shall comply with state laws in carrying out that Act and is silent as to consistency. The Supreme Court has held that state law could not contravene federal law or frustrate the federal

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[62] Hughes v. Washington, 389 U.S. 290 (1967); United States, v. Oregon, 295 U.S. 1, 27-28 (1935).

[63] *See, e.g.* cases on railroad grants, such as Denver & R.G.R. Co., 150 U.S. 1 (1893); Oregon & C. R. Co. v. United States, 238 U.S. 393 (1915), but see also e.g. Burlington, K. & S.W.R. Co. v. Johnson, 38 Kan. 142, 16 P. 125 (1887).

purposes.[64] Therefore, it would seem that as to R.S. 2477, state law may apply to elaborate on the Act, but must comport with the requirements of the Act.

The highway grant is succinct, but does contain discernible elements that must be complied with as part of the federal grant. The grant is for the purpose of 1) the construction of 2) highways 3) across public lands that 4) are not reserved at the time of acceptance.

The majority of cases interpreting R.S. 2477 have been state cases not involving the federal government. The principal case involving the United States that is cited for the proposition that state law controls is the "Burr Trail" or *Hodel* case.[65] But the holding in this case may not be as broad as is sometimes asserted.

On appeal, the case involved only the *scope* of an R.S. 2477 right of way, since the valid *establishment* of the road was not before the court, this point having been conceded. Issues as to establishment could involve whether the road was constructed adequately, was on lands unreserved at the time of establishment, or was a highway within the meaning of the statute; issues as to scope could involve the width and range of permissible uses and improvements that can be said to have been included within the rights of way granted. The specific issue before the court was whether a proposed subsequent widening of the road was reasonable and necessary under Utah law, and within the right that was granted. Although the holding of the court in *Hodel* does not apply to establishment, it is sometimes cited as precedent on that issue.

The appellate court in *Hodel* considered the 1980 Ferguson opinion letter[66] and rejected a reading of that letter that would result in no role for state law. The court then correctly noted that the second possible reading of the letter -- that it speaks only to what is necessary to *perfect* an R.S. 2477 right -- did not help appellant because only the question of scope was before the court.[67] The court then stated:

> The third possible reading of this letter would return us to BLM's regulations: as a matter of federal law, state law has been designated as controlling. This third reading, we think, is most consonant with reason and precedent.[68]

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64 California v. United States, 438 U.S. 645 (1978).

65 Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988).

66 See n. 53, *supra*.

67 *Id.*, at 1081.

68 *Id.*

Given the language that immediately precedes this quote, the best reading of the opinion appears to be that the court held that state law is controlling as to the scope of an R.S. 2477 right of way. To the extent that the opinion might be read as holding that state law is controlling as to establishment, one can argue that that is [illegible] necessary to the decision of the court.

The court's reliance on the wording of the BLM regulations also warrants comment. The court states that the federal regulations "heavily support a state law definition."[70] Yet, as noted above, the federal regulations retain the three essential elements of the statute: namely *construction* of *highways* on *unreserved* lands in accordance with state laws. Therefore, it is not clear from the face of the regulation that state law inconsistent with these requirements could result in a valid acceptance of the grant offer. Therefore too, the acquiescence of Congress in this long-standing agency interpretation may not mean that Congress agreed to state terms that contradict the statute.

The valid existence of an R.S. 2477 road was in controversy in the lower court in *Hodel*. The district court had held that under R.S. 2477, a right of way could be established by public use under terms provided by state law.[71] The court cited two other federal cases as authority for this proposition. In one of them, *United States v. 9,947.71 Acres of Land*, the court concluded that a mine access road was a qualifying R.S. 2477 public highway that resulted in a private property interest in the user that was compensable under the 5th Amendment, even though the road definitely was *not* a public highway under state law.[72] This case does not provide a clear interpretation of R.S. 2477.

The other federal case cited by the district court for the rule that state law governs establishment of R.S. 2477 highways notes that at the time of that decision (1986), there was no direct and controlling precedent for the legal conclusions reached.[73] The parties in that case "were in agreement" that the right of way statute was to be applied by reference to state law to determine

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69 See Ferguson letter, *supra*, at 9-11, wherein the author makes it clear that it is his opinion that state law cannot validly conflict with the statutory elements, and that the 1938 regulations should not be interpreted as meaning that state law contrary to the statutory elements may prevail.

70 *Id.*, at 1080.

71 Sierra Club v. Hodel, 675 F. Supp. 594, 604 (D. Utah 1987), citing Wilkenson v. U.S. Department of Interior, 634 F.Supp. 1265, (D.Colo 1986); United States v. 9,947.71 Acres of Land, 220 F. Supp. 328 (D.Nev. 1963).

72 220 F. Supp. 228 (D.Nev. 1963).

73 Wilkenson v. Dept. of Interior, 634 F. Supp. 1265, 1280 (D. Colo. 1986).

when the offer of the grant has been accepted by the "construction of highways."[74] The court then pointed out that under Colorado law, the term highways could include footpaths, that the use of a road by a single person could suffice, and that mere use of a highway without construction was "sufficient."[75] By implication, the court seems to have meant that elements sufficient to make a highway under state law were sufficient under R.S. 2477, even if state law eliminated one of the federal requirements, *i.e.* construction. Nevertheless, the court probed the road segments in question and concluded that *construction* on "Serpent's Trail", part of the highway connecting the two towns in question that was used by people and livestock, was completed before inclusion of the lands in a federal National Monument. The court also noted that the roads in question were described as surveyed and actually built; visited by approximately one thousand people a year at the turn of the century; traveled by wagons; built in part under a county contract; completed with volunteer labor, financial contributions from Glade Park residents, and payments from the County; and as serving as connectors between towns and the next state.[76] These appear to be qualifying circumstances that satisfy the elements of the statute. One segment was disqualified because the construction was after the establishment of the Monument.[77]

Therefore, the district court opinions in *Wilkenson* and *Hodel* enunciated the rule that state law governs even as to establishment, but neither case had before it an instance where *both* the relevant state law purported to eliminate the R.S. 2477 statutory elements *and* the road in question was unimproved.

