

**Forest Service Manual
National Headquarters - Washington Office
Washington, DC**

**Forest Service Manual 2700 – Special Uses Management
Chapter 2730 - Road and Trail Rights-Of-Way Grants**

Amendment: 2700-2004-4

Effective date: August 10, 2004

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Approved by: James Gladen, Acting Deputy Chief

Date approved: February 24, 2004

Responsible Staff:

Posting Instructions: Amendments are numbered consecutively by title and calendar year.

Post by document; remove the entire document and replace it with this amendment. Retain this transmittal as the first page(s) of this document. The last amendment to this title was 2700-2004-3 to FSM 2710.

Last Change: 2700-2004-3 to FSM 2710

Superseded Document(s): 2730, Amendment 2700-2002-3, September 6, 2002

Digest: Following is an explanation of the changes throughout the directive by section.

2734.4: Revises the direction in this section to conform with revisions to Title 36, Code of Federal Regulation, parts 251, 261, and 295 published in the Federal Register on July 13, 2004 (69 FR 41946). The revised direction in this section clarifies under what situations a special use authorization is not needed and requires that a special use authorization is required for special uses conducted on National Forest System trails.

There are no substantive changes to the direction in the rest of chapter FSM 2730.

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Amendment: 2700-2004-4
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This chapter covers policies, authorities, and direction for granting rights-of-way for roads and trails across National Forest System lands and interests in lands. The direction for roads also applies to trails in sections concerning permits, but not in those sections covering easements. The policy regarding the granting of road rights-of-way under Title V of the Federal Land Policy and Management Act is at FSM 2733.03; the direction does not include skid trails, skyline roads, or other specialized logging system needs, which are addressed at FSM 2725.9.

Whenever the Forest Service has current need for access across the lands of a party who is requesting access across National Forest System lands, the receipt of an adequate right-of-way from that party must be a condition of the grant of an easement. In the event the party refuses to grant the rights needed by the Forest Service, that party shall receive access only by permit, unless prior authorization for the issuance of an easement has been received from the Washington Office, Director of Lands.

2730.1 - Authority

For direction on authorities, see FSM 2701.1 through 2701.3.

2730.2 - Objectives

The objectives of granting rights-of-way for roads and trails are to:

1. Provide rights-of-way for the public road system, including the Federal-aid system, when such roads cross National Forest System lands or interests in lands.
2. Accommodate the access needs for the protection, development, and utilization of lands and resources owned by private interests or administered by public agencies when the planned forest development road system and public road system do not meet those needs adequately.
3. Protect and enhance the quality of air, water, soil, and natural beauty of Forest Service administered lands in the granting of any right-of-way.
4. Cooperate with intermingled and adjacent landowners in developing roads that serve the needs of both parties through the exchange of rights-of-way.
5. Provide access across National Forest System land to private land that is adequate to secure the owners thereof of reasonable use and enjoyment of their land without unnecessarily reducing the management options of the Forest Service or damaging National Forest System lands or resources.

2730.3 - Policy

The broad policy concerning the granting rights-of-ways for roads and trails across National Forest System lands is to provide access as promptly as feasible to requesters, consistent with Forest land and resource management plans and applicable laws and regulations.

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1. Provide access across National Forests when the applicant:

- a. Currently does not have access to the private property;
- b. Cannot gain access across non-Federal land; and
- c. Cannot exercise existing rights of access across non-Federal land.

2. Grant a right-of-way only after the provisions of the National Environmental Policy Act (NEPA) have been met (FSM 1950; FSH 1909.15). During the NEPA analysis, consider alternate forms of access that have been used successfully for access to lands for similar purposes.

Avoid regulation of private lands when considering and authorizing access to those private lands (FSM 5403). In evaluating the effects of the requested access to private property, the environmental analysis, alternatives, and documentation shall:

- a. Be commensurate with the scope of the requested access;
- b. Recognize the rights of private property owners to reasonable use and enjoyment of their property; and
- c. Be commensurate with the discretion available to the Forest Service.

3. When there are existing outstanding rights, such as withdrawals for power or reclamation purposes, and so forth, grant the right-of-way authorization in the form of a permit and advise the permittee in writing of any outstanding rights on record.

