Before the
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Washington, D.C. 20240

In re:
Memorandum of Secretary
Concerning Non-recognition
Of R.S. 2477 Roads by BLM

TO: Bureau of Land Management
Administrative Record
Room 401 LS, 1849 C. St., NW
Washington, D.C. 20240
(Via Internet to WOComment)
@WO.blm.gov. Attn: AC30))

COMMENT AND PROTEST
OF DISTRICT ATTORNEY OF EUREKA COUNTY,
a political subdivision of the State of Nevada

The Secretary of Interior, by internal memorandum, has instructed the state and district offices of the Bureau of Land Management not to recognize any claims to those rights-of-way known as R.S. 2477 roads, absent the most dire emergency.

The Secretary attempts to accomplish, by internal memorandum, an action which he was prevented from accomplishing by regulation in 1994. In that year the Secretary ordered published in the Federal Register proposed rules to drastically revise the law of R.S. 2477 roads. Publication of the proposed rules produced a firestorm of critical comment and protest. Typical of the comments submitted at that time were the comments of Lander County, a political subdivision of the State of Nevada, a copy of which is submitted with this Comment and Protest as Appendix "B" and made a part hereof by reference. Those comments are adopted and ratified by the Eureka County District Attorney to the extent that they are applicable to the Secretary's current memorandum.

At the behest of Congress, the proposed rules were withdrawn pending Congressional reexamination of the rights-of-way grants incorporated in the Act of 1866, later codified as R.S. 2477. The open-ended grants of rights-of-way provided in R.S. 2477 was repealed in 1976 by the enactment of the Federal Land Planning and Management Act (FLPMA). FLPMA provided, however, that preexisting rights and privileges were not repealed or affected by the 1976 legislation, an apparent attempt by Congress to avoid any "takings" liability pursuant to the Fifth Amendment.

In January, 1997, the Secretary announced he did not intend to wait any longer for Congressional action, and circulated a memorandum instructing Interior agencies not to recognize R.S. 2477 rights of way except in cases of exceptional, critical need. The effect of the memorandum is to implement the concepts set forth in the proposed 1994 rulemaking without publication in the Federal Register and conformity with the Administrative Procedures Act.

The Secretary's memorandum is unacceptable, and probably unlawful, on several levels:

1. If implemented, the memorandum effects a Constitutional "taking" of property interests -- the rights granted to the public by Congress. Argument that the rights taken are "public" rather than "private" fails to recognize that many private parties have cognizable interests in those "public" rights of way. Determination by an Executive Branch official to effect a "takings" by a species of adverse condemnation -- taking away a right without judicial process -- implicates the Fifth Amendment prohibition of such "takings" without first making or securing just compensation.

2. Through the memorandum the Secretary arrogates unto himself authority which Congress clearly intended to reserve to the Legislative Branch. The U.S. Constitution does not countenance any such Executive Branch power grab. This is particularly true where the Legislative grant of power to the Executive -- through FLPMA -- expressly limits any effect upon preexisting rights.

3. The Secretary's memorandum, if implemented, sets aside and abrogates an entire line of U.S. Supreme Court decisions interpreting the Act of 1866 as recognizing and ratifying those rights-of-way which existed across the public lands at the time of enactment, and establishing an open-ended, *in praesenti*, grant of rights-of-way for highways, canals, ditches, etc. The Executive lacks any authority under the U.S. Constitution to nullify the interpretations of law and the Constitution pronounced by the Judicial Branch.

The legal status of R.S. 2477 roads has been analyzed at length by the Eureka County District Attorney in a brief originally prepared for amicus *curiae* submission in the case of United States v. Nye County now pending in the U.S. District Court for the District of Nevada. An updated version of that brief is annexed hereto as Exhibit "A" and made a part hereof by reference to state the legal opinion of this office regarding the status of R.S. 2477 roads.

That brief clearly shows that the Act of 1866 evidences the intention of Congress to pass title to an estate in the public domain to persons who would establish public roads on the rights-of-way so granted. Subsequent U.S. Supreme Court decisions hold that the extent or scope of such rights-of-way is to be determined by state laws. The R.S. 2477 grant is equivalent to a patent; once accepted by the grantee by performance of the required act -- establishing a road -- the Executive Branch has no more authority to impose

rules and regulations on such rights-of-way than it has to affect any other private property. The Secretary's memorandum of January 1997 is *ultra vires* and may not be implemented.

