Revised Statute 2477 (R.S. 2477)
California Desert District

Background: February 13, 2003

What is R.S. 2477? Revised Statute 2477 is a complex and controversial issue with far-reaching implications to the management of federal lands throughout the West. Revised Statute 2477 was enacted in 1866, during a period when the federal government promoted settlement of the West. It was a primary authority under which many state and county highways were constructed over federal lands in the West. By its general wording: "*The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted,"* the Act minimized the administrative burden on the federal government to authorize the construction of each highway across the largely undeveloped lands in the West. However, while the Act accomplished its goal of facilitating development of the West, the general wording is a source of disagreement and controversy. R.S. 2477 was repealed by the Federal Land Policy and Management Act of 1976 (FLPMA).

How did FLPMA change rights-of-way like R.S. 2477? A clear understanding of the rights conveyed in a right-of-way is essential for both the right-of-way and for managing the lands and resources through which it passes. The Federal Land Policy and Management Act of 1976 demonstrates that Congress took legislative action to meet this need by repealing R.S. 2477 for subsequent right-of-way authorizations. Title V of FLPMA authorized the Secretaries of the Department of the Interior (for public lands) and the Department of Agriculture (for National Forest System lands) *"...to grant, issue, or renew rights-of-way...."* Applicants must disclose their plans for use of the right-of-way. The agencies may impose terms and conditions to comply with environmental laws and to meet resource management needs. Under FLPMA, a right-of-way is granted for a specific route and a specified purpose to an identified party (holder). It is documented in public land records so there is a clear record of the rights conveyed, which will be considered in subsequent federal actions. This is not the case for R.S. 2477 rights-of-way.

What effect does the repeal of R.S. 2477 have on routes that may have been R.S. 2477 roads before 1976? Although FLPMA repealed Revised Statute 2477, it did not terminate rights-of-way conveyed under R.S. 2477. Section 701 of FLPMA states that nothing *"...shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use authorization existing on the date of approval of this Act."* For a route to be an R.S. 2477 right-of-way, it must have existed before the passage of FLPMA (October 21, 1976) and before any reservation for a public purpose or transfer to non-federal ownership. To determine whether a route is a valid R.S. 2477 right-of-way, BLM must also consider the important terms in R.S. 2477: (1) construction, (2) highways, and (3) public lands not reserved for public uses. The terms "construction" and "highways" are among the most controversial provisions of the 1866 law. This is apparent from the all-encompassing interpretations of these terms found in many assertions, including those in five of six Board of Supervisors Resolutions in southern California counties from September 2001 through July 2002. Ambiguities in the definitions of these critical terms prevent BLM from making objective, consistent determinations regarding R.S. 2477 rights-of-way and are primary reasons for the policy to defer processing assertions.

Has BLM received R.S. 2477 assertions? The BLM has received R.S. 2477 assertions from local government, commercial interests, interest groups, and individuals. Most assertions sought to keep unpaved routes open or to re-open routes that were closed by law (as in designated wilderness areas), or to resolve resource management problems. Six counties is southern California passed Resolutions asserting R.S. 2477 rights-of-way (county-wide) between September 2001 and July 2002.

What is the Report to Congress on R.S. 2477? In 1992, Congress directed the U. S. Department of the Interior to study the history, impacts, and status of R.S. 2477 rights-of-way and to make recommendations

for processing R.S. 2477 claims (assertions). The May 28,1993, letter from the Secretary to Congress, which transmitted the Report to Congress on R.S. 2477 - The History and Management of R.S. 2477 Rights-of-Way Claims on Federal and Other Lands, concluded that: *"Until final rules are effective, I have instructed the Bureau of Land Management to defer any processing of R.S. 2477 assertions except in cases where there is a demonstrated, compelling, and immediate need to make such determinations*

How do R.S. 2477 rights-of-way affect reservations for public use, private land and other rights? Some paved roads, which serve as major transportation routes, have no right-of-way documented in public land records. Many routes that were claimed as R.S. 2477 rights-of-way came into existence with no documentation in public land records. National Parks, National Monuments, National Forests, National Wildlife Refuges, National Conservation Areas, other special areas (e.g., designated wilderness areas), and military bases were reserved after 1866. Generally, these areas were reserved subject to valid existing rights (rights established before the reservation). Some public lands were conveyed out of federal ownership after 1866, also subject to valid existing rights. Under R.S. 2477, routes which came into existence after 1866, but before reservation for a public purpose, withdrawal, patent, mining claim, or transfer out of federal ownership and before the passage of FLPMA, may qualify as existing rights. This means that the validity of an R.S. 2477 right-of-way is not affected by deferring the processing of assertions. It is also important to understand that holders of existing rights retain a right of access associated with those rights without an R.S. 2477 right-of-way. But BLM approval is required prior to driving on any closed route.