2730.4 - Responsibility

Granting road and trail rights-of-way is a land use management function and must be handled and reported as such. Preparation of all rights-of-way permits and easements shall be under the guidance of the Lands Staff, except for road use permits issued under instructions in FSM 7730.

2731 - Department of Transportation Easements

The Secretary of Transportation has delegated the authority to grant easements to the Regional Counsel for the Federal Highway Administration and the Regional Federal Highway Administrators.

2731.03 - Policy

Consent to the grant of rights-of-way under the Highway Act shall be for highway purposes only. Use special use authorizations for material source sites, stockpile or waste disposal sites, or maintenance stations (FSM 2710). Temporary use of lands, other than those needed for the construction and maintenance of the highway facility, also requires the issuance of an

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appropriate special use permit. Neither the Forest Service nor the Federal Highway Administration charges for Department of Transportation easements.

Occasionally, construction of a new highway on the Department of Transportation easements results in the abandonment of segments of existing highways. When the right-of-way for the road segments to be abandoned is owned in fee by the State and bounded by National Forest System land, make every effort to have the State convey the abandoned right-of-way to the United States for inclusion in the National Forest System before consenting to the appropriation of the needed rights-of-way and the grant of a Department of Transportation easement.

2731.04 - Responsibility

2731.04a - Washington Office, Director of Lands

The Director of Lands has the responsibility to:

1. Prepare directives, standard easement conditions, standard stipulation provisions, and special clauses as deemed appropriate.
2. Negotiate all changes in procedures with the Federal Highway Administrator as necessary.
3. Approve the use of special deed or stipulation clauses as recommended by the Regional Forester.

2731.04b - Regional Foresters

Regional Foresters have the responsibility to:

1. Approve the environmental assessment or environmental impact statement, as appropriate, prepared for a project by the Department of Transportation or by the State, and the decision document for the site-specific environmental assessment.
2. Prepare and execute the letter of consent to the appropriation and transfer.
3. Develop special clauses for the stipulation to meet conditions not covered by currently approved clauses and obtain proper approval for use.
4. Develop with States a memorandum of understanding concerning procedures for processing a request for transfer of lands or interest in lands owned by the United States and under the administration of the Forest Service for use by the State for highway purposes (FSH 2709.12, sec. 26, ex. 01).
5. Report any violations of the terms and conditions of the deed or stipulation to the Regional Federal Highway Administrator.

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6. Insert appropriate notation in land status records and establish the conveyance file according to FSM 5490 instructions.

The Regional Forester may redelegate any or all of the preceding duties in this section to the Supervisors of those Forests that the Regional Forester determines to have a staff with the training and experience needed to perform the duties.

2731.04c - Forest Supervisors

Forest Supervisors have the responsibility to:

1. Work directly with the State Highway District Engineer in initiating applications for rights-of-way by appropriation and transfer under the provisions of 23 U.S.C. 317 and 107(d).

2. Cooperate with the Department of Transportation, which has the primary responsibility for preparation of project environmental analysis, and assist the State in preparation of the environmental disclosure documentation for proposed highway projects that require occupancy of National Forest System lands.

3. Prepare the appropriate section 4(f) statement when the project passes through a recreation area and forward it to the Regional Forester.

4. Prepare a preliminary draft of any stipulation using the standard clauses deemed appropriate to the specific proposed highway project (FSH 2709.12, ch. 20).

5. Advise the Regional Forester of any special conditions that may require the development of additional stipulation clauses.

6. Prepare, in cooperation with the State, a draft fire protection plan.

7. Prepare, in cooperation with the State, a draft clearing plan.

8. Prepare, in cooperation with the State, a draft landscape and erosion control plan.

9. Make plan-in-hand inspections of proposed highway projects on the basis of preliminary location and design.

10. Prepare a site-specific environmental assessment for the proposed location on National Forest System land.

11. Make a plan-in-hand inspection of the final location and design.

12. Prepare a proposed final draft of the stipulation, including fire protection, clearing, landscape, and erosion control plans, and forward the draft to the Regional Forester for approval and execution by the State and the Regional Forester.

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13. Conduct periodic inspections of construction and maintenance and report any noncompliance with the terms and conditions of the transfer as directed by the Regional Forester.