CONCLUSION: It is evident that the Secretary exceeded his authority when he promulgated a memorandum instructing Department of Interior agencies to ignore claims to R.S. 2477 rights-of-way. The Secretary, the same as any other Federal official, may be held personally liable for damages resulting from acts in excess of delegated authority. Further, his subordinates who purport to rely on the memorandum are themselves at risk, since the Secretary lacks the power to delegate to them authority to perform unconstitutional, illegal acts. The memorandum must be withdrawn. See, inter alia, Bivens v. Six Federal Agents.

Respectfully submitted this 13th day of February, 1997.

DISTRICT ATTORNEY OF EUREKA COUNTY,

A political subdivision of the State of Nevada
WILLIAM E. SCHAEFFER, District Attorney

By:

Zane Stanley Miles, Chief Deputy

cc: Board of Eureka County Commissioners
Eureka County Public Lands Advisory Commission
Other Interested Entities

POINTS AND AUTHORITIES
Concerning the Law of R.S. 2477 Rights of Way

PREFACE:

Eureka County, a political subdivision of the State of Nevada, does not concede that there are any R.S. 2477 rights of way within the State, asserting that, pursuant to the Equal Footing Doctrine and trust theory, title to the public lands passed to the State upon its Admission to the Union on October 31, 1864, two years prior to enactment by Congress of the standing right-of-way offer commonly referred to as R.S. 2477. If that be correct, there were no remaining Federal public lands in Nevada across which Congress in 1866 could have offered to grant rights of way. Therefore, these Points and Authorities are offered in supplementation of Eureka County's primary thesis, that the public lands of Nevada are owned by the State of Nevada, not the Federal Government.

Issues Presented

I

ARE ALL ROADS AND TRAILS, DITCHES AND CANALS, ESTABLISHED ACROSS UNAPPROPRIATED, FEDERALLY-CONTROLLED PUBLIC DOMAIN, PRIOR TO OCT. 21, 1976, CLASSIFIED AS R. S. 2477 RIGHTS OF WAY?

A. What is the meaning of the term "highway" as used in the Mining Lode Act of 1866 (R. S. 2477)?

II

DO AGENCIES OF THE FEDERAL GOVERNMENT HAVE ANY AUTHORITY TO CONTROL, MANAGE, REGULATE OR CLOSE R.S. 2477 RIGHTS OF WAY?

III

DO COUNTY OFFICIALS OR PRIVATE PARTIES VIOLATE ANY VALID FEDERAL LAW, RULE OR REGULATION WHEN THEY MAINTAIN, OR PREVENT THE DESTRUCTION OR IMPAIRMENT OF, R.S. 2477 ROADS AND TRAILS, DITCHES AND CANALS?

EXHIBIT "A"

Discussion

The Mining Lode Act of 1866 was enacted by Congress two years after Nevada's admission to statehood on October 31, 1864, during a period of intense national interest in the expansion and development of the Western frontier. See, Gates & Swenson, History of Public Land Law Development 716-721 (1968). Also see, Humboldt County v. United States, 684 F.2d 1277, 1281 (9th Cir. 1982).

The Act of July 26, 1866, is entitled "An Act Granting the Right-of-way to Ditch and Canal Owners Over the Public Lands, and Other Purposes." 14 Stat. 251 (1866). Sec. 8 of the Act at 14 Stat. 253, was codified as 2477 of the Revised Statutes of the United States (commonly known as R.S. 2477), recodified as 43 U.S.C. 932, provides:

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

The R.S. 2477 right-of-way grant remained executory for 110 years until it was repealed by FLPMA, the Federal Land Policy Management Act of 1976,

706(a), Pub. L. No. 94-579, 90 Stat. 2793 (1976). Section 701(a) of FLPMA provides:

"Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid . . . right-of-way, or other land use right or authorization existing on the date of approval of this act [Oct. 21, 1976]".

