



United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Washington, DC 20240
<http://www.blm.gov>



FEB 20 2009

MEMORANDUM

To: State Directors
From: Ron Wenker *Ron Wenker*
Acting Director
Re: RS 2477 Claims

Pending further review and direction from the Secretary, the Bureau of Land Management has been directed not to process or review any claims under RS 2477, including the use of the disclaimer rule.

This interim step, which is effective immediately, is designed to preserve the status quo and is not a final policy decision on RS 2477 Claims.

Annex 1

*4/10/07
S. J. [unclear]
[unclear]*

Repealed Statute (R.S.) 2477 ISSUE PAPER

BACKGROUND: R.S. 2477, was passed as part of the 1866 Mining Law, and granted a right-of-way (ROW) for the construction of highways across public lands not reserved for public uses. This legislation was passed during a period when the Federal government was aggressively promoting settlement of the West. To facilitate mining activities and homesteading, construction of roads to support these activities had been occurring without statutory authority. On October 21, 1976, Congress enacted the Federal Land Policy and Management Act (FLPMA). Section 706 (a) repealed the ROW authority for R.S. 2477, subject to valid existing rights. Rights-of-way established under this authority prior to 1976, remain valid. In 1979, proposed regulations were published which required state and local governments to file maps within three years with BLM showing the locations of public highways constructed under the authority of R.S. 2477, in order for BLM to acknowledge R.S. 2477 claims. In 1982, this three year window was removed. BLM has applied state law, to the extent that it is consistent with Federal law, to process R.S.2477 claims. Wyoming state law (Title 24-1-101) specifies that only the County or State governments can establish public roads within the state.



In recent years there has been controversy over whether certain claimed access routes are "highways" that were "constructed" pursuant to R.S. 2477. In January of 1997, the Secretary of the Interior established a policy, stating that **only** the Secretary of the Interior has the authority to approve or disapprove a R.S. 2477 claim.

Under the 1997 policy, a request for a R.S. 2477 declaration, needed to be submitted in writing to the Field Office charged with administering lands where the road is located, and must be accompanied by an explanation of why there is an "immediate and compelling need" for such a designation. Additionally three other basic criteria had to be met:

- The land must have been unreserved public land at the time the road claim was established and before (10-21-1976)
- The road must have been constructed prior to 10-21-1976.
- The road must be a highway (public thoroughfare) prior to 10-21-1976.

Only if all of these criteria were met, and an immediate and compelling need was demonstrated, could the Field Manager forward the application to the State Office for concurrence. If the State Director concurred, the application was transmitted to the Washington Office, and ultimately to the secretary for a final decision on the ROW assertion.

2005

In August 8, 2008, the Washington Office issued a new policy (I.M. 2008-175) for processing requests for improvements to an asserted R.S.2477 rights-of-way. Under this policy, the R.S.2477 ROW has been adjudicated by a Federal court or the R.S.2477 ROW has been recognized by BLM. This policy provided guidance on how to manage proposed maintenance and improvements on valid R.S.2477 ROWs.

On February 20, 2009, the Acting Director on behalf of the Secretary issued a memorandum directing all BLM offices to not process or review any claims under R.S.2477, including the use of the disclaimer rule. This policy is effective immediately and is not a final policy decision of R.S.2477 claims.

To not delay valid requests for access, BLM has encouraged county and state governments to process the road authorization under FLPMA rights-of-way. FLPMA rights-of-way issued to counties or the state are exempt from rental and cost reimbursable charges and have the benefit of being able to be processed quickly, at the local level.

DEFINITIONS:

Highway

A highway is a thoroughfare used prior to October 21, 1976, by the public for the passage of vehicles carrying people or goods from place to place.

Construction

If the lands were not withdrawn, reserved, or otherwise unavailable pursuant to R.S.2477, the agency shall examine all available documents and maps and perform an on-site examination to determine whether construction on the alleged ROW had occurred prior to the repeal of R.S.2477 on October 21, 1976.

Withdrawals and Reservations

If such lands were withdrawn, reserved, or otherwise unavailable pursuant to R.S.2477 at the time that the highway giving rise to the claim of an R.S.2477 ROW was allegedly constructed and remained unavailable through October 21, 1976, the claim is denied.

Reserved for public uses

Includes national parks, monuments, wildlife refuges, national forests and military bases.