2732 - National Forest Road and Trail Act Easements

2732.01 - Authority

Section 2 of the National Forest Road and Trail Act (FRTA; 16 U.S.C. 533) covers the granting of easements; section 3, their termination (16 U.S.C. 534); and section 5, the recording of the granting instrument in county records and the furnishing of copies to the Bureau of Land Management when the easement is across lands withdrawn from the public domain or with public domain status (16 U.S.C. 536).

2732.03 - Policy

Grant FRTA easements to qualified applicants who cooperate in the construction and maintenance of the road system needed to manage the National Forest System.

2732.04 - Responsibility

2732.04a - Chief

The Chief reserves the authority to approve all road easements and permits containing provisions and conditions differing from those in approved formats as set forth in the Forest Service Directive System.

Only the Chief has authority to terminate a National Forest Road and Trail Act (FRTA) easement when the grantee does not consent to its termination (36 CFR 212.8(d)(5)).

2732.04b - Washington Office, Director of Lands

The Director of Lands has the responsibility to approve any additions or modifications of standard clauses for use in easements or permits.

2732.04c - Regional Foresters

Regional Foresters have the authority and responsibility to grant FRTA easements and to terminate such easements with the consent of the grantees.

The Regional Foresters may redelegate all or part of this authority only to those Regional Directors of Lands (and equivalent positions) and Forest Supervisors who have staffs with the training and experience needed to perform the duties. Notice of such delegation shall be published in the Federal Register and documented by Regional supplements to FSM 2730.

2732.04d - Regional Directors of Lands

Only those Regional Directors of Lands (and equivalent positions) specifically delegated such authority by the Regional Foresters (FSM 2732.04c) have the responsibility to grant FRTA easements and to terminate these easements with the consent of the grantee.

2732.04e - Forest Supervisors

Only those Forest Supervisors specifically delegated such authority by the Regional Forester (FSM 2732.04c) may grant and terminate easements. All Forest Supervisors have the responsibility to:

1. Prepare all road easements and send them to the Regional Forester with supporting data.
2. Administer all road easements and permits to ensure the protection of Forest Service roads and adjacent National Forest System lands.

2732.1 - Easement Grants in Road Right-of-Way Construction and Use Agreement

The types of easements granted and the qualifications for the grant vary with the category of the application.

1. Cost Share Easements. These are easement grants for roads on the forest development road system built under cooperative arrangements with owners of land or resources also served by the roads. The landowners must construct their proportionate share of the roads and convey needed rights-of-way to the United States. For further direction on qualification, form of easements, and procedure for issuance, see FSH 2709.12, section 31; FSH 5409.17, chapter 60; and FSM 5467.
2. Non-Cost Share Easements. These are easement grants for construction of roads that serve only the land of the cooperator in an area covered by an agreement for cooperative development of a road system. The cooperator alone finances the road building and maintenance under such easements. For further direction see FSH 2709.12, section 32; FSH 5409.17, chapter 60; and FSM 5467.
3. Prior Grants to Cooperators. These are easement grants for roads covered by cooperative arrangements and for which the cooperator holds some form of permit or stipulation, or a Department of the Interior easement. Generally, these instruments would have been issued before there was authority to grant Department of Agriculture easements. See FSH 2709.12, section 33, for further direction.

2732.2 - Easement Grants Outside of Road Right-of-Way Construction and Use Agreement

There are areas where the development of a right-of-way construction and use agreement is not appropriate or justified for the road system being developed jointly by the Forest Service and cooperators/landowners. See FSM 5467.1 for direction on some characteristics of such areas. Where the cooperators/landowners are able to convey reciprocal easements with clear title and commercial use of the road(s) is anticipated, grant easements to continue or expand the cooperative ownership of the roads serving mutual needs. The direction for issuing easements in these situations is in FSH 2709.12, section 35.

The easements granted outside of cost share agreements require the payment of an appropriate fee. Payment for these easements shall be a one-time lump sum payment in advance of the grant. The payment may be a cash deposit, an exchange of easements, or a combination of these methods. In some cases, the construction of a new road that is part of the forest development road system may require a cash contribution by the United States.

1. FRTA Forest Road Easements. These are easement grants for roads on the forest development system constructed using cost share principles. The easement does not have a provision for the sharing of reconstruction or improvement costs at a later date. The intent is to perform the work needed to accommodate all anticipated use at the time of the grant. See FSH 2709.12, section 35, for direction on qualification, form of easements, and procedure for issuance.