The House Report on FLPMA expressly provided that "rights-of- way granted under statutes superseded or repealed by provisions of this Act are protected." House Report No. 94-1162; see also Senate Report No. 94-583. The law, as codified at 43 U.S.C. 1769(a), reads:

"Nothing in this subchapter shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted. However, with the consent of the holder thereof, the Secretary concerned may cancel such right-of-way or right-of-use and in its stead issue a right-of-way pursuant to the provisions of this subchapter."

Although no new R.S. 2477 roads could be created after the effective date of FLPMA, no R.S. 2477 grants were invalidated by the new law. The new statute recognizes that vested rights cannot be taken, pursuant to Amendment V of the Constitution, the "Takings Clause," without just compensation being paid therefore. The concept of eminent domain, the taking of private property for public purposes, may be traced to early English Common Law. The principal difference between early English royal eminent domain and the United States is that just compensation must be paid to private citizens whose property interests are taken. The Congressional intent of the 1866 law clearly was to protect existing R.S. 2477 rights-of-way against any attempts to restrict or eliminate them, to forbid any "taking" without just compensation.

During that 110 years the nation's courts regularly recognized that R.S. 2477 system confirmed rights of way existing at the date of its passage and authorized acquisition of new rights of way for new "highways." As the U.S. Supreme Court said in Central Pacific Railway Co. v. Alameda County, 284 U.S. 463, 472, 473, 76 L.Ed. 402, 407, 408, 52 S.Ct. 225 (1932):

"We cannot close our eyes to the fact that long before the Act of 1866, highways in large number had been laid out by local, state and territorial authority upon and across the public lands. The practice of doing so had been so long continued, and the number of roads thus created was so great, that it is impossible to conclude otherwise than that they were established and used with the full knowledge and acquiescence of the national government. These roads, in the fullest sense of the words, were necessary aids to the development and disposition of the public lands. (Cit. omit.) They facilitated communication between settlements already made, and encouraged the making of new ones; increased the demand for additional lands, and enhanced their value. Governmental concurrence in and assent to the establishment of these roads are so apparent and their maintenance so clearly in furtherance of

the general policies of the United States, that the moral obligation to protect them against destruction or impairment as a result of subsequent grants follows as a rational consequence. The section of the Act of 1866 granting rights of way for the construction of highways, no less than that which grants the right of way for ditches and canals 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." (Emphasis supplied.)

The Central Pacific Railway language is instructive as to several issues. It specifically observes that maintenance of R.S. 2477 rights-of-way furthers the policies of the Federal Government as expressed by Congress. FLPMA does not invalidate the recognized right and duty to maintain existing R.S. 2477 roads.

When Nevada counties maintain R.S. 2477 roads, even when that maintenance is in conflict with the desires of BLM and Forest Service bureaucrats, the Nevada counties are upholding their "moral obligation" to protect those roads "against destruction or impairment." See, Central Pacific Railway. supra.

The United States Court of Appeals for the D.C. Circuit has held that R.S. 2477 grants do not require the filing of a right-of-way application. Wilderness Society v. Morton, 479 F.2d 842, 882 n.90 (D.C. Cir. 1973). The grant is "self-executing." Standard Ventures, Inc., v. Arizona, 499 F.2d 248, 250 (9th Cir. 1974. An R.S. 2477 right of way comes into existence "automatically when a public highway [is] established across public lands in accord with the law of the state." Standard Ventures, supra, at 250. See, also, Sierra Club v. Hodel, 848 F.2d 1068, 1083-84 (10th Cir. 1988).

The validity of R.S. 2477 roads is to be determined by local governments. The United States Court of Appeals for the Tenth Circuit has held:

"Over the past 125 years, each western state has developed its own state-based definition of the perfection or scope of the R.S. 2477 grant, either by explicitly declaring RS 2477 to incorporate state law or by simply expounding its own law." Sierra Club v. Hodel, 848 F.2d 1068, 1082 (10th Cir. 1988).

That decision was recognized in the "Hodel Policy" adopted by Interior Secretary Donald Hotel in 1988. It is that policy, founded on the 10th Circuit decision, which the present Interior Secretary Bruce Babbitt abrogated by his memorandum of January 22, 1997.

