The administrative difficulty of applying a standard other than actual construction would be potentially unmanageable. If actual use were the only criterion, innumerable jeep trails, wagon roads and other access ways — some of them ancient, and some traversed only very infrequently (but whose susceptibility to use has not deteriorated significantly because of natural aridity in much of the west) — might qualify as public highways under R.S. 2477.6/ Requiring highways to be constructed will prove, we believe, much more workable in determining whether an R.S. 2477 right-of-way existed prior to October 21, 1976.7/

6/ For example, the State of Utah, which argues that R.S. 2477 highways can be perfected merely by public use without construction, is by state law in the process of mapping such "roads" which it considers were in existence as of October 21, 1976, the date of the repeal of R.S. 2477. (Section 27-12-3, Utah Code Annotated (1976).) Our initial review of these maps indicates that the State of Utah considers all of the numerous trails across federal lands to be R.S. 2477 highways, regardless of extent of construction, maintenance or use.

7/ In the debates leading up to the repeal of R.S. 2477 in FLPMA, there occurred a colloquy between Senators Stevens (Alaska) and Haskell (Colorado) which mirrors the confusion in the reported decisions about the meaning of R.S. 2477. See generally 120 Cong. Rec. 22283-84 (July 8, 1974). For example, Senator Stevens refers at one point to "de facto public roads" which are created from trails that "have been graded and then graveled and then are suddenly maintained by the state. He was concerned that repeal of R.S. 2477 might eliminate rights-of-way for such highways if there had been no formal declaration of a highway under R.S. 2477, even if the state "did, in fact, build public highways across federal land." Senator Haskell assured him that such formal perfection of the grant was not necessary; i.e., that actual existing use as a public highway under state law at the time FLPMA becomes law is sufficient to protect the highway right-of-way as a valid existing right not affected by the repeal of R.S. 2477. Senator Haskell referred to a North Dakota state court decision which recognized both formal and informal acceptance of the R.S. 2477 grant, the latter being done by "uses sufficient to establish a highway under the laws of the State." Whether either Senator thought use without construction was sufficient is doubtful. Senator Stevens raised the point in the context of highways which had been graded, graveled and otherwise built. Finally, of course, this debate, occurring nearly 110 years after enactment of R.S. 2477, sheds no light on Congress' intent in 1866.

This is not to say that if a road was originally created merely by the passage of vehicles, it can never qualify for a right-of-way grant under R.S. 2477. To the contrary, we think such a road can become a highway within the meaning of R.S. 2477 if state or local government improves and maintains it by taking measures which qualify as "construction"; i.e., grading, paving, placing culverts, etc. If the highway has been "constructed" in this sense prior to October 21, 1976, it can qualify for an R.S. 2477 right-of-way whether or not constructed ab initio.6/

C. Highway

A highway is a road freely open to everyone; a public road. See, e.g., Webster's New World Dictionary, (College Ed. 1951) at 686; Harris v. Hanson, 75 F. Supp. 481 (D. Idaho 1948); Karb v. City of Bellingham, 377 P.2d 984 (Wash. 1963). Because a private road is not a highway, no right-of-way for a private road could have been established under R.S. 2477. Insofar as the dicta in United States v. 9,947.71 Acres of Land, 220 F. Supp. 328 (D. Nev. 1963) concludes otherwise, we believe the court was clearly wrong. The court's error in that case was in confusing the standards of R.S. 2477 with other law of access across public lands; i.e., the road at issue in that case was a road to a mining claim, and the Department had previously distinguished such roads from public highways such as might be constructed pursuant to R.S. 2477. See Rights of Mining Claimants to Access over the Public Lands to Their Claims, 66 I.D. 361, 365 (1959). The court in 9,947.71 Acres of Land specifically found that the road in question was not a public road or highway, 220 F. Supp. at 336-37, and it therefore follows that it could not have been an R.S. 2477 road.7/ Rather, it was an access road under the mining law of 1872, and even assuming the court correctly concluded that its taking by the government was compensable, the court's discussion of R.S. 2477 was not pertinent to the legal question presented.