2. FRTA Private Road Easements. These are easement grants for construction of roads serving only a cooperator/landowner. The cooperator/landowner alone finances the road building and maintenance under such easements. For further direction, see FSH 2709.12, section 35.

2732.3 - Easement Grants to Public Road Agencies

These easements are the only form of right-of-way grant to public road agencies for public roads and highways which are not part of the Federal-aid system, or which are constructed under the provisions of chapter 2 of the Highway Act of August 27, 1958 (72 Stat. 885; 23 U.S.C. 101, 135, 201-205, 217). Upon application by the holding agency, replace any permits previously issued for such roads with easements. For further direction, see FSH 2709.12, section 34.

Authorize access to subdivisions by FRTA easements to the proper public road authority. If the public road authority refuses to accept the road as part of its system, require the owners of the property served to form a local improvement district or an owners association to assume the maintenance responsibilities under a Federal Land Policy and Management Act (FLPMA) easement for the road to ensure access to all parties who need the road for access to their property (FSM 2733). The organization must have the authority to collect the necessary funds for road maintenance, thereby relieving the Government of any potential maintenance obligation or responsibility. Issue special use permits to public road agencies for non-public or temporary roads (FSH 2709.12, sec. 41.2).

2733 - Federal Land Policy and Management Act Rights-Of-Way

2733.01 - Authority

2733.01a - Statutory Authority

Title V, Federal Land Policy and Management Act of October 21, 1976 (90 Stat. 2743; 43 U.S.C. 1715) (FLPMA) is the primary authority for the Secretary to grant easements and permits on National Forest System lands. See FSM 2732.01 for direction on the authority to grant easements for highways under provisions of Title 23 of the United States Code.

2733.01b - Regulations

Title 36, Code of Federal Regulations, Part 251, Subpart B (36 CFR part 251, subpart B) (FSM 2701.3) provides direction for granting and administering authorizations under FLPMA.

2733.03 - Policy

Grant all road rights-of-way under Title V of the Federal Land Policy and Management Act with the exception of:

1. Federal-aid highways (FSM 2731).
2. Rights-of-way granted to cooperators and public road agencies under FRTA (FSM 2732).
3. Rights-of-way in wilderness in the contiguous 48 States (FSM 2701, Wilderness Act of September 3, 1964; 16 U.S.C. 1131-1136).
4. Rights-of-way for transportation systems on conservation system lands in Alaska (FSM 2701, Alaska National Interest Lands Conservation Act of December 20, 1980; 16 U.S.C. 3210).
5. Roads constructed on valid mining claims or mineral lease areas when the construction is authorized by an approved operating plan (36 CFR part 228 and FSM 2810).

The permits or easements granted are nonexclusive.

- a. When in receipt of a second application for the use of a private road right-of-way, authorize the use by an additional nonexclusive permit or easement as appropriate. A second or additional non-Federal user must reimburse the constructing parties for a proportionate share of the construction costs less depreciation. However, each permittee or grantee shall pay the full fee for the use.
- b. Do not prorate fees between the users. All users are individually responsible for the maintenance necessary to protect adjacent National Forest System lands from damage.

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- c. Use easements and permits to authorize the use and maintenance of a facility planned for construction or already existing on the right-of-way.
- d. Authorize all actual construction or reconstruction by construction stipulations that are executed separately from the granting document, thereby minimizing the bulk and complexity of the document that authorizes the use (FSH 2709.12, sec. 44).
- e. Authorize trails and temporary roads by permit only.

2733.04 - Responsibility

2733.04a - Washington Office, Director of Lands

The Director of Lands has the responsibility to approve any additional special clauses or modifications of standard clauses for use in easements or permits.

2733.04b - Regional Foresters

Regional Foresters have the responsibility to:

1. Issue all easements and reservations for construction and use of roads under this authority, and terminate easements on the occurrence of a fixed or agreed upon condition, event, or time when the easement, by its terms, provides for such termination. Regional Foresters may delegate all or part of this authority and responsibility to the Regional Directors of Lands (or equivalent positions), and to selected Forest Supervisors who have been determined to have staffs with the training and experience needed to perform the duties. Notice of such delegations to the Regional Directors of Lands and those Forest Supervisors determined to meet the criteria for delegation must be published in the Federal Register as well as in a supplement to this Manual chapter.
2. Issue, suspend, or terminate permits. Regional Foresters may delegate all or part of this authority and responsibility to Forest Supervisors.
3. Suspend, revoke, or terminate easements in accordance with the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings instituted by the Secretary at 7 CFR 1.130 - 1.151.