To summarize, the available federal case law is sparse and does not provide definitive and clear precedent on all issues in all jurisdictions. While it may be said that federal law assents to the application of state law as a general matter,[78] not all issues have been definitively resolved. We know of no federal case in which the facts presented the issue of an unimproved highway recognized under state law that contradicts the statutory requirements as to establishment of R.S. 2477 rights of way.

In contrast to the paucity of federal cases, there is a significant body of state cases interpreting R.S. 2477. When one considers state cases, two things are noteworthy immediately: that state law varies as to requirements for accepting R.S. 2477 grants, and despite the "rules" for which many of the cases

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[74] *Id.*, at 1272.

[75] *Id.*

[76] *Id.*, at 1268-1269, 1272.

[77] *Id.*, at 1273.

[78] Because R.S. 2477 was repealed in its entirety in 1976, it is state law in effect on that date that is applicable.

are cited, when one examines the actual facts of the cases, the highways found adequate by the courts probably met the elements of the 1866 Act.

One of the principal cases cited for the proposition that state law determines when the offer of a grant has been accepted by the construction of highways is an Arizona case.[79] This rule is correct with reference to that state's law, since Arizona law required both construction and designation of public highways by official action.[80] Indeed, the rule would always be correct -- that state law determines when the offer of a grant has been accepted *by the construction of highways* so long as state law does not contravene the two elements of construction and highways,[81] and so long as the lands across which a highway runs were not reserved at the time the highway was constructed.

If the governing rule is articulated as being that a valid R.S. 2477 highway is one that is both a valid public highway under the laws of the accepting state and one that also meets the federal requirements, the disparate body of state cases can be seen as essentially harmonious and actual areas of conflict with the federal requirements appear few. This interpretation is also consistent with the Department's earliest interpretations.

Furthermore, in many of the cases cited for the application of state rules that apparently deviate widely from the federal requirements, the actual rule of the court may be misstated in later references, or one finds that under the actual facts before the court the road in question appears to clearly qualify.[82] Therefore, the extent to which there is clear precedent for the premise that roads that do not meet the federal criteria can nonetheless be valid is open to debate.

The state law applied by the courts varied widely. Some of the western territories and new states expressly addressed the issue of roads, especially after the enactment of the 1866 provision. Some state statutes clearly articulated how the highways were to be established and hence how the grant was to be

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79 County of Cochise v. Pioneer National title Ins. Co., 115 Ariz. 381, 565 P. 2d 887, 890 (Ariz. Ct. App. 1977).

80 Arizona Revised Statutes, §§2736 *et seq.* (1887).

81 *See*, Warren v. Chouteau County, 265 P. 676 (Mt. 1928), in which the Supreme Court of Montana stated that a R.S. 2477 grant of a right of way for highway purposes over the public domain does not become operative until accepted by the public by the construction of a highway according to the provisions of the laws of the state. In Moulton v. Irish, 67 Mont. 504, 218 P. 1053 (1923), the court found that the road in question in that case "was never actually opened to travel, and was never traveled by the general public, nor was there a formal order made by the board declaring it a public highway, as required in this state...." *Id.*, at 680.

82 *See, e.g.* Wilkenson, *supra*.

accepted. Where state law was clear, there are few disputes today as to which roads qualify under R.S. 2477. Again, for example, the early Arizona law that provided that all roads and highways in the territory of Arizona which have been located as public highways by order of the board of supervisors, or recorded as public highways [illegible] be public highways.[83]

The law of other states is not as clear, and hence controversies now exist as to whether a valid R.S. 2477 right of way exists. In Utah, for example, evidently there was no formal procedure for accepting the highway grant and the status of roads in that state consequently is unclear.

Some states addressed roads in several ways, speaking both to establishment of highways, and to roads serving individual properties. South Dakota is an example of such a state, having provided both for public highways along section lines and for private access roads.

In contrast to the American system, the Canadian system of surveys also used a township/section system, but expressly provided for road corridors along all section and township lines.[84] Some states adopted the Canadian approach and specified that rights of way existed along section lines. South Dakota law states:

> There is along every section line in this state a public highway located by operation of law, except where some portion of the highway along such section line has been heretofore vacated or relocated by the lawful action of some authorized public officer, board, or tribunal.[85]

If a territorial or state government enacted such a law in response to the 1866 grant, the strips along section lines were considered as dedicated for highway purposes and subsequent patentees took title subject to these rights of way. Eventually, most of these roads were actually constructed, relocated, or vacated in accordance with state law.

States might also separately address the issue of other roads. Again, South Dakota is instructive. Roads that developed simply by dint of public use could be public highways if the local government accepted them as such, worked on

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[83] Arizona Revised Statutes, §§2736 *et seq.* (1887).

[84] "The Dominion lands shall be laid off in quadrilateral townships, containing thirty-six sections of one mile square in each (except in the case of those sections rendered irregular by the convergence or divergence of meridians as hereinafter mentioned), together with road allowances of one chain and fifty links in width, between all townships and sections." (Act of May 15, 1879, 42 Victoria, Chap. 31.)

[85] §31-18-1, South Dakota Codified Laws (1984 Revision). The width of these highways is stated as being 66 feet. *Ibid*, §31-18-2.

them and kept them in repair as such for a period of 20 years. Mere usage of a way by the public did not suffice.[86] Other (non-public highway) roads could be established in other ways: a 1909 law provided relief for owners of isolated tracts of land, enabling them to obtain a right of way across adjacent lands to reach a public highway, and providing for the payment of compensation to the landowners yielding up the easement.[87] In many states, private property interests also could be obtained by adverse possession against the property of another.[88]

One sees in the laws of South Dakota, a gradation of provisions, some of which address private and access roads, and others of which address establishment of public highways that clearly are R.S. 2477 roads. Questions remain, however.

C. Is construction necessary to comply with the grant?

The necessity for actual "construction" is the principal focus of the issue of the proper role of state law in articulating acceptance of the 1866 grant offer, and has already been addressed in part in the general discussion above. One example of a situation in which the construction requirement arises is in the context of section line rights of way. If section line highways, or other public highways dedicated by operation of law, were not constructed by the time the federal grant was repealed, what is the status of such highways? Are they valid existing rights within the intent of FLPMA simply because they were segregated and dedicated "for highway purposes", or did they need to have been actually constructed by the time of the rescinding of the federal grant? The issue is an important one, because some states may press such claims now.[89]

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86 §§31-3-1 and 31-3-2, South Dakota Codified Laws (1984 Revision).

