U.S. Department of the Interior
Main Interior Building
1849 C Street, N.W.
Room 5555
Washington, D.C. 20240

Re: RIN 1004-AB00; RIN 102AC01; RIN 1026-AC45

Revised Statute 2477 Rights-of-way

Dear Sir or Madam:

Submitted herewith are comments adopted by Lander County, a political subdivision of the State of Nevada, concerning the proposed addition of 43 CFR Part 39 to the Code of Federal Regulations.

Lander County opposes promulgation of the regulations on the grounds that such promulgation is beyond and without the authority of the Secretary of Interior and the heads of the Bureau of Land Management, National Park Service and U.S. Fish and Wildlife Service, and for the other reasons set forth in the comments.

Sincerely,

LANDER COUNTY DISTRICT ATTORNEY

By /s/ Zane Stanley Miles
Zane Stanley Miles, District Attorney

cc: Harry Reid, U.S. Senator
Richard Bryan, U.S. Senator
Barbara Vucanovich, Representative in Congress
James Bilbray, Representative in Congress

Before the

DEPARTMENT OF THE INTERIOR
Washington, D.C. 20240

In re:
Advance Notice of Proposed Rulemaking
Revised Statute 2477
Rights-of-Way as Published
at 59 Fed. Reg. 39216,
August 1, 1994

AGENCIES: Bureau of Land Management, National Park Service; Fish and Wildlife Service

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COMMENTS OF LANDER COUNTY,
a political subdivision of the State of Nevada

on proposed 43 CFR Part 39 purporting to regulate R.S. 2477 rights- of-way.

It is the position of Lander County that the Department of Interior, the federal government, has no authority to regulate R.S. 2477 rights-of-way.

Firstly, the federal government lost ownership of the public lands of Nevada Territory when Nevada became a state in 1864, two years prior to enactment of the Mining Law of 1866. On Admission Day the public lands became state property pursuant to the Equal Footing provisions of the U.S. Constitution. Pollard's Lessee v. Hagan, 44 U.S. (3 Howard) 212, 11L.Ed. 565 (1845); Coyle v. Smith, 221 U.S. 559, 31 S.Ct. 688 55 L.Ed. 853; Utah Division of State Lands v. U.S., 482 U.S. 193, 107 S.CT. 2318, 96L.Ed.2d. 161 (1987); New York v. U.S., 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992).

Secondly, assuming arguendo that the federal government somehow retained ownership of the public lands, the R.S. 2477 rights of way constitute an interest in land. An offer of title to those interests was granted by Congress by enactment of the Mining Law of 1866. The grant later was codified as R.S. 2477. The grant is not subject to any clause of reversion. Once the grant was accepted by establishment of a "highway," as that term was understood in 1866, transfer of title to the rights of way was unconditional. Any effort by the Department of Interior, the Bureau and the Services to extinguish, restrict, alter, encumber, or otherwise burden existing RS 2477 rights-of-way would:

a) Exceed the delegated authority of the Department;

b) Disregard the expressed will of Congress;

c) Violate Section 706(2)(A) and (B) of the Administrative Procedure Act since the proposed reulemaking would be arbitrary, capricious, and contrary to applicable statute;

d) Unconstitutionally pre-empt state law; and

e) Violate the Takings Clause of the U.S. Constitution by constraining private property access which is provided by RS 2477 roads.

Therefore, Lander County denies that Interior and its agencies have any authority to promulgate the proposed regulations.

The Board of Lander County Commissioners has adopted a resolution claiming control of R.S. 2477 roads within the county on behalf of the public. A copy of that resolution is attached to these comments and is made a part hereof by reference.

The Board is in the process of enacting an ordinance making it a misdemeanor for any person to interfere with the public's use of R.S. 2477 roads. A copy of that ordinance is attached to these comments and is made a part hereof by reference. It is anticipated that the ordinance will be effective prior to the amended date for comment on November 15, 1994.

The resolution and ordinance recognize that the grant of right of way for "highway" purposes in the 1866 Act encompassed a much broader definition of "highway" than current usage might imply. The county finds that the term "highway," as contemporaneously used in 1866, includes roads, traces, trails, footpaths, horsepaths, canals, navigable waters, and all other traveled routes or routes of commence open to the public.