How do R.S. 2477 rights-of-way affect other rights and multiple use resource management? Some people view R.S. 2477 as a means to re-open historic access across areas where access is closed or restricted and as a means to keep existing routes open without considering natural, cultural, and historic resource issues through a multiple use planning process. Some Revised Statute 2477 rights-of-way which cross environmentally sensitive areas conflict with current management, uses, or conservation priorities, including those established in Congressional reservations. Some R.S. 2477 rights-of-way conflict with the ability of federal land managers to comply with other laws, such as the Wilderness Act, the Endangered Species Act, and the National Historic Preservation Act. Some R.S. 2477 rights-of-way conflict with the rights of private landowners. For example, some private landowners block access on routes that cross their land. If the routes are R.S. 2477 rights-of-way, private landowners may be required to allow the public to use the routes. In another case, the BLM and a private landowner differed over the maintenance of a route through public land to access private land because of concerns over threatened and endangered species. The county asserted an R.S. 2477 right-of-way to enable the landowner to conduct road maintenance. For these reasons, it is imperative that BLM review each assertion carefully to determine whether a route qualifies as the right-of-way Congress intended and how it relates to other rights. The consequences of BLM's determinations to other existing rights and interests (both public and private) are too far-reaching for this responsibility to be taken lightly.

What rights were conveyed under R.S. 2477? Some people believe that R.S. 2477 rights-of-way conveyed rights to grade routes and to increase the travel widths without review by the federal agency responsible for managing the lands through which the routes pass. If BLM determines that a route is an R.S. 2477 right-of-way, it is important to understand the nature and extent of the rights conveyed because those rights have important implications for managing public lands and resources through which the route passes. How wide is the right-of-way? What rights, if any, were conveyed to improve the route? What regulatory authority did the United States retain? A clear description of the rights conveyed is of critical importance for all R.S. 2477 rights-of-way, but especially for those which conflict with reservations for public purposes, other existing rights on federal lands, or with the rights of private landowners.

What regulations cover R.S. 2477? The BLM's approach to the terms in R.S. 2477 was addressed in a November 1992, letter to federal, state, and local government, Congress, and affected interests. It notified them that the Department was beginning a study of R.S. 2477 and solicited their participation: *"...assertions of a right-of-way under R.S. 2477 may be acknowledged by the Federal Government,*

and/or the right-of-way may have attached to the public land if all three of the following conditions were met prior to the repeal of R.S. 2477 on October 21, 1976: 1. The lands involved must have been public lands not reserved for public uses at the time of acceptance. 2. Some form of construction of the highway must have occurred. 3. The highway so constructed must be considered a public highway. Today, controversies still arise regarding whether a public highway was established pursuant to the Congressional grant under R.S. 2477 and, if so, the extent of the rights obtained under the grant."

Draft regulations, which defined critical terms and other factors needed to evaluate R.S. 2477 assertions, were published in 1994. A July 1994 news release from the Office of the Secretary described sharply contrasting definitions for "construction" and "highway" between a 1988 Departmental policy and the 1994 draft regulations. The Supplemental Information for the 1994 draft regulations stated: *"There are some proponents of unlimited and unregulated access to Federal lands who view R.S. 2477 as a mechanism on which they believe they can rely to circumvent the protective requirements of current environmental and land use law and to authorize the present expansion of footpaths and animal trails into highways. Some environmental groups view R.S. 2477 with alarm, believing it to defeat the designation of existing and potential wilderness areas (which are roadless by definition)."*

Due to a 1996 Congressional moratorium, final regulations for processing R.S. 2477 assertions were not promulgated. The Department's appropriations act for fiscal year 1997 permits the publication of final regulations, but states they shall not take effect unless *"...expressly authorized by an Act of Congress subsequent to the date of enactment of this Act."* On August 20, 1997, the Comptroller General ruled that this provision (section 108) of the 1997 Department of the Interior and Related Agencies Appropriations Act is permanent. The lack of definitions prevents BLM from making objective, consistent, and clearly defined determinations on assertions and is a primary reason for the policy to defer processing assertions.