87 Ch. 108, Laws of 1909, Compiled Laws of South Dakota (1910).

88 §47-0603, North Dakota Revised Code of 1943.

89 Alaska evidently may claim section line rights of way even if they were not constructed by 1976, because so much of the state was not even surveyed at that time, and the state has extensive infrastructure needs as yet unmet that were served by R.S. 2477 in other states. *See,* the Alaskan state report: Senate Transportation Committee RS 2477 Task Force, Phase II Report 67 (1986) citing AS 19.10.010 (1975). The Senate Committee Task Force Report also gives "highways" a generic definition that includes paths, trails, walks, etc. *Id.,* at 86.

In enacting the Alaska National Interest Lands Conservation Act (Pub. L. No. 96-487, 94 Stat. 2374)(ANILCA), Congress took note of the undeveloped status of Alaska's transportation system and provided special rights of way provisions for crossing federal conservation areas in that state. The Committee reports do not indicate that Congress considered R.S. 2477 as providing any prospective help on the issue.(*See,* S. Rep. 1300, 95th Cong., 2d Sess. 53, 249 (1978), and H.R. Rep. 1045, Part 1, 95th Cong., 2d Sess. 207, 243 (1978).

The cases usually cited as authority for the conclusion that section line right of way dedications suffice as acceptance of the R. S. 2477 grant are pre-FLPMA cases between a state or state subdivision and a citizen, not between the federal government and a state.

In this context of pre-FLPMA litigation between the state governmental entity that dedicated the section line rights of way during the time when the federal offer of grant was still outstanding, it is reasonable that the state dedication of the lands is effective against a subsequent titleholder of the lands crossed by a right of way, even if the highway was not yet constructed when that person took title. Under state law, the dedication is the lawful first step of a highway construction process that could be completed over time, and that dedication is enough to impose a state interest in the property that is good against subsequent titleholders.[90]

However, this is not to say that the paper dedication is effective against the federal government if the offer of the federal highway grant is rescinded before construction has been completed. A better argument appears to be that the roads must be constructed to comply fully with the terms of the federal highway grant, and if they were not so constructed by the time the grant offer is repealed, then the opportunity to comply with the grant offer was extinguished upon repeal.

During the FLPMA debates there was a discussion between Senators Stevens of Alaska and Haskell of Colorado about whether Alaska could continue to claim roads created from trails that "have been graded and then graveled and then are suddenly maintained by the state", or which *in fact had been built*, (emphasis added) but which might not have been formally declared to be public highways. Sen. Haskell responded that formal perfection was not necessary if the existing use was recognized as a public highway under state law. 120 Cong. Rec. 22283-22284 (July 8, 1974). Obviously, the roads being discussed were constructed and hence were not unconstructed section line roads.

Possible solutions for the special needs of Alaska that may not be adequately met by Title XI of ANILCA and Title V of FLPMA present issues beyond the scope of this paper. One can note, however, that applying R.S. 2477 even in non-qualifying situations may not be the only or best remedy.

[90] Tholl v. Koles, 70 P. 881 (Kan. 1902); Girves v. Kenai Peninsula Borough, 536 P. 2d 1221 (Al. 1975); Bird Bear v. McLean County, 513 F. 2d 190 (8th Cir. 1975). However, even states with section line statutes view the effect of such acts differently depending on the reason for inquiry. In Pederson v. Canton Township, 34 N.W. 2d 172 (S.D. 1948), the South Dakota Supreme Court held that although the section line statute constituted a dedication of section line highways, if a part of a section line highway was not actually constructed, there was no duty for the County government to warn motorists under an abandoned highway statute because in fact there never had been a highway.

That section line dedications alone, without construction, do not complete grants has long been the consistent position of the Department.[91] This is doubly true if construction was not begun before repeal of the granting statute.[92]

The above discussion focused on the circumstance when roads were not constructed at all by the time of repeal. An additional issue is what constitutes sufficient actual "construction."

Again, the laws of some states did not pose any issues, since the duty to improve and maintain public highways was expressly set out.[93] The position of state law in other states is not so clear.

The most difficult question is whether mere use by the public can ever suffice to establish a highway under the grant. Again, some of the cases cited for the proposition that public use alone can result in a public highway appear to be overstated. For example, *Central Pacific Railway v. Alameda County* is frequently cited for the proposition that valid R.S. 2477 highways could be established by the mere passage of wagons. The court did note that in that case "The original road was formed by the passage of wagons, etc., over the natural soil...."[94] However, the Court also had noted that "A public highway ... was *laid out and declared* by the county in 1859, and *ever since has been maintained.* During that time it has served as one of the *main arteries of travel* between the bay regions of southern Alameda County and the Livermore Valley."[95] Therefore, regardless of how the road originated, it did seem to qualify under R.S. 2477.

There are two issues involved in some of the cases that sometimes seem to be confused: 1) whether public use without some formal acceptance by a governmental entity may nonetheless result in a "public highway" and 2)

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91 26 L.D. 446 (1898); Ferguson Op., *supra*; 1988 Policy Statement, *supra*, at 2.

92 The 1988 Policy Statement required that construction had to have been initiated prior to repeal and actual construction had to have followed within a reasonable time.

93 Arizona Revised Statutes, §§2740 and 2741 (1887) required public highways to be kept clear from obstructions and in good repair, with graded banks, bridges and causeways as necessary, and authorized the use of gravel, dirt, timber, and rock for improving the roads.

94 284 U.S. 463, 467 (1932).

95 *Id.*, at 465-466. (Emphasis added.) This case also reinforces the argument that the roads intended as qualifying under R.S. 2477 are significant roads considered public highways.

whether a highway established merely by public use without further improvement or construction of the roadway may qualify under R.S. 2477.