Under no circumstances shall the term "highway" be defined to apply only to routes suitable for vehicular use, or to routes established only by physical construction. In fact, most R.S. 2477 routes were established by usage over decades or a century, generation after generation, not by mechanical construction. No contractors were

hired to construct or establish most of these roads. No mechanical maintenance was performed in most cases until well after the advent of the automobile, and in many cases not even then. Because the so-called "public land counties" had an extremely limited tax base -- since they were forbidden to levy taxes on the public lands -- much of that maintenance which was done was done by private citizens.

While Lander County is certain that the proposed Part 39 regulations are unconstitutional, unlawful, and an infringement on established interests in real property, the county has chosen to comment on the proposal in detail, as set forth below. It is the county's position, however, that the proposed regulations should be withdrawn as beyond the authority of the Department of Interior to promulgate.

Detailed Comments

Sec. 39.1 Purpose.

(a) The proposed regulations proposes to establish procedures for processing "claims" for R.S. 2477 rights-of-way. Use of the term "claims" evidences an effort to equate R.S. 2477 grants with unpatented mining claims. That would help to justify the current efforts of the Department of Interior to "regulate" R.S. 2477 roads. However, R.S. 2477 rights-of-way are not "claims:" they are "grants," the verb used by Congress when it enacted the Mining Law of 1866. The statute declares that necessary rights of way "are hereby granted." The statute contains no reversionary clause. It provides for a grant of a right in real property -- a right of way -- for all time. The right so granted is not subject to any further regulation by the Congress, except for such regulation as the Congress may constitutionally apply to all lands. The rights are not "claims:" they are matured rights, perfected when roads, trails, traces, footpaths, horsetrails, etc., were established across the public lands prior to repeal of R.S. 2477 by the enactment of FLPMA, the Federal Lands Policy Management Act. The Department has no more authority over R.S. 2477 roads than it has over patented mining claims.

(b) No definition of terms is given in the proposed regulation. Definitions are given in Sec. 39.3.

(c) The Department of Interior has no right to "establish public notice and appeal processes of claims for rights-of-way" because the rights proposed for regulation are not "claims" but are matured, perfected interests in land, interests which have been granted away by the United States, akin to patents. Just as Interior has no right to regulate lands which the United States has deeded away by patent Interior has no right to regulate the R.S. 2477 rights-of-way.

(d) Again, the Department of Interior has no right to "provide for the use of rights-of-way validly acquired" because those rights-of-way have been granted by the equivalent of patent, by Congressional Act, and the United States no longer has any authority over those lands.

Sec. 39.2 Applicability and authority.

The section admits that R.S. 2477 rights of way are grants, but attempts to treat them as claims, in direct contravention of the language of the Congressional Act. The section admits that R.S. 2477 rights of way perfected prior to the enactment of FLPMA could not terminate those rights without effecting an adminis- rative taking which would require compensation pursuant to the Constitution of the United

States. FLPMA provides a new process for issuing of future rights-of-way, but FLPMA does not impair one iota those rights-of-way granted by and vested under R.S. 2477 prior to FLPMA's enactment. When lands were withdrawn from the public domain for any Constitutional federal purpose, the agency taking such lands took them subject to whatever legal rights-of-way had been created pursuant to the grant set forth in R.S. 2477, just as any private patentee took his patent from the federal government subject to whatever R.S. 2477 roads (or other easements) had been established and vested across the public lands. Such trails across Lander County as the California Trail and Pony Express Trail come readily to mind.

(a) The Secretary of the Interior does not have authority to enact regulations governing R.S. 2477 roads because those rights- of-way are not Department of Interior Lands, and have not been Department of Interior lands since the roads were established, such establishment effectively accepting the grant for highway purposes made by Congress in 1866. Further, since R.S. 2477 has been repealed by FLPMA, it cannot be used subsequent to that repeal as authority for any act of the Secretary of Interior. The authority cited is inapposite.

(b) FLPMA does not authorize the Bureau of Land Management to promulgate regulations governing R.S. 2477 roads, since the R.S. 2477 rights-of-way passed from federal domain when the Congressional grant of 1866 was accepted by establishment of the requisite "highways" (roads, traces, trails, footpaths, horsepaths, canals, passage across navigable bodies of water, etc.). Once title to the rights-of-way passed, the BLM and its predecessors lost all jurisdiction over those rights-of-way. The authority cited is inapposite.