2733.04c - Forest Supervisors

Forest Supervisors have the responsibility to:

1. Prepare all road easements and send them to the Regional Forester with supporting data and, when appropriate, proposed stipulations.
2. Administer all road easements and permits to ensure the protection of Forest Service roads and adjacent National Forest System lands.

3. Execute stipulations.

2734 - Other Rights-Of-Way

Construction, reconstruction, use, and maintenance of roads, trails, and highways across National Forest System lands all require some form of authorization. In some cases the authorization may already exist through a deed reservation, as outstanding rights, or as part of an authorized use of National Forest System land. In these cases, no additional authorization by the Forest Service is necessary, unless there is a need for additional rights.

2734.1 - Rights-of-Way Resulting From Contracts, Permits, or Leases

The following forms of authorization may eliminate the need for a special use authorization for construction across National Forest System lands:

1. Timber sale contracts for roads under the contract. Alternative routes require approval under the contract (FSM 2450).
2. Forest highway projects approved by the Secretary of Agriculture if the Federal Highway Administration performs the construction (FSM 7740). Construction by State Highway Departments, counties, or other public road authorities requires an easement or a letter of consent and stipulations where appropriate (FSM 2731).
3. Mineral leases, licenses, and prospecting permits authorize the construction of temporary roads during the exploratory phase (36 CFR part 228 and FSM 2820).
4. Construction of long-term roads within a mineral lease is authorized by approval of the operating plan. Construction outside the mineral lease requires an authorization under the Federal Land Policy and Management Act (FLPMA) (36 CFR part 228 and FSM 2830).

Use of existing forest development roads closed to commercial haul without a permit and all reconstruction, maintenance, or other activity, such as snowplowing, on a forest development road must be authorized by an appropriate road use permit (FSM 7730) both on the lease area and outside the lease area.

2734.2 - Reserved or Outstanding Rights-of-Way

The holder of outstanding rights perfected on acquired land prior to Forest Service acquisition, reservation in deeds, easements, or agreements made at the time of acquisition of the land or easement by the United States may exercise those rights without obtaining a special use authorization, unless the document creating the rights provides for an additional authorization. Such rights are limited to the rights existing at the time of acquisition, and the holder cannot enlarge them without a special use authorization. Carefully examine the basis or grounds for a claim of right-of-way and secure a legal opinion if necessary in order to determine the extent of outstanding or reserved rights. Authorize any enlargement of the rights with an appropriate special use authorization.

2734.3 - Roads on Mining Claims

The approved operating plan authorizes the claimant to construct roads on a mining claim for the purpose of developing or operating the minerals on the claim. Construction outside the claim requires authorization under the Federal Land Policy and Management Act (FLPMA). Use of forest development road system roads for commercial hauling may require a road use permit (FSM 7730).

2734.4 - Use by Regulation

Regulations at Title 36, Code of Federal Regulations, section 212.5(a)(1) (36 CFR 212.5(a)(1)) provide that traffic on National Forest System roads is subject to State laws where applicable, except when in conflict with the rules established under 36 CFR part 261. Regulations at 36 CFR 212.5(a)(2) enumerate specific traffic rules that apply on National Forest System roads unless different rules are established in 36 CFR part 261.

Special use authorizations are not necessary for travel on National Forest System roads, unless:

1. The travel is for the purpose of engaging in a noncommercial group use, outfitting and guiding, a recreation event, commercial filming, or still photography, as defined in 36 CFR 251.51; or
2. A special use authorization is required by an order issued under 36 CFR 261.50 or by a regulation issued under 36 CFR 261.70.

Special use authorizations issued pursuant to 36 CFR part 251, subpart B, should be distinguished from road use permits that are issued pursuant to 16 U.S.C. 532 and 36 CFR part 212. Road use permits may be issued for such activities as construction, reconstruction, grading, or snow removal.