The first point may be answered by the statutory and case law of the state involved. Although some of the [illegible] may not work [illegible] example, by discussing "adverse possession" against the United States, which does not lie),[96] there is one avenue of analysis that seems valid. Under the laws of some states, public use of sufficient type over sufficient time may result in the creation of a public highway. Where the highway is on unreserved public lands, a valid R.S. 2477 highway may result, not because citizens are adversely possessing title against the United States, but because if public use of a certain type and duration results in a "public highway" under state law, this could be one means of accepting the federal grant offer.[97]

The second issue is, if public use may result in the creation of a public highway under state law, does the resulting highway qualify under federal law even if the road was not "constructed"? In some of the more arid parts of the country, repeated passage may compact a roadbed capable of sustaining regular use. If a road that was never improved or maintained nonetheless served as a well-traveled transportation corridor between towns, and was recognized as a public highway under state law, could such a road qualify under R.S. 2477?

It seems unlikely as a factual matter that these circumstances would develop because a road is not likely to be both totally unimproved and still support the kind of regular and continuous use as a significant connector that qualifies as a significant road;[98] even in arid areas, ditches and grading may be necessary at certain places to cope with seasonal rains. It also seems unlikely that a road would remain unimproved once it eventually became formally accepted as a public highway and maintained by the local government, circumstances that typically occurred well before 1976.

Again, an examination of the actual facts and holdings in the principal cases cited for the proposition that qualifying roads may result from mere public use reveals that the rule actually stated by the courts was that use by the public that continues for such a length of time under such conditions as to clearly indicate an intention on the part of the public to accept the grant is sufficient to establish a public highway. This rule may be more a statement of when a public highway results from public use without governmental dedication than it is a rule that eliminates the element of construction for R.S. 2477 analysis. In many cases, the roads in question met all of the elements of the 1866 Act.

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[96] United States v. California, 332 U.S. 19, 39-40 (1947); Texas v. Louisiana, 410 U.S. 702, 714 (1973), *rehearing denied*, 411 U.S. 988 (1973).

[97] Hatch Brothers Co. v. Black, 165 P. 518 (Wy. 1917); Lindsay Land & Live Stock Co. v. Churnos, 285 P. 646 (Ut. 1930).

[98] See n. 40, *supra*, for a discussion during a markup of FLPMA to the effect that unimproved ways in arid areas were not roads under FLPMA.

In one case, for example, the road served several towns and several purposes, and citizens had spent considerable private funds installing ditches, bridges, and dugways.[99]

[illegible]

been cited for the proposition that public use *without construction* is sufficient under R.S. 2477. The court in that case actually worded the rule as stated above, and noted that improvements had been made even without public funds, that the road connected points between which there was considerable public travel, and that the use made of the road was as general and extensive as the situation and surroundings would permit had the road been formally laid out as a public highway by public authority.[100] Therefore, *Lindsay* does not appear to stand for the proposition that no construction or improvement of a road is necessary to construct a public highway under the terms of R. S. 2477. This was not the rule stated in the case and was not the situation before the court. Indeed, of the eight Utah cases following *Lindsay*, six specifically indicate that the road in question was constructed or improved; the other two cases do not address the issue.

This is significant because in considering what alternatives may now exist for processing R.S. 2477 claims, it has been said that any attempt to adhere to the language and requirements of the Act would be disruptive of long established expectations. Yet, it may well be that an analytic approach of asking first whether a right of way is a public highway under state law, and then whether the road is a qualifying highway under federal law, in fact will prove to be consistent with most of the case law to date.

As noted above, the Department of the Interior has consistently maintained that construction must have taken place. The original regulation of the Department incorporated this element of the statutory language, as did all subsequent regulations, even past the enactment of FLPMA. The 1980 Ferguson opinion stated that the term "construction" must be construed as an essential element of the grant offered by Congress; otherwise Congress' use of the term would be meaningless and superfluous. The states could only accept that which was offered by Congress and not more.[101] The Ferguson opinion also interpreted the Department's regulation, which stated that R.S. 2477 grants were effective "upon construction *or establishment* of highways" in accordance with state law" (emphasis added), not as meaning that state law could provide means other than construction to establish R.S. 2477 highways, but that state law could impose regulations in addition to construction, such as by specifying formalities.[102]

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99 Hatch, *supra*, n. 96.

100 Lindsay, *supra*, n.96, at 648.

101 Ferguson, *supra*, at 9.

102 *Id.*, at 10.

In the initial regulations of the Department to implement the new FLPMA Title V rights of way, the Department called upon persons "who had constructed public highways" to submit maps locating such highways for notation on the records of the Department in order to facilitate the new federal planning and management mandated by FLPMA. Here again, the Department consi[illegible] use the same phrasing; that which is required by the relevant statute.

The consistent position of the Department together with the fact that the Congress stated that the grant was for the "construction" of highways,[103] the use of the term "road" by Congress in 1976, together with the 1976 committee explanation of that lesser term as requiring some degree of construction or improvement, lend support to the argument that some construction or improvement of a possible R.S. 2477 road is a necessary element, even with respect to roads established by public use in states that recognize such roads as public highways.

While a contrary position has been asserted, as noted above, a review of the principal cases indicates that the number of state or federal cases holding -- based on an unimproved road at issue -- that construction is not necessary to complete a valid grant may prove to be few.

What type and amount of construction qualifies also is a difficult question.

The Ferguson opinion stated that construction ordinarily means more than mere use, and entails actual building such as grading, paving, placing culverts, etc. to prepare the highway for actual use.[104] In contrast, the 1988 Policy Statement states that the simple moving of large rocks and removal of high vegetation may suffice:

> Construction is a physical act of readying the highway for use by the public according to the available or intended mode of transportation -- foot, horse, vehicle, etc. Removing high vegetation, moving large rocks out of the way, or filling low spots, etc., may be sufficient as construction for a particular case.[105]

To the extent this statement means that the mere moving of rocks and vegetation by hand qualifies as construction, this does not appear to comport with Congress's intent of granting rights of way for principal or significant roads. Also, as discussed above, the Department incorporated the concept of road improvement *by mechanical means* set out in a FLPMA committee report

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[103] The contemporaneous dictionaries defined "construction" very straightforwardly as "The Act of constructing; the act of building, or of devising and forming; fabrication; composition .... 1865 Webster's, *supra*.

[104] Ferguson letter, *supra*, 5-7.