(c) The U.S. Fish and Wildlife Service authority cited does not authorize USFWS to promulate regulations governing R.S. 2477 roads across lands controlled by USFWS. Title to R.S. 2477 rights-of-way, established prior to withdrawal of public lands for refuges, game ranges, and other conservation areas, had passed from federal control when the roads were established, accepting the grant made by Congressional Act in 1866. Where lands were withdrawn from the public domain for legitimate, Constitutional federal purposes, R.S. 2477 never applied; any roads established after Constitutional withdrawal are not and never were R.S. 2477 roads. The authority cited is inapposite.

(d) The National Park Service has no authority to regulate R.S. 2477 roads established prior to withdrawal of public domain for park purposes. Lands set aside for park purposes were set aside subject to all valid rights-of-way and easements, including R.S. 2477 roads which had been previously granted. Such rights- of-way and easements are not claims; they are grants according to the language of the Mining Act of 1866. Unless NPS repurchases those rights-of-way, or prevails upon the local government to abandon them, the rights-of-way are not federal lands and not subject to NPS control. The authority cited is inapposite.

Sect. 39.3 Definitions

(a) Administrative determination. No Interior officer has authority to make an "administrative determination" about R.S. 2477 roads. R.S. 2477 rights-of-way are a vested interest in property, determinable only by the courts. Interior may not arrogate unto itself a determination which properly is vested in the Judiciary. The doctrine of separation of powers prohibits an arm of the Executive Branch

from determining title to an interest in land.

(b) Authorized officer. Same comments as (a) preceding.

(c) Claim. R.S. 2477 rights-of-way are not "claims." They are vested interests in land, equivalent to a patent, granted by the Congress in the Act of and not subject to any further action on the part of the Department of Interior. In those cases where a Judicial determination of the existence of a right-of-way pursuant to R.S. 2477 has been made, Interior as an arm of the Executive Branch has no authority to supersede the Judicial determination. Again, the constitutional doctrine of separation of powers forbids Executive interference with the decisions of the Judicial Branch.

(d) Claimant. Since there are no "claims{" to R.S. 2477 "grants," there can be no claimants. There may be governmental entities or persons which wish to quiet title to their R.S. 2477 grants in the Judicial system.

(e) Construction. The proposed definition appears not to recognize roads constructed by use. Use was a perfectly valid, recognized, means of construction roads during the 110 years when R.S. 2477 was in effect. Any definition of construction which does not recognize construction by use is incomplete and invalid. Example: Most of the early trails were created by use. Here and there "intentional physical acts" were used to provide passage across bogs, steep slopes, forests, etc. The proposed regulation would appear to recognize the sections crossing bogs, slopes and forests as R.S. 2477 roads while denying R.S. 2477 status to the portions established only by use. That distinction is irrational and no court would support such a ridiculous definition.

(f) Highway. The term "highway" as used in R.S. 2477 must be defined in the context of 1866, not as the term may be used today, 18 years after repeal of the Act. Some apposite definitions from legal dictionaries and treatises from the Nineteenth Century:

Brande's 1867 Dictionary.

> **Highway**. In English Law, a highway is a way over which the public at large have a right of passage, and includes a horse road, or a mere footpath, as well as a carriage road. Any way common to all people, without distinction, is a highway. (Emphasis supplied.) W.T. Brande, ed., 3 A Dictionary of Science, Literature and Art, 125 (1867).

Bouvier's Law Dictionary, 1866 ed.

> **HIGHWAY**. A passage or road through the country, or some parts of it for the use of the people. The term highway, is a generic name for all kinds of public ways. (Emphasis supplied.) John Bouvier 2 A Law Dictionary 586 (1866).

Burrill's Law Dictionary, 1867.

> **Highway**. A public way or road: a way or passage open to all: a way over which the public at large have a right of passage. Called in some of the old books,

> high street. Every thoroughfare which is used by the public, and is in the language of the English books, "common to all the king's subjects" is a highway, whether it be a carriage-way, a horse-way, a foot-way, or a navigable river. The word highway is the genus of all public ways. (Emphasis supplied.) Alexander M. Burrill, A Law Dictionary and Glossary, (1867)

There are numerous other legal publications providing similar definitions, which were known to Congress when it deliberately used the word "highway" in granting rights-of-way in the Mining Law of 1866. Those contemporaneous definitions are a guide to the "legislative intent" of Congress. Any definition of "highway" for R.S. 2477 purposes must reflect the contemporaneous use of the term as known to Congress.

