



# United States Department of the Interior

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Washington, D.C. 20530

Re: Standards to be applied in determining whether  
highways have been established across public  
lands under the repealed statute R.S. 2477  
(43 U.S.C. § 932).

Dear Mr. Moorman:

## I. Introduction

This is in response to your letter of March 12, 1980. The statute in question, R.S. 2477 (43 U.S.C. § 932), was originally section 8 of the Act of July 26, 1866 (14 Stat. 253). It was repealed in 1976 by section 706(a) of the Federal Land Policy and Management Act. Prior to its repeal, it provided in its entirety as follows:

The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

Because of the repeal, we are only concerned with grants of rights-of-ways perfected prior to October 21, 1976, the date of the enactment of FLPMA.<sup>1/</sup>

As you are probably aware, R.S. 2477 has been the subject of inconsistent state statutes and state court decisions, and a handful of inconsistent federal court decisions, during its 110-year existence.<sup>2/</sup> Even if the state interpretations were fully consistent with each other, they would not necessarily control, especially where, as here, almost all of the reported state court decisions involved competing rights of third parties and the United States was not a party to them. The analysis in the various federal

<sup>1/</sup> A valid R.S. 2477 highway right-of-way is a valid existing right which is protected by FLPMA's sections 701(a) (43 U.S.C. § 1701 note), and 509(a) (43 U.S.C. § 1769(a)).

<sup>2/</sup> The legislative history is silent as to the meaning of this section of the 1866 statute. See generally The Congressional Globe, Vol. 36, 39th Cong., 1st Sess. (1866).

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cases involving R.S. 2477 also are not only inconsistent with each other, but none of them definitively come to grips with the precise issue we now face: Exactly what was offered and to whom by Congress in its enactment of R.S. 2477, and how were such rights-of-way to be perfected?

In the face of this tangled history,<sup>3/</sup> we outline below what we believe to be the proper interpretation of R.S. 2477. Our interpretation comports closely with its language which, because of the absence of legislative history, is especially appropriate. Our view is also consistent with many of the reported decisions. It has the added virtue of avoiding what would otherwise be a serious conflict between highway rights-of-way established under R.S. 2477 and the meaning of the term "roadless" in section 603 of FLPMA, which deals with the Bureau of Land Management (BLM) wilderness review responsibilities.

3/ A similar situation existed in the dispute over the ownership of the submerged land off the coast of California. In United States v. California 332 U.S. 19 (1947), the state argued that the United States was barred from asserting its title to the area because of the prior inconsistent positions taken by its agents over the years. The Supreme Court rejected this contention, stating in part (332 U.S. at 39-40):

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 has 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, inaction, or failure to act. (Citations omitted, emphasis added.)

II. Does R.S. 2477 Apply to Highways Constructed After 1866?

A threshold issue here is whether the statute sought only to validate highways previously constructed in trespass, or to apply prospectively as well. This Department has always regarded R.S. 2477 as applying prospectively to highways constructed after 1866. In United States v. Dunn, 478 F.2d 443, 445, note 2 (9th Cir. 1973), however, the court of appeals held that the Act was designed only to cure the trespass of those persons who had already (prior to 1866) "encroached on the public domain without authorization." The court said R.S. 2477 was "not intended to grant rights, but instead to give legitimacy to an existing status otherwise indefinable." The Ninth Circuit relied on Supreme Court decisions in Jennison v. Kirk, 98 U.S. 453, 459-61 (1878), and Central Pacific Ry. Co. v. Alameda County, 28 U.S. 463 (1931).

Jennison concerned section 9 of the 1866 Act, R.S. 2339, which — besides confirming and protecting the water rights of those who had perfected or accrued water rights on the public domain under local custom and laws — held liable for damages any person who, in constructing a ditch or canal, impaired the possession of any settler on the public domain. This section immediately followed section 8 of that Act (R.S. 2477) with which we are here concerned. The dispute in that case concerned two competing miners, the second of which (the plaintiff) had constructed a ditch for hydraulic mining which had crossed, and interfered with the first miner's working of, his mining claim. The first miner (defendant) had cut away the second miner's ditch in order to work his claim as before, and the Court held this did not give rise to the second miner's claim for damages under section 8. In dictum, the Court acknowledged that the broad purpose of the 1866 Act was to cure prior trespasses on the public domain, but made no specific comments on R.S. 2477.