[105] 1988 Policy Statement, at 2.

as the analysis of what could constitute a road under §603 of FLPMA. Again, to require less for a right of way to qualify as a highway than is required to be a road might be seen as inconsistent.

As will be discussed [illegible] of the administrative alternatives considered in the Task Force Report.

D. Scope

The 1866 Act is silent as to the extent and features of a right of way, and the regulations of the Department did not elaborate on the scope of R.S. 2477 grants. In the *Hodel* case involving the Burr Trail, the 10th Circuit held that the scope of a valid R.S. 2477 right of way generally is to be determined by the laws of the state in which the right of way is located.[106]

Under this rule, analysis of the scope of a particular right of way will vary depending both on the facts of each case and the laws of the state in which the right of way is located. The role for federal law is open to debate, since there have been few post-FLPMA cases.

The *Hodel* case addressed only the part of the road in question that was adjacent to Wilderness Study Areas (WSAs). The court discussed the relationship of the permissible scope of the right of way under Utah law to the management duties of BLM in that context.

The district court in *Hodel*, applying Utah law, found that a valid R.S. 2477 right of way includes the potential to expand the right of way to a width that is "reasonable and necessary" for the type of use to which the road had been put.[107] The 10th Circuit affirmed on this point, adding that reasonable and necessary must be read in light of traditional uses to which the right of way was put. Furthermore, the court felt that the basic principles of law governing easements would control abuses, in that owners of the dominant and servient estates must exercise their rights so as not unreasonably to interfere with each other.[108]

Although the appeals court stated that state law controlled and that state law held an easement was limited to the original use for which it was acquired, the court next stated that the county's right of way was not limited to the use to which it was first put, because R.S. 2477 was an open-ended and self-executing grant under which new uses automatically vested. The court apparently meant that all the particular highway uses that developed over the years before 1976 would determine the reasonable and necessary scope of valid

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[106] Sierra Club v. Hodel, 848 F. 2d 1068, 1080-1081 (10th Cir. 1988).

[107] Sierra Club v. Hodel, 675 F. Supp. 594, 607 (C.D. Utah 1987).

[108] Sierra Club v. Hodel, 848 F. 2d at 1083, citing Utah cases.

expansion.[109] The court noted that the district court had found expanding the road to promote economic development was within the historic uses of the road as a "vital link between the country's major centers of activity".[110]

The district court had directed the county to apply to BLM for a right of way permit for a part of the road segment that needed to be relocated from its historic location. The appeals court agreed, but added that the BLM could not deny the permit or impose conditions it usually could impose on rights of way granted under Title V of FLPMA, but that BLM could specify where the road should be relocated in order to have the least degrading impact on the WSA.[111]

The court had perceived a conflict between the saving provisions of FLPMA that preserved the valid R.S. 2477 right of way, and the duty imposed on BLM in §603(c) to manage WSAs to avoid impairing their wilderness values and to avoid unnecessary and undue degradation. Congress had specified in §603 that certain other uses were to be allowed to continue in WSAs, but did not speak to valid existing roadways. BLM had analogized valid existing highways to other grandfathered uses and afforded them the same protections, an interpretation the court found reasonable.

It is interesting to note that the courts in the *Hodel* cases derived the authority of the federal government to have any control over the scope and exercise of the R.S. 2477 right from the duty of BLM to prevent unnecessary and undue degradation of the WSAs under their management. Under the general management section of FLPMA, 43 U.S.C. 1732(b), BLM has a similar duty to prevent undue degradation of *all* the lands under its management. In other words, the federal government is no longer in the pre-FLPMA position of having no interest in or responsibilities for the lands impacted by R.S. 2477 highways.

It remains for future agency and judicial exposition to set out how the new management policies and duties of FLPMA relate to regulation of R.S. 2477 rights of way.

The court in *City and County of Denver v. Bergland*[112] pointed out that only R.S. 2477 was repealed *in its entirety* in FLPMA; other rights of way provisions were repealed only as to *issuance* of rights of way, a fact the court felt was relevant to which agency had current management responsibilities for such a right of way. Whether this distinction may also be relevant to the scope of current federal regulatory authority over R.S. 2477 rights of way also awaits further judicial analysis.

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109 *Id.*, 1083-1084.

110 675 F. Supp. at 606.

111 848 F. 2d at 1088.

112 695 F.2d 465 (10th Cir. 1982), *rehearing denied*, 1983.

E. Is R.S. 2477 retrospective or prospective?

The court in *United States v. Dunn*, held that the 1866 Act was meant only to sanction trespasses that had occurred on the public domain [illegible] grant rights, but instead to give legitimacy to an existing status otherwise indefinable."[113] The court reached this result by relying on two previous cases, both of which addressed those aspects of the 1866 Act that cured past trespasses, because those were the facts before the court. A better reading of both cases is that the 1866 Act served to legitimize past trespasses and to establish priorities of occupancy rights that related back to the establishment of the uses rather than only to the 1866 date of enactment.[114] Neither case held that the 1866 Act *only* addressed past trespasses, and the best reading of these two cases and of the majority of judicial interpretation indicates that the act also was prospective in its application.

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[113] 478 F. 2d 443, 445 n.2 (9th Cir. 1973)

[114] Jennison v. Kirk, 98 U.S. 453, 459 (1878), quoted approvingly the statement of the author of the act that "It merely recognized the obligation of the government to respect private rights which had grown up under its tacit consent and approval. It proposed no new system, but sanctioned, regulated, and confirmed a system already established, to which the people were attached." However, the Court in that case addressed a factual situation where two miners disagreed as to whose rights had priority with respect to a mining claim and a water ditch -- two uses in effect when the 1866 Act was passed. The Court's comments were therefore dicta to the extent they should be construed as indicating the Act had no prospective effects. The better reading, however, seems to be that the author meant that the 1866 Act more closely followed current practices than did the other proposal of Rep. Julian. See discussion above. Central Pacific Railway Co. v. Alameda County, 284 U.S. 463 (1931) presented the issue of whether a R.S. 2477 road should be considered established in 1866 when it was validated by the Act, or whether it should be considered as having been established in 1859 when it was layed out and approved by the county. (If the former, it predated the rights of the railroad.) The Court held that the 1866 Act sanctioned existing rights of way rather than creating new ones *as of 1866*. The Court reviewed the *Jennison* case and stated that: "The section of the Act of 1866 granting rights of way for the construction of highways, no less than that which grants the right of way for ditches and canals, was *so far as then existing roads are concerned*, a voluntary recognition and confirmation of preexisting rights, brought into being with the acquiescence and encouragement of the general government." (*Id.*, at 473. Emphasis added.) Quite arguably, the Court in *Central Pacific* corrected the possible reading of the Jennison case that it denied possible prospective rights, and made clear that both cases spoke only to then existing rights, finding that they were ratified as of the time the uses were established, rather than being "new" rights as of 1866.