What is the current policy on R.S. 2477? The January 22, 1997 "Interim Departmental Policy on Revised Statute 2477 Grant of Right-of-Way for Public Highways; Revocation of December 7, 1988 Policy" from the Office of the Secretary is the current policy. The policy defers processing of assertions except when there is a demonstrated, compelling, and immediate need, but it provides guidance for processing an assertion, should it become necessary for the Department to do so. It addresses, among other things, definitions for "construction" and "highway." In the policy, an entity asserting an R.S. 2477 right-of-way and requesting a determination by the Department must provide *"...an explanation of why there is a compelling and immediate need for such a determination."* In addition, "*...the request should be accompanied by documents and maps that the entity wishes the agency to consider in making its recommendation to the Secretary."* A map dated before the passage of FLPMA, which shows a route claimed, demonstrates that the route existed before FLPMA, but whether the route meets other criteria applicable to R.S. 2477 rights-of-way is not answered by a map alone. Using only the information provided by a pre-FLPMA map, BLM would have an insufficient basis to determine that an R.S. 2477 right-of-way exists.

How are routes claimed as R.S. 2477 rights-of-way treated in wilderness areas? The wilderness areas designated in the California Desert Protection Act of 1994 (CDPA) [Section 101 (2)] are recognized as *"increasingly threatened by and especially vulnerable to impairment, alteration, and destruction by activities and intrusions associated with incompatible use and development."* In keeping with this Congressionally recognized policy, we do not use a route designation process in wilderness areas. Closed routes on public lands in wilderness areas will remain closed, as the law requires, until R.S. 2477 assertions are processed.

How are routes claimed as R.S. 2477 rights-of-way addressed in land use plans? The BLM's determinations on whether a route is a valid R.S. 2477 right-of-way are not planning decisions, which are subject to the multiple use mandate of FLPMA and the requirements of the planning regulations. The BLM's determinations are based on the history of a route and an interpretation of R.S. 2477 relative to that route. On public lands, such determinations do not require plan amendments.

How are routes claimed as R.S. 2477 rights-of-way treated in the route designation process? In the interim, to meet the multiple use mandate of FLPMA, BLM may close some routes across public land to protect important resources through a route designation process or on an emergency basis. The concept of "multiple use" provides that public lands be managed to provide (Sec. 103(c) of FLPMA) *"...a combination of balanced and diverse uses that considers long-term needs for renewable and nonrenewable resources, including recreation, rangeland, timber, minerals, watersheds, and wildlife, along with scenic, scientific, and cultural values."*

The BLM's decisions about which routes are designated open or limited and which are designated closed are based on resource management concerns and legal mandates (such as in designated wilderness) in a process called "route designation" which incorporates public participation. A route designated "open" does not mean that BLM determined the route to be an R.S. 2477 right-of-way. Conversely, a route designated "closed" does not reflect a determination that an R.S. 2477 right-of-way does not exist. The closure of a route does not modify or extinguish any R.S. 2477 right-of-way that may exist. Holders of valid existing rights, retain a right of access without an R.S. 2477 right-of-way. However, BLM approval is required before driving on a closed route. Closed routes outside wilderness areas will remain closed until R.S. 2477 assertions are processed or until the routes are opened using the route designation process.

How are routes that are "cherrystemmed" outside wilderness boundaries treated? Routes that are "cherry-stemmed" outside the boundaries of wilderness boundaries areas are not automatically open. These routes are subject to the multiple use mandate of FLPMA. They will be reviewed using the same route designation process BLM uses for other routes outside wilderness.

Can routes claimed as R.S. 2477 rights-of-way be closed to motorized vehicles? Yes. When BLM closes a route using the route designation process or on an emergency basis to protect important resources, the closed route can be opened without going back through route designation if it is determined that an R.S. 2477 right-of-way exists.

Can routes claimed as R.S. 2477 rights-of-way be rehabilitated? The rehabilitation of a closed route does not affect any R.S. 2477 right-of-way that exists even if the route is no longer visible. It is no different than if the "rehabilitated itself" due to lack of use. The BLM's objective in rehabilitating a closed route is to discourage travel on the route. Generally, when a closed route is rehabilitated, it is not rehabilitated over its entire length. Often, only the portion of a closed route visible from an open route is rehabilitated so that it no longer looks like a route.