In 1938 the then Secretary of the Interior (Harold Ickes) viewed R.S. 2477 "as effecting a grant of a right-of-way 'upon the construction or establishing of highways, in accordance with State laws . . .' (Emphasis supplied.)" 43 C.F.R. 244.55 (1939). That general rule has been followed since by BLM. The

Court of Appeals for the 9th Circuit, in an opinion which is binding in Nevada, concluded that whether a right-of-way has been established over public lands is a question of state rather than Federal law. Schultz v. Department of Army, 10 F.3d 649 (1993) at 655, and citations therein noted. Public user "for such a period of time and under such conditions as to prove that the grant has been accepted" is sufficient. Schultz, supra, at 655-6. In Sierra Club v. Hodel, supra, at 1080, it was observed that the Bureau's own Manual provided:

"State law specifying widths of public highways within the State shall be utilized by the authorized officer to determine the width of the R.S. 2477 grant."

The Manual further provides that an R.S. 2477 right-of-way is "is definitely established in one of the ways authorized by the laws of the state where the land is located." 2801(B) (Rel. 2- 152 9/10/82). (Emphasis supplied.) The department's own Interior Board of Land Appeals has consistently followed the principle that the validity of R.S. 2477 roads is to be determined under state law. See, Edward A. Nickoli, 90 I.B.L.A. 273, 275 (1986 ("determining the validity of an R.S. 2477 trail is generally beyond the jurisdiction of BLM"); Northway Natives, Inc., 88 Interior Dec. 14, 19 (1981); Leo Titus, Sr., 92 Interior Dec. 578, 588 (1985); Blue Mesa Road Association, 89 I.B.L.A. 120, 125 (1985) ("As a general rule, a determination of the existence of an R.S. 2477 right-of-way will not be made by the Department").

Interior's rules are not binding on the U.S. Forest Service, a unit of the Department of Agriculture. Interior's rules are entitled to great deference however, because Interior -- specifically the Bureau of Land Management and its predecessor agencies -- was the administrative agency charged with administration of the public lands during the sunset years of R.S. 2477.

Agents of the Forest Service have from time to time espoused the position that all roads within the boundaries of a national forest are forest roads, and that R.S. 2477 right-of-way grants somehow were extinguished at the time a particular forest was created by Presidential proclamation. No reasonable support or authority for such a position has been found.

Assuming, arguendo, that R.S. 2477 roads cannot be established across national forest lands (assuming, arguendo, that national forest lands are "reserved for public use" in the statute's language), that does not equate to extinguishment of existing R.S. 2477 rights of way as of the date a particular national forest reserve was created or enlarged.

The Department of Agriculture and its U.S. Forest Service are no different than any other party to a transaction: i.e., the donee or grantee takes and receives no more than the donor or grantor has to give. If the donor/grantor earlier has disposed of part of the bundle of sticks making up fee simple, he cannot legally later purport to grant out the entire bundle, and the

donee/grantee has no business trying to claim the entire fee. The rule sometimes is expressed in doggerel, to-wit:

"He who sells what isn't his'n
"Must buy it back or go to pris'n."

It really doesn't matter whether R. S. 2477 offers a grant of easement or of fee simple title, or something between. Whatever the offered property interest is, when it is accepted, the conveyance is absolute. The Federal Government has granted out that stick from the bundle, and it isn't available for future grants from the government.

Any Federal agency obtaining that land by future withdrawal takes it subject to the prior grant of right-of-way, just as any settler or rancher obtaining that land by future patent would take it subject to the prior grant of right-of-way.

In Central Pacific Railway, supra, the High Court upheld that principle. Alameda County, pursuant to State law, had established a public highway in 1859 through and along the bottom of Niles Canyon, between Niles and Sunol. In 1862 an Act of Congress granted to the railway's predecessor, Central Pacific Railroad Company, a right-of-way 400 feet wide across the public lands. The railroad right-of-way grant impinged on the public road. The Court held that the railroad right-of-way was servient to the pre- existing public road easement. See also, Cramer v. U.S., 261 U.S. 219, 67 L.Ed. 622, 43 S.Ct 342 (1923) (public lands occupied by individual Indians prior to railroad grants excepted from those grants); Atchison v. Peterson, 87 U.S. 507 (20 Wall 507), 22 L.Ed. 414, quoting approvingly Irvin v. Phillips, 5 Cal. 140, 146, 63 Am. Dec. 117 (1855) (rights of miners and water appropriators "permitted to grow up by the voluntary action and assent of the population" have "the force and effect of res judicata" and must be protected by the governments and courts because "free and unrestrained occupation of the mineral region has been tacitly assented to by the one [Federal] government and heartily encouraged by the expressed legislative policy of the other [State]").