The 9th Circuit noted the issue as an open question in a 1982 opinion in *Humboldt County v. United States*.[115] However, two years later, the same Circuit noted that the parties to new litigation agreed that R.S. 2477 operates prospectively to grant rights of way for highways constructed after its enactment. The court then stated: "*Dunn* is questionable authority because it is contrary to the cases cited in *Humboldt County*, 684 F. 2d at 1282 n. 6, and appears to misread *Central Pacific Railway Co. v. Alameda County*, 284 U.S. 463, 52 S. Ct. 225, 76 L. Ed. 402 (1932)."[116]

Therefore, the better interpretation would seem to be that while the 1866 Act confirmed preexisting rights of way, it also applied prospectively.

F. Does R.S. 2477 apply only to roads for mining or homesteading purposes?

The Ninth Circuit also has held that an alternative ground for finding that Humboldt County did not acquire a right of way under R.S. 2477, is that a right of way could not be acquired under that Act for a road for purposes other than mining or homesteading, which did not include the desired purpose of reaching a recreation area. The court found that although the language of the grant is without limitation as to purpose, the statute of which it was a part addressed solely mining and homesteading claims. The court noted that the holding in *Wilderness Society v. Morton*,[117] was consistent with this interpretation in that the road in that case would facilitate oil drilling, which was completely consonant with Congress' intent in 1866 to facilitate private mineral development.[118]

On this point too, although the argument can be made that section 8 is limited to the context of the act of which it is a part, the language is not so limited on its face, and the provision seems consistently to have been interpreted as being of general import. The meaning of "highway" as a significant road set forth earlier in this paper also refutes the narrow interpretation. Furthermore, when the provision was codified, it was not placed with the remainder of the sections pertaining to mineral claims, but rather was codified as part of the general rights of way provisions as 43 U.S.C. §932. Although unenacted titles of the United States Code are only evidence of the law and cannot change the

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[115] 684 F. 2d 1276, 1282 n. 6 (9th Cir. 1982).

[116] United States v. Gates of the Mountains Lakeshore Homes, 732 F. 2d 1411, n. 3 at 1413 (9th Cir. 18984).

[117] 479 F. 2d 842 (D.C. Cir. 1973)(*en banc*), *cert. denied*, 411 U.S. 917 (1973).

[118] Humboldt Co. v. United States, 684 F. 2d 1276, 1282 (9th Cir. 1982).

law,[119] this Code placement is further evidence that the provision should be interpreted as of general import.

The Department also has interpreted the provision as applicable to other than mining access. A 1959 Solicitor's Opinion [illegible] access to mining claims states that Congress understood when it enacted the mining laws that miners would have to use the public lands for roads, and that roads were necessary and complementary to mining activities. The opinion does not mention section 8 of the 1866 Mining Act (R.S. 2477) as relevant to the discussion of mining roads, a fact that argues for the interpretation that the highway grant in section 8 was speaking of roads other than mere mining access roads.[120] It also appears that the vast majority of cases have implicitly found that highway right of way is not limited to the mining and homesteading context.[121]

G. What are unreserved lands?

The 1866 grant was for rights of way across public lands that were not then reserved. Public lands are those lands in the public domain -- the western lands the United States obtained from another sovereign rather than from a state or individual -- that were open to the operation of the various public land laws enacted by Congress, such as the homesteading acts.

Reserved lands are those public lands that were withdrawn and dedicated to a particular federal purpose or purposes, such as military reservations or national parks.

The position of the Department is that public lands, not reserved for public uses, do not include public lands reserved or dedicated by Act of Congress, Executive Order, Secretarial Order, or, in some cases, classification actions authorized by statute, during the existence of that reservation or dedication, or lands pre-empted or entered by settlers under the public land laws or located under the mining laws which ceased to be public lands during the pendency of the entry or claim.[122]

Usually, it is clear whether a full-fledged reservation has occurred. The situation may not be as clear, however, when classification actions and certain other federal actions are involved.

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[119] 1 U.S.C. §204; Preston v. Heckler, 734 F. 2d 1359, 1367 (9th Cir. 1984); Stephan v. United States, 319 U.S. 423, 426 (1943)(*per curiam*)..

[120] *See,* 66 I.D. 361, 362, 364 (1959).

[121] *See, e.g.* Sierra Club v. Hodel, 675 F. Supp. 594, 601 (D. Utah 1987), which indicates that the road in that case originated as a livestock driveway and a wagon road.

[122] 1988 Policy Statement at 1.

For example, the withdrawals and classifications associated with the creation of grazing districts under the Taylor Grazing Act[123] may reserve lands sufficiently to preclude establishment of an R.S. 2477 right of way. The Taylor Grazing Act at 43 U.S.C. §315f provides that affected lands "shall not be subject to disposition, settlement, or occupation until [illegible] the same have been classified and opened to entry." Yet 43 U.S.C. §315e states that "nothing contained in this chapter shall restrict the acquisition, granting or use of ... rights -of-way within grazing districts under existing law ...."

The 9th Circuit has held that the two sections should be read together, such that withdrawals and creation of a grazing district precluded establishment of a road across grazing district lands, unless the entity seeking to acquire a right of way had sought the reopening of such lands under 43 U.S.C. §315f in order to establish the road.[124]

If this reasoning is repeated in other cases, it obviously would have a great impact on the remaining R.S. 2477 validity determinations.