How does R.S. 2477 affect acquired lands? Lands that were acquired by the federal government add additional complexity. For example, in areas where lands were conveyed to the railroads in a checkerboard pattern, some routes pass from public lands to railroad lands and back to federal lands. The federal government did not convey rights-of-way under R.S. 2477 while the lands were in non-federal ownership. If the lands through which a route passes were conveyed out of federal ownership in the 1860s, as is the case for many railroad land grants, and a route can be demonstrated to have existed only as far back as 1900, there is an insufficient basis to acknowledge a route as an R.S. 2477 right-of-way on the lands that left federal ownership. This may result in a situation where an R.S. 2477 right-of-way exists on lands that did not leave federal ownership but it does not exist on lands that were transferred to the railroad, i.e., an R.S. 2477 right-of-way exists only on alternating sections. When the federal government acquires these alternating sections, as occurred recently in California, the checkerboard status of the R.S. 2477 right-of-way remains even though the checkerboard surface ownership pattern is changed to solid block public land.

How do Recordable Disclaimers of Interest affect R.S. 2477 assertions? The regulations covering recordable disclaimers of interest (43 CFR 1864) define the process BLM will use to disclaim federal ownership on a wide variety of property interests that may be in dispute (68 FR 494-503; January 6, 2003). Disclaimers document cases where the federal government no longer retains the property interest referenced in the application for a recordable disclaimer. A disclaimer does not convey new rights where none existed. When it is unclear whether the federal government retains a property interest, that question must be answered first, before BLM can respond to the application for a recordable disclaimer. Often, when an R.S. 2477 right-of-way is asserted, its validity is in question. For this reason, BLM's response to an application for a recordable disclaimer is equally unclear. If the validity of an R.S. 2477 right-of-way is in dispute, BLM would be unable to approve an application for a recordable disclaimer of interest.

If an R.S. 2477 right-of-way does not exist because the route claimed does not meet the criteria for an R.S. 2477 right-of-way, then BLM's approval of a recordable disclaimer of interest would be inconsistent with the determination under R.S. 2477. It would be similar to a federal action that conveys new rights to another party. Such new rights cannot be conveyed under R.S. 2477 because the Federal Land Policy and Management Act repealed R.S. 2477 in 1976. Nor could BLM convey new rights under a recordable disclaimer of interest. Any new rights must be conveyed under the authority of FLPMA and in compliance with other legislation and regulations, e.g., the National Environmental Policy Act (NEPA), the Endangered Species Act, and the National Historic Preservation Act. The validity of an R.S. 2477 right-of-way that may exist must be determined before BLM could make a decision on an application for a recordable disclaimer of interest. All decisions would be made on a case-by-case basis. Another concern with recordable disclaimers is that most R.S. 2477 assertions apply to routes on public lands, where the only interest in question is that related to the possible right-of-way for the "highway" specified in R.S. 2477. The federal government retains other property rights on the parcel.

What are the views of public land user groups? Some user groups and local government support increased access and broad definitions of the terms construction and highway. They believe rights-of-way were conveyed on all types of routes. Their primary concern is over route closures. Environmental groups support a relatively narrow interpretation of the terms construction and highway and support the current policy to defer processing assertions. They are concerned that R.S. 2477 rights-of-way across reserved or environmentally sensitive areas may conflict with existing management and limit an agency's ability to manage lands in compliance with environmental laws.

How does BLM address the concerns over access while deferring the processing of R.S. 2477 assertions? To administer BLM's multiple use responsibilities under FLPMA, as well as our responsibilities under other statutes (e.g., the Wilderness Act, the Endangered Species Act, and the National Historic Preservation Act), we will acknowledge R.S. 2477 rights-of-way where they exist, but we must be cautious not to acknowledge assertions as rights-of-way until clear and consistent determinations that rights-of-way exist can be made.

The public's need for access to public land and across public land can be met while the federal government defers processing R.S. 2477 assertions and while decisions on which routes are open, closed and limited are made based on existing laws and regulations, land use plans, and resource management issues. BLM will consider the need for access in developing land use plans for public lands administered by BLM. BLM will work cooperatively with local government to provide the access needed for essential public services, such as fire management, police protection, and public health and safety.