The Central Pacific Ry. case did involve R.S. 2477, but only the validity of roads constructed prior to 1866. The Court said that, like section 9 construed in Jennison, section 8 (R.S. 2477) 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." 284 U.S. at 473 (emphasis added). The underlined clause is ambiguous, but might be read as suggesting that R.S. 2477 could apply to highways constructed after 1866, and indeed this is how the Department applied it both before and after the Dunn case.

We find implicit support for the Department's view in Wilderness Society v. Morton, 479 F.2d 842, 882-83 (D.C. Cir. 1973), cert. denied, 411 U.S. 917 (1973), which upheld the validity of an R.S. 2477 grant of a right-of-way for a highway constructed in 1970 along the Trans-Alaska Pipeline. Dunn's holding to the contrary, therefore, does not find unambiguous support in the cases it cites as support for its holding, and most reported decisions assume to the contrary; as a result, it has not been followed by the Department, in the Ninth Circuit, or elsewhere.

While the Ninth Circuit is correct in finding that one major purpose of the 1866 Act, taken as a whole, was to validate various prior trespasses on the public lands, it does not follow a fortiori that R.S. 2477 applies only retroactively. The statutory language, fairly read, looks forward as well as backward in time, and the great bulk of case law also supports the Department's consistent administrative interpretation.

III. Determining whether an R.S. 2477 highway has been validly established is a question of federal law.

The common law doctrine of adverse possession does not operate against the federal government. 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. 960 (1973); Grew v. Valentine, 10 F. 712 (5th Cir. 1865). The necessary corollary of this rule is that in order for a state or individual to gain an interest in land owned by the United States, there must be compliance with a federal statute which grants such interests.

The operative rule of construction applicable to such statutes is that grants by the federal government "must be construed favorably to the government and . . . nothing passes but what is conveyed in clear and explicit language -- inferences being resolved not against but for the government." Caldwell v. United States, 250 U.S. 14, 20 (1910); Wisconsin Central R.R. Co. v. United States, 164 U.S. 190, 202 (1896); Great Northern Ry. Co. v. United States, 315 U.S. 262, 272 (1942); Andrus v. Charleston Stone Products Co., 436 U.S. 604, 617 (1978); cf. Leu Sheep v. United States, 440 U.S. 606 (1979). This doctrine applies to grants to states as well as grants to private parties. Quincy v. Pacific Ry. Co., 64 U.S. 66, 82 (1859). Thus, in accordance with these rules, any ambiguities which exist in the statutory language must be resolved in favor of the federal government.

The question of whether a particular highway has been legally established under R.S. 2477 remains a question of federal law. It is a settled rule of statutory construction that all words in a statute are to be given effect. It must be assumed that Congress meant every word of a statute and that, therefore, every word must be given force and effect. United States v. Menasche, 348 U.S. 520, 535-37 (1955); Williams v. Sisseton-Wapeton Sioux Tribal Council, 367 F. Supp. 1194, 1200 (D. South Dakota 1973); see also Zeigler Coal Co. v. Kleppe, 536 F. 2d 398, 406 (D.C. Cir. 1976); Wilderness Society v. Morton, 479 F. 2d 642, 850 (D.C. Cir. 1973),

cert. denied, 411 U.S. 917 (1973); United States v. Wong Kim Ho, 472 F. 2d 720, 722 (5th Cir., 1972); Consolidated Flower Ship. Inc.-Day Area v. C.A.B., 205 F.2d 449 (9th Cir. 1953). This is especially so when, as here, there is no legislative history to suggest otherwise.<sup>4/</sup>

Thus in order to determine whether a valid R.S. 2477 highway exists on the federal lands, the several elements of the offer provided by the terms of the statute must be met. First, was the land reserved for a public use? Second, was there actual construction? Third, was what was constructed a highway?