H. "Estoppel"

An issue that underlies much of the controversy surrounding R.S. 2477, especially with reference to construction issues, is that of federal "acquiescence" in whatever interpretations the states devised. The argument can be made that because the agency administering the Act allegedly did not assert any federal requirements or dispute state claims for a period of over a hundred years, and because Congress also acquiesced in state articulation of all aspects of these grants, the federal government may not now assert statutory requirements that contradict state claims or interpretations. Therefore, the argument continues, the valid existing rights that were preserved by FLPMA are those and only those that are recognized as valid under state law.

This issue of estoppel by acquiescence was discussed in *United States v. California*, a case involving disputed ownership and jurisdiction over the three-mile belt of submerged lands off the coast of California. The Court ruled for the United States (a position Congress later changed by statute), despite a long history of acquiescence by federal officials in the assertion of jurisdiction by the State, even to the point of making federal purchases of rights in the belt. The Court said:

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[123] Act of June 28, 1934, ch. 865, 48 Stat. 1269, codified at 43 U.S.C. §§315 *et seq.*.

[124] Humboldt County v. United States, 684 F.2d 1276, 1281 (9th Cir. 1982). *See also,* the Burr Trail/*Hodel* cases, which found that, in that case, a road had already been established by the time of the withdrawals in question. 675 F. Supp. at 604; 848 F. 2d at 1079 n.10.

> As a matter of fact, the record plainly demonstrates that until the California oil issue began to be pressed in the thirties, neither the states nor the Government had reason to focus attention on the question of which of them owned or had paramount rights in or power over the three mile belt. And even assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the government in this ocean area are not to be forfeited as a result. The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property: and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.[125]

The analogy with the current situation appears clear. The federal government had no reason to focus on validity of R.S. 2477 rights of way until after the repeal of the measure, and possibly not until the issuance of the 1988 Policy Statement, which perhaps encouraged claims that had previously not been considered to be valid. Quite arguably, the actions of the federal agents were not as compromising in the R.S. 2477 context as they were in the *California* context because the regulation of the Department did incorporate the elements of the relevant statute, and because of the historical context surrounding rights of way before FLPMA.

In *Utah Power & Light Co. v. United States*, involving another right of way statute and a combination of acquiescence and overt actions on the part of federal agents, the Supreme Court also held:

> This ground also must fail. As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest .... A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane in this and some other respects from the ordinary private suit to regain the title to real property or to remove a cloud from it.[126]

An "estoppel" argument also was raised in *City and County of Denver v. Bergland*, involving another right of way statute. The court quoted from *U.S.*

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[125] 332 U.S. at 39-40. *See also*, Utah Power and Light Co. v. United States, 243 U.S. 389, 409 (1917).

[126] 243 U.S. 389, 409 (1917).

v. California, supra., with approval, and stated that estoppel, if applicable at all, can lie only against an agency to which Congress has delegated the authority to dispose of lands held in trust for the public.[127] The court did not decide whether some version of estoppel could apply to the agencies regarding the right [illegible] make a traditional case of estoppel against the United States for reasons that may well also pertain in the current R.S. 2477 context.[128] Even if the elements of estoppel are present, when title to public lands is involved, policy considerations demand that estoppel not be applied without compelling reasons.[129]

An argument can be made that estoppel is not appropriate in the R.S. 2477 situation, because the elements required by the 1866 Act are evident on the face of the Act and have consistently been required by the Department since its earliest regulation that provided that a grant was effective upon construction or establishment of highways across unreserved lands in accordance with state law. This regulation incorporates the essential requirements of "construction" and "highway" and does not connote that a grant may be effective without them.

Clearly, there is a legitimate and significant role for state law to play in implementing the statute. The exact posture of state law on R.S 2477 issues is difficult to ascertain, and it can hardly be assumed that Congress agreed with possible state interpretations of which it was not aware and regarding which it had no reason to inquire. Furthermore, Congress has acted to address rights of way in legislation since 1866, and these enactments are consistent with an intent in the 1866 Act to grant rights of way for highways in the sense of significant roads.

A reconsideration of the 1988 Policy and the criteria set out in it, the argument might continue, that resulted in a new articulation closer to the requirements of the Act would not actually be disruptive of the current status quo because most of the qualifying roads clearly qualified by 1976. Furthermore, an examination of some of the leading state cases indicates that an interpretation that required qualifying roads to be public highways under state law and also to meet the elements of the federal grant would not be at odds with most of the actual rules and facts of those cases.

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[127] 695 F. 2d 465, 482.

[128] *Id. See also*, Oregon v. BLM, 676 F. Supp. 1047, 1059 (D.Or. 1987); United States v. Wharton, 514 F. 2d 406 (9th Cir. 1975); and U.S. v. 31.43 Acres of Land, more or less, 547 F. 2d 479, 482 (9th Cir. 1976.).

[129] *See, e.g.,* Oregon v. Bureau of Land Management, 676 F. Supp. 1047, 1059 (D. Or. 1987), a case in which the General Land Office had made certain determinations involving lands, which the BLM invalidated 40 years later. The court cited with approval, United States v. Ruby, 588 F. 2d 697, 704 (9th Cir. 1978).

VI. STATUTE OF LIMITATIONS

If the United States were to disagree that a way constituted a valid R.S.2477 right, it appears that the appropriate course of action would be for a claimant to file a quiet title action in the United States District Court. As the sovereign federal government, it is necessary that the government have consented to suits of the type sought to be brought. In 28 U.S.C. §2409a, the United States has consented to be sued for the purpose of quieting title to real property. However, except for state suits involving tidal or submerged lands, that statute imposes a statute of limitations of 12 years. This time begins to run when a claimant knew or should have known of a claim of the United States contrary to their own.[130] Whether the statute of limitations may have run with respect to R.S. 2477 claims is an issue that has been raised.

After Congress repealed R.S. 2477 in its entirety in 1976, no new R.S. 2477 rights of way could be established. After repeal, BLM notified the states that R.S. 2477 was no longer effective and that all new claims would be under Title V of FLPMA.[131] In 1980, BLM proposed regulations for Title V rights of way, and included a request for all persons, state or local governments that had "constructed public highways" under the authority of R.S. 2477 to file maps showing the locations of the highways.[132]

As part of its implementation of section 603 of FLPMA, BLM also developed proposed criteria for determining which lands were "roadless". These criteria were finalized after public review and numerous public meetings. The Wilderness Policy and Review Procedures were issued in draft form on February 27, 1978. More than 60 meetings were held and over 5,000 letters and written comments were received, most of which focused on the proposed definition of "road" that would be used in the inventory.[133] A wilderness inventory handbook was issued on September 27, 1978.[134] BLM then completed two levels of inventories that were completed by December, 1980.