In summary, it is our view that R.S. 2477 was an offer by Congress that could only be perfected by actual construction, whether by the state or local government or by an authorized private individual, of a highway open to public use, prior to October 21, 1976, on public lands not reserved

6/ It is not necessary to deal herein with whether and how an R.S. 2477 right-of-way can be terminated. Because only a right-of-way rather than title is conveyed, however, it seems clear that such a right-of-way can be terminated by abandonment or failure to maintain conditions suitable for use as a public highway. Cf. United States v. 9,947.1 Acres of Land, 220 F. Supp. 328, 334 (D. Nev. 1963).

7/ In fact, the State of Nevada had officially taken the position that the road in question was not considered a public road or highway. See 220 F. Supp. at 337.

for public uses. Insofar as highways were actually constructed over unreserved public land by state or local governments or by private individuals under state or local government imprimatur prior to October 21, 1976, we do not question their validity.

D. State law construing R.S. 2477

As noted above, state court decisions and state statutes are in conflict with each other on the issue of how a right-of-way under R.S. 2477 is perfected. Generally, the approach of the states appears to fall into three general categories. First, some (Kansas, South Dakota and Alaska) have held that state statutes which purport to establish such rights-of-way along all section lines are sufficient to perfect the grant upon enactment of the state statute, even if no highway had either been constructed or created by use. Tholl v. Koles, 70 P. 881 (Kan. 1902); Pederson v. Canton Twp., 34 N.W. 2d 172 (S.D. 1948); Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Alas. 1975), contra Warren v. Chouteau County, 265 P. 670 (Mont. 1928). Second, states such as Colorado, Oregon, Wyoming, New Mexico, and Utah have held that R.S. 2477 rights-of-ways can be perfected solely by public use, without any construction or maintenance. Nicolas v. Grassie, 267 P. 196 (Colo. 1928); Montgomery v. Somers, 90 P. 674 (Ore. 1907); Hatch Bros Co. v. Black, 165 P. 516 (Wyo. 1917); Wilson v. Williams, 97 P. 2d 883 (N.M. 1939); Lindsay Land & Livestock Co. v. Charnos, 285 P. 646 (Utah 1930). Third, Arizona courts have held that such rights-of-way can be established only by a formal resolution of local government, after the highway has been constructed. Perfection by mere use is not recognized. Tucson Consol. Copper Co. v. Reese, 100 P. 777 (Ariz. 1908).

The above analysis of the plain meaning of R.S. 2477 shows that the Arizona interpretation is the only correct one, and that the positions taken by other states do not meet the express requirements of the statute. For example, the Kansas, South Dakota and Alaska approach based on section lines does not even require that there be a highway or access route, much less that it be constructed. The approach taken by states such as Colorado, Utah, New Mexico, Oregon and Wyoming, that R.S. 2477 rights-of-way may be perfected by access ways created by use alone, without any construction, also fails to meet the plain requirement of R.S. 2477 that such highways be "constructed."

The term "construction" must be construed as an essential element of the grant offered by Congress; otherwise, Congress' use of the term is meaningless and superfluous. The states could accept only that which was offered by Congress and not more. Thus, rights-of-way which states purported to accept but on which highways were not actually constructed prior to October 21, 1976, do not meet the requirements of R.S. 2477 and therefore no perfected right-of-way grant exists.

Given the statutory requirement of construction, the phrase "or establishment in accordance with the State laws" must mean that a state could lawfully require more than mere construction of the highway in order to perfect the R.S. 2477 grant; i.e., "construction" is the minimum requirement of federal law but the State could impose on itself additional requirements in order to perfect a grant under R.S. 2477. This in fact is what Arizona has apparently done; i.e., construction of the highway is sufficient as a matter of federal law to qualify for a right-of-way under R.S. 2477, but Arizona has imposed upon itself the additional requirement of formal approval of the grant by local government. Highways thus might be "constructed" under R.S. 2477, but the right-of-way won't be accepted as far as Arizona is concerned, or "established" in terms of 43 C.F.R. § 2822.2-1, until local government resolves to accept or designate them.