Special use authorizations are required for special uses conducted on National Forest System trails. The use of motorized vehicles is prohibited on the Appalachian Trail, Pacific Crest Trail, and other congressionally designated trails pursuant to 16 U.S.C. 1246(c) and on trails within designated wilderness areas pursuant to 36 CFR 261.16. Motorized use in other areas may be prohibited or restricted pursuant to 36 CFR 261.12 and 261.55.

2734.5 - Rights-of-Way Granted by Statute

Under the Act of July 26, 1866 (Revised Statute (RS) 2477; 43 U.S.C. 932), Congress granted rights-of-way for public highways and county roads constructed across public domain before the lands received National Forest status. Although the 1866 act was repealed by the Federal Land Policy and Management Act in 1976 (43 U.S.C. 1715), rights, which preexisted the establishment of the National Forest, are preserved.

2734.51 - Policies and Administration for Rights-of-Way Granted by Revised Statute 2477

1. Use current authorities in determining whether to authorize any construction activity that expands the preexisting facility or changes the alignment by an appropriate easement.
2. Encourage the appropriate public road agency to apply for a Department of Transportation or a Forest Road and Trail Act easement to document rights-of-way secured under 43 U.S.C. 932.
3. Follow the policy developed by the Department of Interior to interpret rights granted by Revised Statute (RS) 2477; the policy is in exhibit 01. The Act of October 27, 1986 (100 Stat. 3047; 43 U.S.C. 1761), transferred to the Secretary of Agriculture the administration of rights-of-way granted or issued on National Forest System lands under authority of previous acts, including rights-of-way issued or granted by the Secretary of the Interior. In order to provide a uniform interpretation of the rights granted by RS 2477, the Forest Service adopted the policy approved by the Secretary of the Interior on December 7, 1988, as the policy to guide the administration and recognition of rights established prior to the reservation of public domain lands as National Forests. The Department of the Interior had developed the policy for its agencies to evaluate the acceptance and scope of the rights-of-way claimed under RS 2477. The portion of the policy applicable to other uses placed on Bureau of Land Management land prior to November 7, 1974, does not apply to National Forest lands. The Forest Service requires special use authorizations for utilities and other such uses.
4. Ensure that the Government's servient estate does not suffer unnecessary degradation as a result of any actions by the holder of the right-of-way. Activities on a right-of-way, which potentially may affect the servient estate, are subject to the National Environmental Policy Act (Tenth Circuit Court of Appeals ruling in *Sierra Club v. Hodel*, 848 F.2d 1068). Although the Forest Service has no jurisdiction over highway-related activities of the right-of-way holder, the agency is responsible for ensuring the Government's servient estate does not suffer unnecessary degradation.
5. Ensure that legal requirements for cutting timber are followed during construction and maintenance of the highway. The timber on the right-of-way remains the property of the United States and it cannot be removed, converted to the holder's own use, or sold without authorization from the Forest Service.

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2734.51 - Exhibit 01

THE SECRETARY OF THE INTERIOR
WASHINGTON

Memorandum

To: Secretary

From: Assistant Secretary for Fish and Wildlife and Parks
Assistant Secretary for Land and Minerals Management

Subject: Departmental Policy on Section 8 of the Act of
July 26, 1866, Revised Statute 2477 (Repealed),
Grants of Right-of-Way for Public Highways (RS 2477)

Although RS 2477 was repealed nearly 12 years ago, controversies periodically arise regarding whether a public highway was established pursuant to the congressional grant under RS 2477 and the extent of rights obtained under that grant. Under RS 2477, the United States had (has) no duty or authority to adjudicate an assertion or application. However, it is with some certainty the existence, or lack thereof, of public highway grants obtained under RS 2477.

With the passage of the Federal Land Policy and Management Act, the Bureau of Land Management (BLM) developed procedures, policy, and criteria for recognition, in cooperation with local governments, of the existence of such public highways and notation to the BLM's land records. This has allowed the BLM to develop land use plans and to make appropriate management decisions that consider the existence of these highway rights.

Issues have recently been raised by the State of Alaska and others which question not only the BLM policy but also the management actions by other bureaus within the Department. We have had the BLM review and report on the various issues and concerns (Attachment 2) and consulted with the State of Alaska, the BLM, the Fish and Wildlife Service, and the National Park Service.