U.S. DEPARTMENT OF THE INTERIOR **BUREAU OF LAND MANAGEMENT**
National

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240
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August 8, 2008

In Reply Refer To:
2600 (350) P

BMS TRANSMISSION 09/22/2008
Instruction Memorandum No. 2008-175
Expires: 09/30/2009

To: All Washington Office and Field Office Officials

From: Director

Subject: Consultation Process on Proposed Improvements to Revised Statute (R.S.)2477
Rights-of-Way

Program Area: Lands and Realty

Purpose: On May 26, 2006, the Bureau of Land Management (BLM) issued Instruction Memorandum (IM) No. 2006-161 ("Consultation on Proposed Improvements to R.S. 2477 Rights-of-Way"). The IM described the process that the BLM will follow, in consultation with the holder of an R.S. 2477 right-of-way (ROW), when the holder proposes to undertake any construction or improvement (collectively "improvement"), beyond routine maintenance, on any portion of the ROW crossing lands administered by the BLM. This IM clarifies and supplements the information set forth in IM No. 2006-161, and hereby replaces it.

For purposes of this Instruction Memorandum, the following definitions are applicable:

o "Holder" means: (1) a state or political subdivision of a state that holds an R.S. 2477 ROW, as adjudicated by a Federal court, or (2) a state or political subdivision of a state claiming to have an R.S. 2477 ROW that has been recognized by the BLM in an administrative nonbinding determination (NBD).

o "Routine maintenance" includes work that is reasonably necessary to preserve the existing road in its present condition, including the physical upkeep or repair of wear or damage whether from natural or other causes, maintaining the shape of the road, grading it, making sure that the shape of the road permits drainage, and keeping drainage features open and operable – essentially preserving the status quo.

o "Improvement" includes the widening of the road, the horizontal or vertical alignment of the road, the installation of (as distinguished from cleaning, repair, or replacement in kind of already existing) bridges, culverts, and other drainage structures, as well as any significant change in the surface composition of the route (e.g., going from dirt to gravel, from gravel to chipseal, from chipseal to asphalt, etc.), or any other change in the nature of the road that may significantly impact public lands, resources, or other values.

Policy/Action: Before the consultation process described in this IM may occur, the validity of an asserted ROW established under R.S. 2477 must have been adjudicated by a Federal court or recognized by the BLM in an NBD. IM No. 2006-159 (dated May 26, 2006), describes the process for the BLM to follow if it chooses to process an NBD on an asserted R.S. 2477 ROW. When an entity asserting that it holds an R.S. 2477 ROW wants to undertake an improvement, the appropriate BLM State, District, or Field Office (hereinafter appropriate BLM office) should refer to the March 22, 2006, memorandum from the Secretary (Departmental Implementation of *Southern Utah Willcress Alliance v. Bureau of Land Management*, 425 F.3d 735 (10th Cir. 2005)); Revocation of January 22, 1997, Interim Policy; Revocation of December 7, 1986, Policy) and advise the entity of its options.

If the validity of an asserted R.S. 2477 ROW has not been adjudicated as valid by a Federal court or recognized as valid by the BLM in an NBD, the entity asserting that it is the holder of the ROW may not undertake any improvement on the ROW. When an entity undertakes an improvement without such adjudication or NBD and, thus, has not been found to be a holder, the BLM may deem the action a

Trespass or take other appropriate action to protect the public lands and resources.

When the holder of an R.S. 2477 ROW proposes to undertake any improvement beyond routine maintenance on any portion of the ROW crossing BLM-administered lands, the appropriate BLM Office and the holder will consult in advance of the holder making the improvement. (1) Consultation between the ROW holder and the BLM is necessary to give the appropriate BLM office the opportunity to carry out its duties as the manager of the public land that may be affected by the proposed improvement. The consultation process described in this IM provides a way for the BLM and the holder to coordinate so that each can exercise its rights in a spirit of mutual accommodation. See *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 733, 748 (10th Cir. 2005) (*SUWA v. BLM*).

Copies of this IM should be shared with state, county, and city governments and other appropriate entities to facilitate open communication about the consultation process.