Likewise, in U.S. v. California, 436 U.S. 32, 56 L.Ed.2d 94, 98 S.Ct. 1662 (1978) the Supreme Court held that Presidential proclamations could not incorporate into the Channel Islands National Monument some tidelands which had passed into State owner ship at California's statehood. Once those lands became State lands, the Federal Government lost jurisdiction over them. Those tidelands were public lands but they are not lands subject to any Federal control. See also, Borax Consolidated,Ltd. v. Los Angeles, 296 U.S. 10, 80 L.Ed. 9, 56 S.Ct. 23 (1935). The legal principle is clear: once fee title passes to a State, no increment of owner ship remains upon which the Federal Government can act.

The Jefferson Canyon road in the Toquima Range above Big Smoky Valley in Nye County, over which the Forest Service claims dominion, was established

in the 1800s as a road to the old mining camp of Jefferson. At the time the road was created, the R.S. 2477 right-of-way grant offer by Congress was effective. The offer was accepted by establishment of the road. At that point title to the road (either in fee simple or as an easement) passed to the public, represented by Nye County, the local government. The Federal Government at that point was divested of jurisdiction and control over the right-of-way.

The same scenario applies to the road up the west side of the Toiyabe Range into the old mining camp of San Juan (the San Juan Canyon road). The Forest Service is attempting to claim San Juan is a forest road subject to USFS control; in fact the San Juan claim was patented in 1872, more than 30 years prior to any reservation of land for Toiyabe National Forest.

Nevada law provides that the public can perfect an R.S. 2477 right-of-way through mere use. Anderson v. Richards, 96 Nev. 318, 608 P.2d 1096 (1980). See, NRS 403.410, originally enacted in 1866, which declares that "all such roads, streets and alleys as the board of county commissioners of the county in which they are situated shall thereafter lawfully cause to be opened, are declared to be public highways." In Anderson, supra, the Nevada court quoted approvingly from a 1963 Colorado Supreme Court decision:

"The sum of our holding is that the statute [43 U.S.C. 932] [formerly R.S. 2477] is an express dedication of a right of way for roads over unappropriated government lands, acceptance of which by the public results from 'use by those for whom it was necessary or convenient.' It is not required that 'work' be done on such a road, or that public authorities shall take action in the premises. User is the requisite element, and it may be by any who have occasion to travel over public lands, and if the use be by only one, still it suffices. 'A road may be a highway though it reaches but one property owner.' Brown v. Jolley, 387 P.2d 278 (Colo. 1963). (Emphasis supplied.)

The Nevada statute and Anderson clearly show that mechanical construction of a road is not necessary for it to qualify as an R.S. 2477 highway, contrary to the position currently taken by the Forest Service and Department of Interior agencies. See also, Central Pacific Railway, supra, at 467, 76 L.Ed. 405, noting that the highway which was the subject of that case was formed "by the passage of wagons, etc., over the natural soil . . ."

Anderson, supra, and Central Pacific Railway, supra, also are in accord on the question of abandonment. Anderson holds:

"The party asserting abandonment of a public road must carry the burden by clear and convincing evidence. (Cit. omit.) The fact that travel on the now disputed roadway may have decreased over the years does not work an abandonment or affect its status as a public road. Whether a road is public or private is determined by the extent of the right to use it, and not by the extent to which that right is exercised or by the quantity of travel over it (Cit. omit.)". At 322, 323.

Likewise, in discussing the railroad's claim that portions of the Niles Canyon road had been abandoned, the Central Pacific Railway court observed:

"The burden of sustaining [the abandonment premise] . . . plainly rests upon the party who asserts it, since proof of the establishment of a road raises a presumption of its continuance. That is to say, the respondents having shown the establishment by the county of a road through Niles Canyon in 1859, the continuing identity of that road must be presumed until overcome by proof to the contrary, the burden of which rests upon the petitioners. (Cit. omit.) This is in accord with the general principle that a condition once shown to exist is presumed to continue." At 468, 76 L.Ed. 405.