The proposed definition clearly reflects an Interior purpose to deny the existence of thousands of R.S. 2477 roads in the West in order to justify declaration that huge parts of the public domain are "roadless" areas suitable for wilderness status. That approach flies in the face of 1866 Congressional intent, and is a specious attempt to take true R.S. 2477 roads from their legitimate holders.

Vehicular use is not required to satisfy the 1866 definitions of a "highway." Interior's attempt to posit vehicular use as a requirement is a thinly disguised effort to take valid property rights without just compensation, as required by the United States Constitution.

> (g) **A holder is a governmental entity or person who owns a right-of-way pursuant to R.S. 2477**. The fact that its or his property right has not been subject to Judicial determination makes him no less a holder and owner. The Department of Interior has nor authority to usurp the Judicial function of determination of ownership of a property right.
>
> (h) **Improvement**. An improvement does not necessarily expand the scope of a right-of-way. If maintenance or construction is within the traveled right-of-way, or the adjoining maintenance area necessarily included in and a part of the original grant of right of way, there is no expansion.
>
> (i) **Judicial determination**. Except for use of the word "claimant" instead of "owner," the definition is acceptable.
>
> (j) **Latest available date**. For purposes of discussion the definition is acceptable. However, the withdrawal described in (j)(2) must have been for a permissible Constitutional purpose.
>
> (k) **Maintenance**. The definition does not recognize maintenance by use, which is the most common form of maintenance on primitive roads and trails. Limitation of "maintenance" to maintenance for vehicular use is contrary to the original intent of the grant made by Congress in the Mining Act of 1866. R.S. 2477 roads include footpaths and horsepaths, trails and traces, not just routes suitable for vehicular travel. The definition must recognize that maintenance can occur outside the traveled way. The R.S. 2477 right-of-way grant includes adjacent lands necessary for maintenance of the traveled way.
>
> (l) **Public Lands Not Reserved for Public Uses or Unreserved Public Lands**. The definition should recognize that all withdrawals must have been for Constitutionally authorized purposes to be valid.

withdrawals not authorized by the Constitution are void ab initio.

(m) **Public Land Records**. The definition should include the records of the states which are the actual owners of the public lands not the federal government.

(n) **Routine Maintenance**. The definition must recognize that routine maintenance can occur outside the traveled way. The R.S. 2477 right of way includes that land adjacent to the traveled way which is necessary to maintain the traveled way.

(o) **Scope**. The proposed definition is markedly erroneous. R.S. 2477 grants confer an interest in land for "highway" purposes as the word "highway" was understood in 1866. The grant is not limited to the traveled way; it includes that land adjacent to the traveled way which is necessary to maintain the traveled way. Then grant does not limit the surface treatment, which may from time to time be changed or improved by the owner. Likewise, the width or location of the traveled way may be changed by the owner within the limits of the original grant -- the traveled way and that land adjacent to the traveled way which is necessary to maintain the traveled way.

(p) **Secretary**. The definition is acceptable.

Sec. 39.4 Recognition of a validly acquired right of way.

Grants pursuant to R.S. 2477 confer an interest in land. Those interest are determinable only by the Judicial Branch. No "authorized officer" of the Executive's Interior has the authority to make determinations of the extend or amount or existence or to otherwise define the conditions of a grant conferred by the Legislative Branch.

Sec. 39.5 Interests granted and retained by the United States.

(a) Interests validly acquired pursuant to R.S. 2477. The interest acquired by the owner of an R.S. 2477 right-of-way is ownership of an easement, the fee to that easement. Such an owner, not "holder," has a right, not subject to regulation, to perform maintenance as he sees fit. Routine maintenance, construction, improvement, use, and operation of the right of way are not subject to regulation by Interior, since the federal government has granted away all right, title and interest to the right of way by Act of Congress, the grant having been validly accepted by establishment of the "highway" as that term commonly was used in 1866.

(b) Interests retained by the United States. The United States does not retain any right to regulate the use of a right of way granted pursuant to R.S. 2477, just as a private landowner has no right to regulate the use of maintenance of an easement across his property. The underlying land becomes servient to the dominant easement. That rule applies to the federal government as landowner.

Sec. 39.5 Requirement to file a claim.

(a) No owner of a right of way obtained pursuant to R.S. 2477 may now be required, years after repeal of the act of FLPMA, to make any claim not required originally by the Mining Law of 1866. That law did not provide for any filing of claims. Particularly, an owner who has obtained Judicial recognition of his title may not be required to file paperwork with Interior to further validate that claim.