The Consultation Process

A. Relevant Information

When a holder proposes to undertake an improvement beyond routine maintenance, the first step in the consultation process is that the appropriate BLM office will request the holder of the ROW to provide the following information:

- 1) the location of the portion or portions of the ROW on which the improvement is proposed (this can be shown by the submission of a map, aerial photograph, or other appropriate means);
- 2) a description of the proposed improvement, including any engineering plans that have been prepared;
- 3) an explanation of why the proposed improvement is within the scope of the ROW;
- 4) the anticipated time of commencement of activities and an estimate of the time it will take to complete the improvement; and,
- 5) the approximate date when the holder last maintained the ROW and a brief description of the work performed at that time.

If the holder fails or refuses to respond or provide the requested information, the appropriate BLM office will advise the holder in writing that it cannot proceed with the consultation process without the requested information.

B. Information Evaluation

Once the appropriate BLM office receives all the requested information, it will evaluate the information and assess first whether the proposed improvement is within the scope of the ROW. This is generally a question of state law. For example, in *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988), the Tenth Circuit applied Utah law to determine whether proposed improvements were within the scope of the subject ROW.

If the BLM concludes that the proposed improvement is not within the scope of the ROW, the holder must apply for a Title V ROW under the Federal Land Policy and Management Act (FLPMA) in order to proceed with the proposed improvement. If the BLM concludes that the proposed improvement is within the scope of the ROW, then the BLM will next assess whether the proposed improvement may adversely impact the surrounding public lands or resources, and if so, whether there are modifications to the proposed improvement that would avoid or minimize such impacts.

See below for more discussions on making these assessments.

Question 1. Is the proposed improvement within the scope of the ROW?

The BLM will first assess whether a proposed improvement is within the scope of the R.S. 2477 ROW. As noted above, whether a proposed improvement is within the scope of the ROW is generally dependent on the law of the state in which the R.S. 2477 ROW exists. As such, the appropriate BLM office should consult with the Solicitor's Office when considering whether a proposed improvement is within the scope of the ROW. As an example, in *Sierra Club v. Hodel*, 848 F.2d at 1083-84, the Tenth Circuit indicated that under Utah law, a project to widen a one-line dirt road to ensure the safe passage of vehicles driving on the road would likely be considered within the scope of the ROW because the improvement was reasonable and necessary, in order to meet the necessity of increased use and travel, in light of the traditional use(s)

of the ROW established as of October 21, 1976, when the FLPMA was enacted. On the other hand, the court also noted that conversion of a two-lane road into an eight-lane highway would not be considered reasonable and necessary. *Id.* at 1083. Thus, to perform such expansion, the ROW holder would be required to apply for a ROW under Title V of the FLPMA.

• 8. The proposed improvement is outside the scope of the ROW.

If the appropriate BLM office concludes that, under applicable state law, a proposed improvement is outside the scope of the ROW, the BLM will inform the holder of the ROW of its conclusion as soon as practicable. The appropriate BLM office will give the holder an opportunity to review the information on which the BLM's conclusion is based and provide any additional information the holder believes is relevant. The holder may also point to previously submitted information that it believes the BLM did not take into account in assessing whether the improvement is within the scope of the ROW.

If the holder of the ROW does not submit additional information, or submits additional information but the appropriate BLM office still concludes that the proposed improvement is outside the scope of the ROW, the BLM will inform the holder that it may apply for a FLPMA Title V ROW authorizing the proposed improvement. If the holder disagrees with the BLM's conclusion that the proposed improvement is outside the scope of the ROW or declines to apply for a FLPMA Title V ROW, the parties may "resort to the courts." *SUIWA v. BLM*, 425 F.3d at 749.

When a holder applies for a FLPMA Title V ROW to undertake a proposed improvement that is outside the scope of the ROW, the appropriate BLM office needs to complete the appropriate level of National Environmental Policy Act (NEPA) analysis and documentation, as well as any other required analysis (e.g., consultation under Section 7 of the Endangered Species Act (ESA)) in considering the Title V ROW application.

b. The proposed improvement is within the scope of the ROW.

If the BLM concludes that a proposed improvement to an R.S. 2477 ROW is within the scope of the ROW, the next step in the consultation process is to assess whether the proposed improvement may adversely impact the surrounding public lands or resources and, if so, whether there are alternatives or modifications to the proposed improvement that would avoid or minimize such impacts. This step is described below.