By the end of 1980, lists of areas determined to be roadless that were classified as "Wilderness Study Areas" (to be studied further for suitability for

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[130] Under 28 U.S.C. §2409a(k), the notice for the purpose of the accrual of an action brought by a state must be "(1) by public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or (2) by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious."

[131] Organic Act Directive No. 76-15 at 5, December 14, 1976.

[132] *See* n. 50, *supra.*

[133] See the Preface to the *Wilderness Inventory Handbook*, 1978.

[134] 43 Fed. Reg. 43772 (September 27, 1978).

inclusion in the National Wilderness Preservation System) were published in the Federal Register and the BLM directors in each state issued press releases on the classifications and designated areas. The names and addresses of each BLM State Director were given in the Notices, which also stated that inventory maps [illegible][135]

Arguably, this sequence of actions, especially the opportunity for public comment on the proposed wilderness inventory procedures and in particular the definition of "road" that generated such response, the public notice of the final Wilderness Handbook, the BLM inventories of roadless areas, and the subsequent published determinations of which areas were deemed to be *without roads* constituted notice of a position of the United States adverse to possible claimed R.S. 2477 rights in those areas so classified.

If these actions of BLM are found to have put possible rightholders on notice that they should assert R.S. 2477 claims, the statute of limitations may have run such that some claimants may be without a means of contesting adverse determinations now.

On the other hand, the contrary argument can be made that if R.S. 2477 highways included ways that were not even roads as defined for purposes of section 603 of FLPMA, then the classification of areas as roadless still did not suffice as notice of a position of the United States hostile to the interest of possible R.S. 2477 rightholders, such that the clock on the statute of limitations began to run. Absent Congressional action, this, like many other issues appears likely to be settled by the courts.

In either case, Congress may wish to consider imposing a window of time to present R.S. 2477 claims, beyond which time such claims would be deemed to have been abandoned.[136]

VII. CONCLUSIONS

Because of the surveying system used by the United States, some form of access across federal lands was essential to accomplish the settling of the West. Given the historical position of the federal government in readily permitting individual access across the federal lands, combined with early federal subsidies for major transportation corridors, R.S. 2477 was arguably intended to grant rights of way for "highways" in the sense of principal or significant roads.

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[135] Many of the state-by-state final inventories were published in the Federal Register on November 14, 1980. *See, e.g.* lists beginning on 45 Fed. Reg. 75577 (November 14, 1980).

[136] *See*, section 314 of FLPMA, 43 U.S.C. 1744 in which Congress imposed a three year time limit on recording mining claims, beyond which time the claims would be deemed conclusively to constitute an abandonment of the claims. This approach was upheld in United States v. Locke, 471 U.S. 84 (1985).

Although Congress could have used the term highway in a broader sense meaning any way open to public passage, the meaning of highways as principal roads is supported by contemporary treatises and dictionaries, by the historical context in which Congress acted, and by contemporaneous and subsequent [illegible]

It also appears that highways must be constructed to meet the second major element of the statute. The Department implementing the Act allowed state law on "the construction or establishment of highways" to define how the grant could be accepted. However, this position arguably did not eliminate the requirement that the elements of construction and highways be met. The acquiescence of the federal government in state court determinations over the years before FLPMA may be more a reflection of the historical context and absence of coherent federal land management authority than it is probative of a federal legal position approving the elimination of the elements of the 1866 Act.

There are few federal decisions that hold that state law is controlling as to *establishment* of R.S. 2477 highways and in none of those cases were the roads in question unimproved roads. Furthermore, a close reading of the principal state cases indicates that typically the roads in question would qualify under the terms of the Act, that the rules applied in many of the cases are misstated in subsequent references, and the cases are cited for principles beyond their actual holdings or the facts before the courts.

The government would not appear to be estopped from administratively reconsidering criteria for final R.S. 2477 determinations that comport with the statutory language. Both because of the difficult issues regarding the proper interpretation of the 1866 Act and the need for some final resolution of R.S. 2477 issues, Congress may also wish to consider further action to clarify the statutory questions or to provide a final process and standards for ratifying clearly qualifying highways and for deciding disputed R.S. 2477 claims.

VIII. ALTERNATIVES DISCUSSED IN THE DRAFT TASK FORCE REPORT

The Draft Task Force report at 63-69 sets out several alternatives for actions by the Department or Congress. The Report notes that other administrative alternatives exist, but presents three.

Possible administrative actions:

1). Continue existing policy.

2). Adopt the procedures contained in H.R. 1096 (102d Congress, now H.R. 1603 in the 103rd Congress). This alternative would not address the statutory elements of whether state or federal law would govern acceptance and standards, but rather require that claims be submitted with two years

of enactment or they would be deemed abandoned. The public would be able to contest certain claims and request that the BLM investigate their validity.

3). Continue the existing administrative policy with two changes: provide more public notification and redefine the element of construction to require improvements by some type of mechanical means to qualify as a highway. This would result in a position more like that of the 1980 Ferguson letter. State law would apply to define other aspects of acceptance and standards. There would be no sunset provision.

The Draft Task Force Report also suggested two legislative alternatives.

Legislative alternatives:

1). Legislation that would include a uniform public notification process; a statutory definition of construction requiring substantial mechanical improvement to qualify; a federal highway standard to define acceptance and scope of public highways; no adversarial process; a sunset provision; and "provision for declarative taking is required to meet Congressional management directives."

2). Possible separate legislation to provide a different alternative for Alaska, possibly including a uniform public notification process; the use of the current DOI policy with elements defined differently in Alaska to allow for seasonal trails and footpaths, but not unconstructed section line dedications; no adversarial process; and an extended sunset provision.

The Draft Task Force Report was issued for public comment in March, 1993. A Final Task Force Report is expected to be sent to Congress in June, 1993. At that time, the authorizing committees may hold hearings on R.S. 2477 issues.