We believe that the land management objectives of the Department will be improved with adoption of a Department policy and recommend that the attached policy (Attachment 1) be adopted for Department wide use.

Approve: <u>/s/ Donald Paul Hodel</u>	Disapprove:
Date: <u>DEC 07 1988</u>	Date:

Attachments: (1) RS 2477 Policy and (2) BLM Report

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2734.51 - Exhibit 01--Continued

RS 2477
Section 8 of the Act of July 26, 1866
Revised Statute 2477 (43 U.S.C. 932)
Repealed October 21, 1976

Section 8 of the Act of July 26, 1866, provided:

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

Although this statute, 43 U.S.C 932 (RS 2477), was repealed by Title VII of the Federal Land Policy and Management Act of October 21, 1976, 90 Stat. 2793, many rights-of-way (R/W) for public highways obtained under the statute exist or may exist on lands administered by the Department and other Federal agencies. The existence or lack of existence of such highways R/Ws has material bearing on the development and implementation of management plans for conservation system units and other areas of Federal lands. Land managing Bureaus of the Department should develop, as appropriate, internal procedures for administratively recognizing those highways meeting the following criteria and recording such recognized highways on the land status records for the area managed by that bureau.

Acceptance:

To constitute acceptance, all three conditions must have been met:

1. The lands involved must have been public lands, not reserved for public uses, at the time of acceptance.
2. Some form of construction of the highway must have occurred.
3. The highway so constructed must be considered a public highway.

Public lands, not reserved for public uses:

Public lands were those lands of the United States that were open to the operation of the various public land laws enacted by Congress.

Public land, not reserved for public uses, do not include public lands reserved or dedicated by Act of Congress, Executive Order, Secretarial Order, or, in some cases, classification actions authorized by statute, during the existence of that reservation or dedication.

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Public lands, not reserved for public uses, do not include public lands pre-empted or entered by settlers under the public land laws or located under the mining laws, which ceased to be public lands during the pendency of the entry, claim, or order.

Construction:

Construction must have occurred while the lands were public lands, not reserved for public uses.

Construction is a physical act of readying the highway for use by the public according to the available or intended mode of transportation - foot, horse, vehicle, etc. Removing high vegetation, moving large rocks out of the way, or filling low spots, etc., may be sufficient as construction for a particular case.

Survey, planning, or pronouncement by public authorities may initiate construction but does not, by itself, constitute construction. Construction must have been initiated prior to the repeal of RS 2477 and actual construction must have followed within a reasonable time.

Road maintenance over several years may equal actual construction.

The passage of vehicles by users over time may equal actual construction.

Public Highway:

A public highway is a definitive route or way that is freely open for all to use. It need not necessarily be open to vehicular traffic for a pedestrian or pack animal trail may qualify. A toll road or trail is still a public highway if the only limitation is the payment of the toll by all users. Multiple way through a general area may not qualify as a definite route, however, evidence may show that one or another of the ways may qualify.

The inclusion of a highway in a State, county, or municipal road system constitutes being a public highway.

Expenditure of construction or maintenance money by an appropriate public body is evidence of the highway being a public highway.

Absent evidence to the contrary, a statement by an appropriate public body that the highway was and still is considered a public highway will be accepted.

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Ancillary uses or facilities usual to public highways:

Facilities such as road drainage ditches, back and front slopes, turnouts, rest areas, and the like, that facilitate use of the highway by the public are considered part of the public highway R/W grant. Other facilities such as telephone lines, electric lines, etc., that were often placed along highways do not facilitate use of the highway and are not considered part of the public highway R/W grant. An exception is the placement of such facilities along such R/W grants on lands administered by the Bureau of Land Management prior to November 7, 1974. Prior to this date, the requirement of filing an application for such facilities was waived. Any new facility, addition, modification of route, etc., after that date requires the filing of an application/permit for such facility. Facilities that were constructed, with permission of the R/W holder, between November 7, 1974, and the effective date of this policy, should, except in rare and unusual circumstances, be accommodated by issuance of a R/W or permit authorizing the continuance of such facility.