#### A. Land reserved for public use

R.S. 2477 only grants rights of way over public lands "not reserved for public uses." Therefore, Indian reservations, wildlife Refuges, National Parks, National Forests, Military Reservations, and other areas not under the jurisdiction of BLM are clearly not open to construction of highways. The extent to which withdrawals of public lands constitute "reservations for public uses" is potentially complicated — see, e.g., Executive Order 6910 (54 L.D. 539) (1934); Wilderness Society v. Morton, 479 F.2d 642, 602, n.90 (D.C. Cir. 1973) — but for present purposes it is sufficient to observe that R.S. 2477 was an offer of rights-of-way only across public lands "not reserved for public uses."

#### B. Construction

Consistent with the rules of statutory interpretation previously discussed, the choice of the term "construction" in R.S. 2477 necessitates that it be considered an essential element of the offer made by Congress. "Construction" is defined in Webster's New International Dictionary, (2d Ed. 1935) (unabridged) at 572, as: "act of building; erection; act of devising and forming." Construction ordinarily means more than mere use, such as the creation of a track across public lands by the passage of vehicles. Accordingly, we believe that the plain meaning of the term "construction," as used in R.S. 2477, is that in order for a valid right-of-way to come into existence, there must have been the actual building of a highway; i.e., the grant could not be perfected without some actual construction.

<sup>4/</sup> An analogy can be drawn from the law of contracts. It is a basic tenet of contract law that no more than is offered is susceptible of a valid acceptance. Madrox v. Northern Natural Gas Co., 259 F. Supp. 781, 783 (D.C. Okla. 1966). Thus, in order for rights-of-way to have been validly accepted under the instant statute, such acceptance must have been performed in accordance with the terms and conditions of the offer. Minneapolis & St. L.R. Co. v. Columbus Rolling Mill Co., 119 U.S. 149, 151 (1886); Tilley v. County of Cook, 103 U.S. 155, 161 (1880); National Bank v. Hall, 101 U.S. 43, 49 (1879).

We believe the correct interpretation on this point is that adopted by the New Jersey Supreme Court in Paterson R.R. Co. v. City of Paterson, 80 A. 68 (N.J. 1912) construing the nearly identical phrase "construction of a highway" which appeared in a 1911 state statute. The court noted (80 A. at 69-70, emphasis added):

[T]he first question that arises is what is meant by the "construction of a highway." Does it mean simply to lay out the highway on paper and file a map thereof in some public office, or does it contemplate such grading, curbing, flagging, planking, or other physical alteration or addition as may be necessary to prepare the crossing for use by horses, wagons and other vehicles, [and] foot passengers. . . . The plain words of the statute indicate to my mind that the latter is the intention.

To survey a piece of lands and make a map of it, to designate it as a public street, and to file the map cannot in any sense be said to be the construction of a highway. To construct a building it is not sufficient to make a drawing of it and file it: it is necessary to make a physical erection which can be used as buildings ordinarily are used, and so I think that a highway cannot be said to be "constructed" until it shall have been made ready for actual use as a highway. The word "construction" implies the performance of work; it implies also the fitting of an object for use or occupation in the usual way, and for some distinct purpose; it means to put together the constituent parts, to build, to fabricate, to form and to make. The use of the word in connection with a highway manifestly means the preparation of the highway for actual ordinary use, and not the mere delineation thereof, or the taking of land for the purpose of a street.

The federal court decisions are not helpful in interpreting "construction." For example, both Dunn and Wilderness Society involved roads actually constructed. One might find a faint suggestion in the Central Pacific Ry. case that an R.S. 2477 highway may be created solely by actual use,<sup>5/</sup> but the Court never addressed the question whether some "construction" in the ordinary, dictionary sense of the word was necessary.

<sup>5/</sup> See 284 U.S. at 467, where the Court noted in passing that the original road in question "was formed by the passage of wagons, etc., over the natural soil . . . ." Earlier the Court noted that the highway had been "laid out and declared by the county in 1859, and ever since has been maintained." 284 U.S. at 465.