Just as State law provides the criteria for establishment of an R.S. 2477 road, State law provides the criteria for abandonment. If the Forest Service or agencies of the Department of Interior (BLM and others) wish to assert the abandonment of the Jefferson Canyon Road, or any other R.S. 2477 road, they must look to State law to determine whether abandonment has occurred. They would find that Nevada Revised Statute 403.170 authorizes county commissioners to abandon county roads, only after a hearing advertised for at least ten (10) days. There is no statutory provision for abandonment of roads by non-user.

Consequently, it appears that the only Forest Roads to be found in national forests in Nevada are roads which came into existence after the effective date of the proclamation creating a particular forest. All roads which pre-date establishment of a particular forest are roads established pursuant to the open-ended grant made by Congress in 8 of the Mining Act of 1866, R.S. 2477. Likewise, any roads across BLM-managed lands which came into being prior to repeal of the R.S. 2477 offer by FLPMA (October, 1976) are R.S. 2477 roads.

What is a "Highway?"

The Departments of Interior and Agriculture recently have taken the position that the term "highway" as used in R.S. 2477 means a major paved road. They assert that back country "two- tracks" and trails are not "highways" as intended by the statute.

It seems legally reasonable, however, that contemporaneous definitions of the term "highways" provide guidance as to Congres sional intent when it deliberately used the term in 1866. Some apposite, published definitions from that era follow.

John Bouvier, A Law Dictionary 2 (1866 ed.) at 586:

> "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.)"

A. M. Burrill, A Law Dictionary and Glossary (1867 ed.):

> "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.)"

A Dictionary of Science, Literature and Art 3 (W. T. Brande, ed. 1867) at 125:

> "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.)"

The Nineteenth Century definitions cited are representative of the definitions known to Congress when it enacted the Act of 1866. The offer of right-of-way grant provided in that act must be viewed within the context of 1866 language and intent, not what some Federal bureaucrat would like to make the term "highway" mean today.

As noted above, the Nevada Legislature in 1866 defined "highways" as including "roads, streets and alleys". See, NRS 403.410.

Taken, then, in the proper context of 1866, the R.S. 2477 highways are any foot trail, horse trail, wagon road, carriage road, or navigable stream, established by repeated use or by mechanical means. All of the back-country roads and trails in Nevada, the "two-tracks" and the paved roads, are R.S. 2477 highways if they were:

> 1) Established across Federally-controlled public lands
>
> 2) When those lands were unappropriated and not with drawn for specific purposes,
>
> 3) During or prior to the period when the Congressional offer of right-of-way was executory (prior to Oct. 21, 1976).

Neither the Forest Service nor the Bureau of Land Management, nor the U.S. Fish and Wildlife Service, nor the National Park Service, nor the Bureau of Reclamation, nor any other Federal agency, have jurisdiction over such R.S. 2477 highways. The control and management of such roads is vested in the 17 counties of Nevada, which hold title to the rights-of-way (fee simple or easement) in trust for the use of the traveling public, until and unless abandonment pursuant to Nevada statutes has been effected.

Conclusions

1. All roads and trails across Federally controlled and managed public lands, not specifically withdrawn before the roads were established, which came into being prior to Oct. 21, 1976, are R.S. 2477 highways.

2. The Federal Government has no authority to control, manage or regulate R.S. 2477 roads, Federal title having been extinguished when establishment of such a road effected acceptance of the Congressional offer of a grant of right-of-way.

3. Nye County officials, and officials of other Nevada counties, do not violate any valid Federal law, rule or regulation when they maintain, or prevent the destruction or impairment of, R.S. 2477 roads.

Respectfully submitted this _____ day of _____, 1997.

EUREKA COUNTY DISTRICT ATTORNEY

William E. Schaeffer, District Attorney
Eureka County, Nevada
Nevada Bar No. 002789

By

Zane Stanley Miles
Chief Deputy District Attorney
Nevada Bar No. 002410

EXHIBIT "B"

October 20. 1994

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 1028-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

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