Question 2: Whether the proposed improvement may adversely impact the surrounding public lands or resources and, if so, are there alternatives or modifications to the proposed improvement that would avoid or minimize such impacts?

If the appropriate BLM office concludes that the proposed improvement will not adversely impact the public lands or resources, the BLM should promptly advise the holder of the ROW of this. At this point, the consultation process is concluded.

If, however, the BLM concludes that the proposed improvement may adversely impact the public lands or resources, as soon as practicable, the BLM will inform the holder of the ROW of its conclusion and any suggested alternatives or modifications to the proposed improvement that would avoid or minimize such impacts. The appropriate BLM office will also give the holder of the ROW the opportunity to review the information on which the BLM's conclusion is based, meet with the BLM, and provide any additional information to resolve these matters.

In assessing the potential impacts of a proposed improvement, the BLM should consider whether there will be any adverse impacts to cultural resources; sensitive, threatened or endangered species; or any other important features or resources on the public lands. In doing so, the BLM should take into account existing information on such resources in the vicinity of the ROW and decide whether additional information is necessary in order to adequately assess the potential impacts of the proposed improvement. In the event additional information is necessary and available, the BLM should obtain it as expeditiously as possible. The BLM should advise the holder of alternatives or project modifications that would avoid or minimize impacts to these resources. In the event the holder chooses not to implement such alternatives or project modifications, the BLM should consult with the Solicitor's Office on possible appropriate responses.

The holder of an R.S. 2477 ROW does not need to obtain a BLM authorization to undertake a proposed improvement in situations where the BLM has concluded that the improvement is within the scope of the

IM 2008-175, Consultation Process on Proposed Improvements to Revised Statute (R.S.) ...

ROW. Thus, there is no Federal action that triggers the requirements of the NEPA, and the BLM is not required to complete a NEPA analysis in assessing the potential impacts of a proposed improvement. Similarly, there is no Federal action that triggers the requirements of the National Historic Preservation Act or the Endangered Species Act. However, it may be useful and efficient for the appropriate BLM office to use its expertise in preparing NEPA and other analyses as it assesses the potential impacts of a proposed improvement; the BLM may decide that it would be appropriate to model its assessment on similar analyses that it may have prepared under NEPA. A proposed improvement that would be covered by a categorical exclusion in a circumstance where NEPA did apply (e.g., if a person applied for a Title V ROW), would not need to be further assessed. In addition, the BLM should advise the holder that the holder itself may be subject to these statutes (e.g., the "Lake" prohibition under Section 9 of the ESA).

The appropriate BLM office should complete the consultation process in a timely and expeditious manner.
Timeframe: This IM is effective upon receipt.

Background: On March 22, 2006, Secretary Norton issued a memorandum entitled "Departmental Implementation of Southern Utah Wilderness Alliance v. Bureau of Land Management, 425 F.3d 735 (10th Cir. 2005); Revocation of January 22, 1997, Interim Policy; Revocation of December 7, 1988, Policy to the Assistant Secretaries of Land and Minerals Management; Fish Wildlife and Parks; Indian Affairs; and Water and Science (Memorandum). Among other things, the Memorandum discussed the legal principles set forth in *SUWA v. BLM* on the recognition, use, maintenance, and improvement of ROWs obtained under R.S. 2477, and directed all bureaus within the Department of the Interior to revise any existing guidance or policies on R.S. 2477 ROWs to be consistent with the *SUWA v. BLM* decision and the Memorandum.

Budget Impact: The additional expenditure of funds and staff time is unknown at this time.

Manual/Handbook Sections Affected: The 2800 series Manual/Handbook.

Coordination: This guidance was coordinated with the Solicitor's Office, the BLM's Washington Office, and

with the BLM State Office technical staffs and managers involved in the R.S. 2477 program.

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

Signed by:
James L. Caswell

Authenticated by:
Robert M. Williams

Division of IRM Governance, WO-560

Director



[1] Note that when the holder of an R.S. 2477 ROW intends to undertake routine maintenance activities, no such consultation process is necessary. The appropriate BLM office is encouraged, however, to coordinate with holders of R.S. 2477 ROWs before routine maintenance activities are undertaken. As explained by the Tenth Circuit, "communication and cooperation," and not "unilateral action" should govern the exercise of the ROW holder's and the BLM's respective rights. Id.