Width:

For those highway R/Ws in the State, county, or municipal road systems, i.e., the R/W is held and maintained by the appropriate government body, the width of the R/W is as specified for the type of highway under State law, if any, in force at the time and grant could be accepted.

In some cases, the specific R/W may have been given a lesser or greater width at the time of creation of the public highway than that provided in State law.

Where State law does not exist or is not applicable to the specific highway R/W, the width will be determined in the same manner as non-governmentally controlled highways.

Where the highway R/W is not held by a local government or State law does not apply, the width is determined from the area, including appropriate back slopes, drainage ditched, etc., actually in use for the highway at the later of (1) acceptance of the grant or (2) loss of grant authority under RS 2477, e.g., repeal of RS 2477 on October 21, 1976, or an earlier removal of the land from the status of public lands not reserved for public use.

Abandonment:

Abandonment, including relinquishment by proper authority, occurs in accordance with State, local or common law or Judicial precedence.

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Responsibilities of Agency and Right-of-Way Holder:

This policy addresses the creation and abandonment of property interests under RS 2477 and the respective property rights of the holder of a R/W and the owner of the servient estate.

Under the grant offered by RS 2477 and validly accepted, the interests of the Department are that of owner of the servient estate and adjacent lands/resources. In this content, the Department has no management control under RS 2477 over proper uses of the highway and highway R/W unless we can demonstrate unnecessary degradation of the servient estate. It should be noted, however, that this policy does not deal with the applicability, if any, of other federal, state, and/or local laws on the management or regulation of R/Ws reserved pursuant to RS 2477.

Reasonable activities within the highway R/W are within the jurisdiction of the holder. As such, the Department has no authority under RS 2477 to review and/or approve such reasonable activities. However, review and approval may or may not occur, depending upon the applicability, if any, of the other federal, state, or local laws or general relevance to the use of a R/W.

2734.6 - Statutory Rights of Ingress and Egress

Section 1323(a) of the Alaska National Interest Lands Conservation Act (FSM 2701.1) authorizes the Secretary of Agriculture to provide, subject to reasonable rules and regulations, such access to non-Federal lands within the boundaries of the National Forest System as deemed adequate to secure the owner the reasonable use and enjoyment of his land. The exercise of a right of reasonable access does not include the right to construct facilities, clear, or perform ground disturbing activities, without an authorization issued under an appropriate authority. Use of existing Government roads or facilities also requires an appropriate authorization.

The access to which the landowner is entitled need not be on the most direct, economical, or convenient route for the landowner.

Adequate access may not be road access in all cases, and alternative modes of access may be considered. The appropriate mode or type of access selected should be one that is both reasonable for the planned use of the private land and, insofar as possible, compatible with the Forest land and resource management plans for the National Forest System lands.

2735 - Administration of Rights-Of-Way Authorizations

2735.1 - Accommodating Additional Use Applications

In cases where an additional private party or parties need temporary use (1 year or less) of a road constructed under a private road permit or easement, they should make arrangements with the holder to use the road. If the parties are unable to reach agreement, or if the need is for long-term use, the Forest Service may issue an appropriate authorization for joint use of the rights-of-way provided the joint use does not interfere unreasonably with the original use.

If the joint users are unable to agree on maintenance arrangements, the Forest Service may review the facts and specify an equitable solution.

The rights of the United States to use the road are under the jurisdiction of the Forest Service. The Forest Service authorizes use by other agencies. Any authorization to another non-Federal party for use of the road must provide for reimbursement to the constructing party for its proportionate share of the road cost less depreciation in most cases.

2735.2 - Provisions for Use by Forest Service and Others

1. Permits and easements for what are essentially private roads must provide for use by the United States for its needs. In some cases, the documents may require the Forest Service to bear a proportionate share of road construction costs before making commercial use of the road for other than incidental commercial hauling of National Forest products (FSH 2709.12, ch. 30).

2. All other easements and permits for construction and use of roads must provide for use by the Government and such use by others as the Government may authorize.

2735.3 - Control of Traffic and Use

Except for easements granted to public road agencies for public roads and easements or permits for private roads, all traffic on all other easements and permits is subject to State law unless special traffic-control rules are imposed by the Forest Service as provided in 36 CFR 261.50. State law can be enforced by both State or local law enforcement officers or Forest Service officers. Special Forest Service rules can be enforced only by Forest Service officers.