(b) Determination of appropriate office.

Since the proposed Part 39 is unconstitutional and unlawful, there can be no appropriate Executive Branch (Interior) agency.

(c) Information required in claim.

Since the "appropriate officer" of the Executive Branch (Interior) has no authority to determine title to an interest in land, strictly a function of the Judicial Branch, this subsection is meaningless. The owner of a right of way obtained pursuant to R.S. 2477 is not a "claimant" and his right of ownership is not a "claim" Interior's agencies have no authority over the owner, nor any right to regulate his activities.

Assuming, without recognizing, that Interior has some authority to adopt this subsection, the following comments are made:

(1) The name of the owner may be relevant; his affiliation is not. The owner is not a "claimant;" he is an owner.

(2) Acceptable.

(3) Most R.S. 2477 highways (roads, trails, traces, footpaths, horsepaths, navigable waters) do not have state or county numbers. The type of service is legally irrelevant.

(4) Legally irrelevant.

(5) Legally irrelevant.

(6) If Interior wants to challenge ownership, it should find this information for itself.

(7) Irrelevant.

(8) Irrelevant. Visual observation of the existence of a highway (road, trail, trace, footpath, horsepath, canal, navigable water) is all that is required.

(9) Vehicular use is not a requirement. "highways" as used in 1866 included roads, trails, traces, footpaths, horsepaths, canals, and navigable waters. It is not necessary that an R.S. 2477 road connect two points, merely that it be used by the public.

(10) The federal government is the repository for records of claimed withdrawals. Interior should consult its own records.

Sec. 39.7 Effect of failure to file a claim.

Since R.S. 2477 rights of way are vested when the grant is accepted by establishment of a "highway" as that term was used in 1866, failure to file a claim as these proposed regulations would require has no legal significance. These rights of way no longer are federal property, and there is no provision in the granting legislation for any form of reversion to the United States.

Sec. 39.8 Processing of claims.

R.S. 2477 rights of way are owned; they are not "claims." The ownership is by grant of Congress, akin to patent. There is no reversion clause in the grants. These property rights cannot be taken from their current owners except upon the payment of just compensation.

There is no possible administrative determination of the validity of R.S. 2477 claims; that is strictly a function of the Judicial Branch. This entire section as proposed is violative of the Constitution and the common law of property.

Sec. 39.9 Appeals procedure from administrative determinations.

Since the executive (Interior) has no authority to determine title to interests in land, the entire proposed appeals procedure is unlawful and irrelevant.

Sec. 39.10 Interim activity.

Since the owner of an R.S. 2477 right-of-way owns the easement, he may conduct any activity within the scope of the grant of easement by Congress at any time, whether or not Interior is proceeding with its proposed unconstitutional and unlawful attempt to regulate R.S. 2477 roads.

Sec. 39.11 Information collection.

The proposed requirement that R.S. 2477 right-of-way owners provide subject information to Interior is unduly burdensome, unlawful, unconstitutional, and constitutes unreasonable interference with the property interest of such owners.

RESPECTFULLY SUBMITTED, this 20th day of October, 1994.

LANDER COUNTY, a political subdivision of
the State of Nevada.

By its Board of Commissioners

/s/ Ray Williams, Jr.
Ray Williams, Jr., Chairman
/s/ Jerry LaMiaux
Jerry LaMiauz, Vice Chairman
/s/ Bill Elquist
Bill Elquist, Commissioner

Attest:

/s/ Judy Negro
Judy Negro, Clerk

The foregoing prepared and approved for legality and form by the Office of the District Attorney of Lander County, Nevada and submitted as the legal position of said county.

/s/ Zane Stanely Miles

Zane Stanley Miles, Dist. Att'y

Enclosures made a part hereof by reference:

1. Lander County resolution concerning RS 2477 roads
2. Lander County ordinance concerning public roads

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By its Board of Commissioners

/s/ Ray Williams, Jr.
Ray Williams, Jr., Chairman
/s/ Jerry LaMiaux
Jerry LaMiauz, Vice Chairman
/s/ Bill Elquist
Bill Elquist, Commissioner

Attest:

/s/ Judy Negro
Judy Negro, Clerk

The foregoing prepared and approved for legality and form by the Office of the District Attorney of Lander County, Nevada and submitted as the legal position of said county.

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