V. Relationship between "roadless" as used in section 603 of FLPMA and "highway" as used in R.S. 2477.

Section 603 of FLPMA (43 U.S.C. § 1782) mandates an inventory of all public lands initially to determine which lands contain wilderness characteristics as defined in the Wilderness Act (16 U.S.C. § 1131 et seq.), contain 5,000 acres or more and are roadless. Areas which meet these standards must be managed to protect their suitability for wilderness preservation until Congress determines whether or not they should be placed in the wilderness system. Critical to this process is the meaning of the term "roadless."

As discussed in a Solicitor's Opinion interpreting section 603 of FLPMA (86 I.D. 89, 95 (1979)), the definition used by the BLM in administering section 603 comes from the House Report on FLPMA and provides as follows:

> 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.

H.R. Rep. No. 1163, 94th Cong., 2d Sess. 17 (1976).

The above analysis shows that an area containing a highway validly constructed under the offer of R.S. 2477 is of necessity not roadless under section 603 of FLPMA, because an area containing a valid R.S. 2477 highway can never meet the definition of "roadless" in the House Report. That is, a valid R.S. 2477 right-of-way must be a public highway constructed (or, as the House Report on section 603 indicates, "improved and maintained by mechanical means") over unreserved public lands, and can, therefore, never be a way established merely by the passage of vehicles. Read in

this way, the two statutes are consistent with each other,10/ and with the settled rules of statutory construction that Congress is presumed to be cognizant of prior existing law,11/ and that statutes should be construed consistent with each other where reasonably possible.

Finally, it should be noted that in states such as Alaska, which have enacted statutes designating all section lines as highways, purporting to constitute the perfection of the R.S. 2477 grant, see Girves v. Kenai Penensula Borough, 536 P. 2d 1221, 1225 (Alas. 1975), no public lands in the entire state would qualify for wilderness study because there would be no "roadless" areas over 640 acres, and section 603 of FLPMA requires a roadless area of 5000 acres as a minimum in order to be considered for wilderness area designation. There is absolutely no indication in the legislative history of FLPMA that Congress thought such a bizarre result would be possible. On the contrary, all indications are that Congress thought that all areas of public lands without constructed and maintained roads would be considered for possible preservation as wilderness.

I trust you will find this explanation of our position useful. I look forward to our meeting on May 2 to discuss this further.

Sincerely,

FREDERICK N. FERGUSON

DEPUTY SOLICITOR

10/ It is significant that in formulating its definition of "roadless" that the House Committee identified no conflict between that definition and R.S. 2477. See H.R. Rep. No. 1163, 94th Cong., 2d Sess. 17 (1976). The transcript of the House Committee markup session reveals that Congressman Steiger of Arizona suggested the definition of "road" which 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 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. See Transcript of Proceedings, Subcommittee on Public Lands of House Committee on Interior and Insular Affairs, Sept. 22, 1975, at 329-33.

11/ See, e.g., United States v. Robinson, 359 F. Supp. 52 (D. Fla. 1973); In re Vinarsky, 267 F. Supp. 446 (D. N.Y. 1968).

cc: Dep. Asst. Atty. Gen. S. Sayalkin, DOJ
[illegible], DOJ
[illegible], DOJ
[illegible], Dir. Of Gen. Counsel, DOI
Assoc. Sol., Land
Assoc. Sol., Land
Regional Sol., Southwest Region
Regional Sol., Pacific Southwest Region
Regional Sol., Alaska Region
Regional Sol., Utah Region
Regional Sol., Rocky Mt. Region
Asst. Sol., Land Use, DLR
Asst. Sol., Realty, DLR
[illegible], DLR
[illegible], DLR

[illegible]

[illegible]

Appendix II, Exh[illegible]
page 13 of 13